POTENTIAL CIVIL LIABILITY OF COMMUNICATIONS BETWEEN INSURANCE COMPANIES AND LAW ENFORCEMENT AGENCIES

--A report prepared for the

National Workshop on Auto Theft Prevention

Preface

During October 1978, a four day conference was held at the New York Hilton Hotel by the National Workshop on Auto Theft Prevention. The conference was held under the aegis of the New York State Senate Committee on Transportation whose Chairman is Senator John D. Caemmerer, with the aid of a grant from the United States Department of Justice and matching funds from the New York State Senate. It was organized and directed by the Honorable McNeil Mitchell.

At the conference, a consensus developed calling for a study of potential civil liability that might hamper communications between law enforcement authorities and insurance companies in reporting suspected automobile thieves and fraudulent claims. Those present expressed strong belief that apprehension of criminals involved in this traffic may well be seriously retarded by the reluctance in many cases of insurance companies to assist law enforcement officials.

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Over one million cars were stolen in the United States last year resulting in property losses of over four billion dollars and the diversion of unestimateable police resources. Automobile theft and accompanying insurance fraud are part of a serious and complex pattern of organized crime. Insurance companies are repositories of vast amounts of highly personal and confidential information to which they are in a position to analyze and communicate to law enforcement authorities. The willingness of insurance companies to compile and disclose material to police authorities is reduced by the spectre of potential civil liability.

Various causes of action may arise from communications aiding law enforcement officials. We are concerned in this report with identifying and examining the three significant areas of potential liability: defamation, malicious prosecution, and the right of privacy. A general discourse on each of these actions and defenses is avoided, as such material is readily available and is not pertinent to the resolution directing this report. Truth is always a defense in defamation, for example, but an insurance company must operate in a manner that supposes a possible error of initial judgement and the filing of a law suit. It is the further hope of this report that the discussion and the lists of cases developed herein will be of practical use to counsel in preparing pleadings.

DEFAMATION

Defamation is the untruthful publication of anything injurious to the good name or reputation of another which tends to bring him into disrepute. In general, defamation in written form is termed libel, while an oral disparagement is termed slander. An action for libel or slander is based upon a violation of an individual's interest in a reputation free from false and defamatory attack. (50 Am. Jur. 2d 192, Libel and Slander)

The defense of privilege may serve to immune a defendant from an otherwise actionable tort of libel or slander. On the grounds of public policy, the law recognizes certain communications as being privileged because of the occasion or the circumstances under which made. Privileged communications are divided into two general classes; (1) communications which are absolutely privileged and (2) communications which are qualifiedly or conditionaly privileged.

An absolute privilege is afforded in a limited number of occasions to insure a free exchange of information necessary to protect a vital public interest. Comments made during a court proceeding or legislative debate are absolutely privileged. Where an absolute privilege exists, no remedy can be had in a civil action however hard it may bear upon the person who claims to be injured, and even though it may have been made maliciously and is false. (50 Am. Jur. 2d 193, Libel and Slander)

Where a conditional or qualified privilege exists, a showing of falsity and actual malice is necessary to a plaintiff's right of

recovery. A defense of qualified privilege must be affirmatively pleaded by a defendant, and it is for the trier of facts to determine if actual malice has been proven.

> A qualified or conditional privilege communication is one made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion, duty, right or interest. The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. (50 Amer. Jur. 2d 195, Libel and Slander)

A. Qualified Privilege

Not only may an insurance company have a personal monetary interest in communicating information concerning criminal or fradulent activity to law enforcement agents but it is the duty of all to report such matters. (Vogel v Gruaz (1884) 110 US 311, 28 L Ed 158, 4 S Ct 12; In re Quarles and Butler 158 Us 532, 39 LEd 1080, 15 S Ct 959) Courts and statutes within thirty-five states and the District of Columbia have expressly ruled that a qualified privilege applies to communications made in good faith to police officers for the purpose of aiding law enforcement. A statement informing a peace officer of a rumor connecting a party with the commission of a crime is privileged if made in good faith with an honest desire to promote justice. (Miller v Nuckolls (1906) 77Ark 64, 91 SW 759) And in Mueller v Radenbough (1909) 79 Kan 306, 99 P 612, communications to an officer in an attempt to recover stolen

property and discover the parties guilty of the theft will not support an action for slander unless maliciously made. Thus, when a person acts in a bona fide discharge of any private or public duty, whether legal or moral, or in prosecution of his rights or interests, no action for libel can be maintained against him, without proof of malice in fact. (Dunn v Winters (1841) 21 Tenn 512, 2 Humph 512)

A limited body of case law exists as to what actions constitute malice when a report is made to law enforcement authorities. Rather than to say conflicts exist between jurisdictions, it is more appropriate to appreciate that a full body of case law has not developed in each jurisdiction. A concise summary of the limits placed upon privileged communication with law enforcement authorities is provided in Travis v Busherig (1928) 7 Tenn App 638:

> The law requires charges to be made in the honest desire to promote the ends of justice, and not with spite over malicious feelings against the person accused, nor with the purpose of obtaining any indirect advantage to the accusor. Nor should serious accusations be made recklessly or wantonly, they should always be warranted by some circumstances reasonably arousing suspicion, and they should not be made unnecessarily to persons unconcerned, nor before more persons, nor in stronger language than necessary.

Where a charge was made against an individual during a casual conversation with a police officer no privilege existed, as the statements were not made for the purpose of aiding law enforcement. (Liske v Stevenson 58 Mo App 220) Simarily, where an individual allowed nine years to pass before coming forward with criminal charges the New York Court of Appeals concluded that a jury might

infer that a purpose other than aiding law enforcement officials was present. (Tolker v Pollak (1978) 44 NY 2d 211, 376 NE 2d 163)

Significantly, a qualified privilege might not exist if a statement were made without probable cause or if made recklessly. (Miller v Nuckolls (1906) 77 Ark 64, 91 SW 759; Pierce v Oard (1888) 23 Neb 828, 37 NW 677) Malice could be inferred from the repetition of rumor without making even a cursory investigation of the subject matter. (Pecure v West (1922) 233 NY 316, 135 NE 515; Jolly Valley Pub. Co. (1964) 63 Wash 2d 537, 388 P 2d 139) However, according to a minority of authority, a statement made in good faith would be under a qualified privilege even if the defendant did not have a reasonable basis when he made them. (Flanagan v McLane (1913) 87 Conn 220, 87 A 727, 88 A 96)

When a criminal charge was made in a loud and harsh manner to police officers in a public market so that all could hear, the privilege was found to have been abused. (Stevens v Haering's Grocetorium (1923) 125 Wash 404, 216 P 870) But a privilege is not defeated by the mere fact that the statement is made within the incidential presence of third parties or if the language used is intemperate. (Phillips v Bradshaw (1910) 167 Ala 199, 52 So 662) Circumstances, however, may exist where the language used reflects hostility and bad faith and the privilege is considered abused. (Newark Trust Co. v Bruwerk (1958) 51 Del 88, 141 A 2d 615)

That a qualified privilege exists as to a communication to an officer respecting the commission of a crime, if made in good faith and without malice, was recognized expressly in the following cases and statutes:

Alabama	Phillips v Bradshaw (1910 167 Ala 199, 52 So 662 Willis v Demopolis Nursing Home Inc. (1976) 336 So 2d 1117.
Arkansas	Mueller v Nuckolls (1906) 77 Ark 64, 91 Sw 759; Thiel v Dove (1958) 229 Ark 601, 317 SW 2d 121
California	California Insurance Code Sec. 12993 (a statute expressly for the insurance industry)
Connecticut	Flanagan v McLane (1913) 87 Conn 220, 87 A 727, 88 A 96; Moriarity v Lippe (1974) 162 Conn 430, 294 A 2d 326.
Delaware	Newark Trust Company v Bruwer (1958) 51 Del 88 141 A 2d 615.
District of Columbia	Sowder v Nolan (1956) 125 A 2d 52 (D.C. Mun. App.)
Georgia	Georgia Code Annotated Sections 105-709, 105-710 Hardway v Sherman Enterprises (1974) 133 Ga. App 181, 210 SE 2d 363, cert. den. 421 US 1003.
Illinois	Christman v Christman (1890) 36 Ill App 567; Flaner v Allyn (1964) 47 Ill App 2d 308, 198 NE 2d 563; McDavitt v Boyer (1897) 169 Ill 484, 43 NE 317
Kansas	Mueller v Radenbough (1909) 79 Kan 306, 99 P 612; Farber v Byrle (1951) 171 Kan 38, 229 P 2d 718.
Louisiana	Hyatt v Linder (1913) 133 La 614, 63 So 241.
Maine	Parker v Kirkpatrick (1924) 124 Me 181, 126 A 825; Elms v Crane (1919) 118 Me 261, 107 A 852.
Maryland	Brinsworth v Howeth (1908) 107 Md 278, 68 A 566.
Massachusetts	Hutchinson v New England Tel. & Tel. Co. (1966) 350 Mass 183, 214 NE 2d 57; Worthington v Scribner (1872) 109 Mass 487, 12 Am Rep 736.

Minnesota	McLaughlin v Quinn (1931) 183 Minn 568, 237 NW 598.
Mississippi	Illinois Cent. R. Co. v. Wales (1937) 177 Miss 875, 171 So 536.
Missouri	Davenport v Armstead (1953) 255 SW 2d 568.
Montana	Revised Code of Montana 64-208, Griffin v Opinion Pub. Co. 114 Mont 502, 138 P 2d 580.
Nebraska	Pierce v Oard (1888) 23 Neb. 828, 37 NW 677.
New Hampshire	Hill v Miles (1837) 9 NH 9.
New Jersey	Cohen v Spann (1973) 125 NJ Super 386, 311 A 2d 192.
New York	Toker v Pollak (1978) 44 NY 2d 211, 376 NE 2d 163.
North Carolina	Hartsfield v Harvey C. Hines Co. (1931) 200 NC 356, 157 SE 16.
North Dakota	North Dakota Century Code Section 14-02-05.
Ohio	Popke v Hoffman (1926) 210 App 454, 153 NE 248; Parker v Roddy (1911) 14 OCC (NS) 288, 34 OCC 89.
Oklahoma	Beshiers v Allen (1915) 46 Okl 331, 148 P 141; Johnson v Inglis (1942) 190 Okla 316, 123 P 2d 272.
Oregon	Schafroth v Baker (1976) 276 Or 39, 553 P 2d 1046.
Pennsylvania	Mahler v Dunn (1906) 15 Pa Dist R. 273.
Rhode Island	Sylvester v D'Ambra (1947) 73 RI 203, 54 A 2d 418.
South Carolina	Bell v Bank of Abbeville (1946) 208 SC 490, 38 SE 2d 641.
South Dakota	South Dakota Codified Laws Section 20-11-5.
Tennessee	Dunn v Winters (1841) 21 Tenn 512, 2 Humph 512; Travis v Bacherig 7 Tenn App 638 (1928).
Virginia	Williams Printing Co. v Saunders (1912) 113 Va 156, 73 SE 472.
Washington	Steven v Haering's Grocetorium (1923) 125 Wash 404, 216 P 870; Jolly v Valley Publishing Co. (1964) 63 Wash 2d 537, 338 P2d 139; Revised Code of Washington Ann. 9.58.070.
West Virginia	Barger v Hood (1920) 87 W Va 78, 104 SE 280.
Wisconsin	Bergman v Hupy (1974) 64 Wisc 747, 221 NW 2d 898; Wisonsin Statutes Ann. 601.42.

B. Apparent Qualified Privilege

Ten states have not had appellate cases specificaly dealing with defamation arising from a communication with law enforcement authorities. Nevertheless, broad principles of law have been enunciated describing a broad class of qualifiedly privileged communications that logicaly subsume our particular interest.

For example, in Russell v American Guild of Variety Artists 53 Haw 456, 497 P 2d 40 the court held:

> A qualified privilege arises when the author of the defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral or social, and where the publication concerns subject matter in which the author has an interest and the recepients of the publication a corresponding interest or duty.

A communication to police officers concerning the commission of a crime, when made in good faith, would surely fall within this general definition of a qualified privilege. Almost identical language is used by the Court in O'Neil v Tribune Co. 176 So 2d 535 (Fla App 2d Dist). and American Jurisprudence cited at the start of this section.

Even more general language is found in Fairbanks Pub. Co. v Francisco (Alaska, 1964) 390 P 2d 784 where a qualified privilege "is conditioned upon the existance of a state of facts which make it in the public interest to protect the person speaking or writing." Clearly, there is a public interest in having citizens come forward with information concerning a crime.

The following is a list of cases dealing with the law of qualified privilege that should logically cover instances of communication to police officers regarding the commission of a crime which are made in good faith and without malice. Thus, legal precedant exists in the following jusisdictions that a qualified privilege, at a minimium, should be afforded communications in aid of law enforcement.

Alaska	Fairbanks Pub. Co v Francisco (1964) 390 P 2d 784; West v Northern Pub. Co. (1971) 487 P 2d 1304.
Arizonia	Long v Mertz (1965) 2 Ariz App 215, 407 P 2d 404.
Colorodo	Walker v Hunter (1930) 86 Colo 483, 283 P 48; Ling v Whittemore (1959) 140 Colo 247, 343 P 2d 1048.
Florida	State v Chase 99 Fla 1071, 114 So 856; O'Neil v Tribune Co. (Fla App 2nd Dist) 176 So 2d 535.
Hawaii	Russell v American Guild of Variety Artists 53 Haw 456, 497 P 2d 40.
Nevada	Thompson v Powning 15 Nev Repts 195.
New Mexico	N.S.L. v Bank of New Mexico 79 NM 293, 442 P 2d 783
Utah	Combs v Montgomery Ward and Co. 119 Utah 407, 228 P 2d 272; Hales v Commercial Bank of Spanish Fork 197 P 2d 910.
Vermont	Posnett v Marble 62 481, 20 A 813.
Wyoming	Sylvester v Armstrong 53 Wyo 382, 84 P 2d 729.

C. Absolute Privilege

Professor Prosser has written that all communications to a prosecuting attorney should be entitled to an absolute rather than qualified privilege. (Prosser, The Law of Torts Sec. 114 at 780-781 4th Ed. 1971) Courts in several jurisdictions have held that communications to prosecuting attorneys are absolutely privileged because of the need to encourage the public to report information concerning suspected criminal activities.

The United States Supreme Court in Vogel v Gruaz (1884) 110 US 311, 28 L Ed 158, 4 S Ct 12, a defamation case decided under federal common law, held that all communications to prosecuting attorneys were absolutely privileged. This absolute privilege exists "without reference to the motive or intent of the informer or the question of probable cause." (Volel v Gruaz, supra, at 315) The Supreme Court in Re Quarles and Butler 158 US 532 (at 535), 39 L Ed 1080, 15 S Ct 959, again held that information supplied to law enforcement agents concerning the commission of a crime were "privileged and confidential communications, for which no action of libel or slander will lie." Communications to federal law enforcement officials regarding the suspected violation of federal law will be absolutely privileged and no civil recovery is possible in an action for libel and slander. The jurisdiction of a United States Attorney General, however, is limited to the interstate transportation of stolen vehicles and stolen automobile parts so far as we are concerned here.

Wisconsin law is clearly settled, but does not provide the same extent of protection to an informer as does federal law. An absolute privilege exists for communications addressed to prosecuting attorneys, but only a qualified privilege is afforded to statements made to police officers. In Schultz v Strauss (1906) 127 Wis 325, 106 NW 1066, 1067) the court stated:

> The policy of the law here steps in and controls the individual rights of redress. The freedom of inquiry, the right of exposing malversation in public men and public institutions to the proper authorities, the importance of punishing offenses, and the danger of silencing inquiry and of affording immunity to guilt, have all combined to shut the door against prosecutions for libels.

The policy of Shultz, supra, was recently affirmed in Bergman v Hupy (1974) 64 Wis 2d 747, 221 NW 2d 898.

In Gabriel v McMulin (1905) 127 Iowa 426, 103 NW 355, it was held to have been prejudicial error to receive in evidence testimony of the county attorney concerning charges spoken to him; the communication was deemed to have been absolutely privileged. The Vogel case, supra, was cited and quoted for the proposition that potential civil liability would deter communication with prosecuting attorneys.

Michigan provides an absolute privilege for communications to police authorities. In Shinglemeyer v Wright 124 Mich 230, 82 NW 887, we have a comprehensive explanation of the purpose of an absolute privilege and some interesting insights concerning crime in the year 1900.

> Such communications are made in the strictest confidence, and are as sacred in the eyes of the law, as the communication between client and lawyer, or parent and physician...such officers, especially in large cities, are entitled to know from the citizen against whom a crime has been committed all his suspicions and knowledge, and also in regard to his character and habits. The defendant did not make these statements for repetition. He made them for the exclusive use and benefit of the trusted and sworn officer of the law. They should

> have been forever locked in their breasts, and never disclosed; otherwise few persons would dare to disclose to an officer the name of a suspect, or anything he had learned about his character.

The Shinglemeyer opinion was affirmed in Wells v Toogood 165 Mich 677, 131 NW 124, and in Simpson v Burton (1950) 44 NW 2d 181.

Information given to a prosecutor for the purpose of initiating a prosecution is absolutely privileged; so ruled the United States Court of Appeals in Borg v Boas (1956) 231 F. 2d 788, in construing Idaho state law where the state courts had not previously addressed the issue. The court stated that information given to a prosecutor to initiate a prosecution is akin to testimony before a grand jury and deserved the same legal protection. No appellate Idaho case, however, has since directly dealt with this issue and affirmed the federal court opinion.

An 1873 case in Indiana asserted that an absolute privilege exists for communications made to a prosecuting attorney in the interest of aiding law enforcement. In Oliver v Pate 43 Ind 132, the court held that an absolute privilege is a "necessity of preserving the due administration of public justice." No further appellate case has arisen in Indiana dealing with this specific issue.

In Bazzaell v Ill, Cent. R. Co. (1924) 203 Ky 626, 262 SW 966, the court citing Vogel v Granz, supra, and Gabril v McMullin, supra, declared that it is the duty of every citizen to communicate to police officers facts dealing with the commission of a crime. The

court declared that, "the interests of the public in protecting the privacy of a communication seems indeed greater when it is made to a prosecuting attorney in that capacity than when it is made by a client to his attorney." (Bazzaell v Ill Cent R. Co. 262 SW 966 at 967) However, as the facts of the case related to the disclosure of information presented to a grand jury by the presiding prosecutor in an action for malicious prosecution, the court's declaration must be considered as juris dictum.

A conflict of authority exists in the State of Texas as to whether communications to police authorities are absolutely or conditionaly privileged. A letter written to a county attorney charging a violation of criminal law, and asking that the matter be brought before a grand jury, was held to be absolutely privileged in Hott v Yarborough (1923) 112 Tex 179,. 245 SW 676 (Comm. Appeals). Similarly, statements to the chief of police reporting a threat to life were privileged and did not constitute a cause of action in Brewster v Butler (1940) 139 SW 2d 643 (Ct of Civil Appeals).

Other cases, however, concerning communication to police officers have held that only a conditional privilege is attached. (Meyer v Viereck (1926) 286 SW 894 (Ct of Civil Appeals); Vogt v Gurdy (1921) 229 SW 656 (Texas Civil Appeal); Zarate v Cortinas (1977) 553 SW 2d 652. Ct of Civil Appeals) The Supreme Court of Texas will have to rule on the issue to settle the question.

MALICIOUS PROSECUTION

A claim of malicious prosecution arises by the defendant's wrongful setting in motion a criminal prosecution or civil lawsuit. An interesting alternative definition is "a judicial proceeding, begun in malice, without probable cause, which finally ends in failure." (Grant v City of Rochester((1971, N.Y.) 68 Misc. 2d 350, 360) The elements of the tort are:

(1) Institution of criminal proceeding or civil action,

(2) want of probable cause,

(3) malice,

(4) termination favorable to the plaintiff, and

(5) damages.

The rules of practice defining what constitutes the commencement of an action varies from jurisdiction (see: 1 Am. Jur. 2d Actions, Section 86). The courts will look beyound the formal process to determine whether the defendant caused or assisted in causing the prosecution (Stewart v Sonneborn 98 US 187, 25 L Ed. 116; Barnes v Danner 169 Kan 32, 216 P2d 804). Merely bringing facts to the attention of a district attorney is not the institution of criminal proceedings (52 Am. Jur. 2d, Malicious Prosecution, Section 24).

Requesting a district attorney to conduct an independant investigation before prosecuting will aid an insurance company in disclaiming responsibility. It is not similarly possible to disclaim responsibility in a civil action as the decision making is entirely vested with the plaintiff.

Probable cause is the knowledge of facts--actual or apparent--strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting or suing the defendant (Burt v Smith (1905) 181 N.Y. 1). It should be noted that a lack of probable cause may not be inferred from proof of malice and must be proven independantly (Mezzacupo v Krivis (N.Y., 1930) 230 App. Div. 465).

Malice is always the most difficult matter to prove as the truth lies in the mind of the instigator. Objective evidence of malice must depend upon admissions against interest, testimony by third parties regarding antagonism, and, most often, inferred from the want of probable cause. In a review of state appellate court decisions, it is clear that whenever (with one exception[1]) the issue has arisen, it is permissibile for the trier of fact to infer malice based only upon a want of probable cause. The most serious source of potential liability lies in obviating the necessity of presenting proof of malice.[2] Subsequently, efforts to minimize potential liability should focus on insuring that an insurance company's prosecution commences with probable cause.

1. Where the only evidence of a want of probable cause is the inference that may be drawn from the voluntary dismissal of the original action, such an inference will not support the second inference, that the defendant acted with improper motives. There must be some direct or circumstantial evidence to support the inference of malice. (Alvarez v Retail Credit Ass'n of Portland, Ore. Inc. (1963) 234 Or 255, 381 P 2d 499, 503)

2. The most extreme position was taken in Brand v Hinchman (1888) 68 Mich 590, 36 NW 664, where the court stated: "The want of probable cause raises the persumption of malice under the law. If they did not find the existance of probable cause, they must also find, in addition, that the defendant acted from malicious motives."

That malice may be inferred from proof of the want of probable cause was recognized expressly in the following cases.

Alabama	Hanchey v Brunson 175 Ala 236, 56 So 971.
Arizonia	Cunningham v Moreno 9 Ariz 300, 80 P 327.
Arkansas	Casey v Dorr 94 Ark 433, 127 SW 708.
California	Portman v Keegan 31 Cal App 2d 30, 87 P 2d 400.
Colorodo	Murphy v Hobbs 7 Colo 541, 5 P 119.
District of Columbia	Chapman v Anderson 55 App DC 165, 3 F 2d 336 (1925).
Florida	Ward v Allen, 152 Fla 82, 11 So 2d 193.
Georgia	Hearn v Batchelor 170 SE 203, 47 Ga App 213.
Illinois	Carbaugh v Peat 40 Ill App 2d 37, 189 NE 2d 14.
Indiana	Paddock v Watts 116 Ind 146, 18 NE 518.
Iowa	Schnathorst v Williams 240 Iowa 561, 36 NW 2d 739.
Kansas	Rouse v Burnham 51 F 2d 709 (Kan.); Bratton v Exchange State Bk. 129 Kan 82, 281 P 857.
Kentucky	Barbara Lane Stores v Brumley 195 F 2d 1006; Sweeney v Howard 447 SW 2d 865.
Louisiana	Jefferson v S.S. Kresge Co. 344 So 2d 1118 (La. App. 1977)
Maine	Nyer v Carter 367 A 3d 1375 (Me. 1977)
Maryland	Weskor v G.E.M., Inc. 272 Md 192, 321 A 2d 529.
Massachusets	Reed v Home Savings Bank 130 Mass 443.
Michigan	Davis v McMillan 142 Mich 391, 105 NW 862.
Minnesota	Price v Minnesota, D & W. R. Co. 130 Minn 329,153 NW 532.

Mississippi	Brown v Watkins 213 Miss 365, 56 So 2d 888.
Missouri	Randol v Kline's, Inc. 322 Mo 746, 18 SW 2d 500.
Montana	Wendel v Metropolitan Life Ins. Co. 83 Mont 252, 272 P 245.
Nebraska	Wertheim v Altshaler 12 Neb 591, 12 NW 107.
New Hampshire	Cohn v Saidel 71 NH 558 (1902).
New Jersey	Earl v Winne 14 NJ 255, 337 A 2d 365.
New Mexico	Meraz v Valencia 28 NM 174, 210 P 225.
New York	Martin v City of Albany 42 NY 2d 13, 364 NE 2d 1304.
North Carolina	Cook v Lanier 267 NC 166, 147 SE 2d 910.
North Dakota	Johnson v Huhner 76 ND 13, 33 NW 2d 268.
Oklahoma	Chicago, R. I. & P.R. Co. v Holliday 30 Okla 680, 120 P 927.
Oregon	Brown v Liquidators 152 Or 215, 52 P 2d 187.
Pennsylvania	Sicola v First Nat. Bank 404 Pa 18, 170 A 2d 584.
Rhode Island	DeSimone v Parillo 87 RI 95, 139 A 2d 81.
South Carolina	Margolis v Telech 239 SC 232, 122 SE 2d 417.
South Dakota	Richardson v Dybedahl 14 SD 126, 84 NW 486.
Tennessee	Mullins v Wells 60 Tenn App 675, 450 SW 2d 599.
Texas	Gulf C. & S.F.R. Co. v James 73 Tex 12, 10 SW 744.
Vermont	Ryan v Orient Ins. Co. 96 Vt 291, 119 A 423.
Virginia	Freezer v Miller 163 Va 180, 176 SE 159, 182 SE 250.
Washington	Hightower v Union Sav. & T. Co. 88 Wash 179, 152 P 1015.
West Virginia	Wright v Lantz 133 W Va 786, 58 SE 2d 123.
Wisconsin	Elmer v Chicago & N.W.Ry. Co. 257 Wis 228, 43 NW 2d 244.
Wyoming	McIntosh v Wales 21 Wyo 397, 134 P 274.

PRIVACY

A. Constitutional Right to Privacy

With today's data technology, computers and information systems, a much more dynamic interchange could be developed between government agencies and insurance companies to reduce automobile theft and insurance fraud. For example, information concerning an individual's personal history can be the basis for the denial of insurance or signal the need for an intensive investigation of an insurance claim. Data technology can be utilized to identify possible suppliers of stolen auto parts.[1] The development of information systems is dependant on cost-benefit evaluations and possible trends in the law of privacy.

Only recently has privacy attained the status of a recognized constitutional right. The right of privacy has been determined to include decisions whether to use birth control devices (Griswald v Connecticut (1965) 381 US 479, 85 S Ct 1678), and state control over the availability of abortions (Roe v Wade (1973) 410 US 113, 93 S Ct 705). In Stanley v Georgia (394 Us 557, 89 S Ct 1243 (1969) the Supreme Court struck down a state statute that prcscribed the possession of obscene material in the home. The constitutional right of privacy protects a citizens expectation of privacy in relation to local,

1. The success of auto theft rings and "chop-shops" reveals their own existance. The operations demonstrate a capability of providing quickly a wide range of parts that belies their small inventory and capital.

state, and federal governmental action. (W. Prosser, "The Law of Torts," Sec. 117 at 816) However, where governmental action and private informational systems are integrated a claim can be made that the constitutional requirement of state action is satisfied (US v Williams 341 US 70, 95 L Ed 758).

While the constitutional right of privacy has been recognized with regard to contraception, abortion and pornography, is there a constitutional right to control information about oneself? To date the Supreme Court has upheld consistently the government's power to collect and disseminate data concerning the private lives of individuals.

Professor Arthur Miller is one of the leading advocates for affording a right to privacy to the subjects of data banks. He concludes that the courts are far from recognizing a constitutional right to control information about oneself. ("Computers, Data Banks and Dossiers: The Assault on Privacy," Arthur Miller, New American Library, 1971, pp 184-225)

> Is the right to control information about oneself-- particularly the right to decide when to go public with personal data-- a "fundamental" right that is "implicit in the concept of ordered liberty?" Even if the answer to the query is yes, under what circumstances is the states interest in collecting or using information about an individual "compelling?" In sum, there is still a long decisional path to be traversed before a constitutional right of informational privacy is established.

A constitutional right to privacy is still an undefined concept whose particular doctrinal basis for existance has

not been agreed upon by the Supreme Court. Constitutional protection has been extended to only a limited number of areas. It is far too early to speculate on whether the direction of this "new" constitutional right will reach the control of personal information. As information systems grow and have greater influence, a parallel growth of decisional law will follow. Presently, a constitutional claim of privacy that would effect communications between law enforcement authorities and insurance companies has not been recognized.

B. Federal Privacy Statute

Various federal statutes have been enacted to protect the privacy of individuals in limited circumstances. The Fair Credit Reporting Act (15 USC 1601) gives a consumer limited rights to know what is in the files that are kept and disseminated about him. When a person is denied automobile insurance for a family car on the basis of an adverse credit report, the law requires that he or she be notified of the name and address of the reporting company, which must then disclose the "nature and substance" of the report and the sources of information. The subject of the report can then compel the company to reinvestigate incorrect information and can sue if the company willfully refuses to make the appropriate correction.

In the event a cause of action is brought under the Fair Credit Reporting Act, the identity of sources may be compelled under discovery rules of the jurisdiction (Retail Credit Co v United Family Life Ins Co 130 Ga App 524, 203 SE 2d 760; Retail Credit Co v Dade County (DC Fla) 393 F Supp 577). The danger is that one member of an auto theft ring could bring suit and compel discovery proceedings which could expose not only the source of information but possibly an entire network of intelligence activities. Sources of information acquired soley for use in preparing investigative reports,however, are protected from disclosure under the act (15 USCS 1681g (a) (2).

Thus, a source of information or informer must rely on the legal representation of an insurance company and the proper functioning of the judicial system to protect his identity. To the degree that an individual mistrusts this procedure he will be deterred from coming forward. Similarly, pooling of information, which is vital in combating organized crime, is hampered by potential disclosure of sources. Subsequently, the quality of information communicated by insurance companies to law enforcement agencies is lessened.

C. Common Law Tort of Privacy

In 1890 a famous Harvard Law Review article advocated that a common law right of privacy existed that would exclude public observation of basically private events (4 Harvard L.R. 193, "The Right to Privacy". Samuel D. Warren and Louis D. Brandeis). Simply stated, the right of privacy connotes "the right to be left alone" and protects unwarranted invasion upon an individual by another individual or nongovernmental organization. Today forty-nine states and the District of Columbia protect the several interests classified under the concept of "privacy."[1] Only Nebraska has not recognized a common law right of privacy.

The common law right of privacy is in reality an unbrella term that covers four distinct interests of an individual. They are:[2]

(1) Appropriation for the defendant's benefit or advantage of the plaintiff's name or likeness;

(2) Publicity which places the plaintiff in a false light in the public eye;

(3) Intrusion upon the plaintiff's physical and mental solitude or seclusion; and

(4) Public disclosure of private facts.

1. "Informational Privacy and the Private Sector," Fred Greguras, 11 Creighton L.R. 312 at 320; Bethiaum v Pratt (1976) 365 A 2d 792 at 794 note 6; General Laws of Rhode Island 9-1-28; Billings v Atkinson(Tex. 1973) 489 SW 2d 858; Wisconsin Statutes Anno. Sec. 895.50.

2. 48 California L.R. 383 (1960), William Prosser, "Privacy." These four denominations, adopted in nearly all jurisdictions, represent the broad framework of legal ananysis of the right of privacy in all jurisdictions.

Professor Prosser explains these four categories in the following manner.

> As it appeared in the cases thus far decided, it (privacy) is not one tort, but a complex of four. To date the law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff "to be left alone."
> (W. Prosser, "Law of Torts," 4th Ed., 1971, pg. 804)

Only the latter two categories present a tangential relevance to the potential liability faced by insurance companies in communicating with law enforcement officials.

I. Intrusion upon the plaintiff's physical and mental solitude and seclusion.

A cause of action in privacy is recognized when there is a prying and intrusion into private matters in a manner which would be found objectionable by a reasonable man. The concept focuses on the manner in which information is obtained rather than how it is used. Typical actions center on aggressive investigation using wiretapping and electronic surveillance.

An individual's privacy is balanced against the interest of the public to know information affecting its safety and security. This cause of action is limited to matters which are entitled to remain private. (48 Calif. L.R. 383, 391, W. Prosser, 'Prosser, 'Privacy.") Those who honestly seek the enforcement of the law by instigating police action based on a reasonable belief that a party may be guilty of a criminal offense will not be held liable (Lucas v Ludwig (1975)

313 So 2d 12, application denied 318 So 2d 42). Courts have always recognized the public interest in exposing fraudulent claims. Furthermore, a plaintiff in a personal injury action must expect that a reasonable investigation would be made of his claim (In Tucker v American Employers Ins Co (1965, Fla App) 171 So 2d 437, 13 ALR 3d 1020; Forster v Manchester (1963) 410 Pa 192, 189 A 2d 147).

Where an investigation is conducted in a vicious and malicious manner not reasonably limited to obtaining information necessary for legal defense but deliberately calculated to frighten and torment a suspect a cause of action exists (Pinkerton National Detective Agency Inc v Stevens (1963) 108 Ga App 159, 132 SE 2d 119). Clearly a paradox would arise where the courts to limit the scope of the matter that may be investigated; an investigation unearths information whose nature and relevance will only become known after its completion. It is the aggressive and blatant manner of the investigation that violates the privacy of an individual. While extreme cases may be decided as questions of law, it is for the trier of fact to determine if an investigation is offensive and unreasonable. (Alabama Electric Co-Operative Inc v Partridge (Ala. 1969) 225 So 2d 848)

Where an individual is followed in an open, public and persistent manner, without any attempt at secrecy, and where it is obvious to the public that the individual was being followed or watched, a cause of action exists. (Schultz v Frankfor M Acc & P&G Ins Co (1913) 151 Wisc 539, 139 NW 386) But, the fact that an investigator inadvertently exposed

himself to a subject was not in itself enough to render the investigator liable. (Tucker v American Employers Ins Co (Fla App. 1965) 171 So 2d 437; McLain v Boise Cascade Corp 271 or 549, 553 P 2d 343 (1976) Nor would a tresspass by the investigator alone constitute an unreasonable surveilance (Ellenberg v Pinkerton Inc (1973) 130 Ga App 254, 202 SE 2d 701; McLain v Boise Cascade Corp (1975) 533 P 2d 343).

2. Public Disclosure of Private Facts

A cause of action in privacy may also exist for the public disclosure of private matters. The matter made public must be that which would be found offensive and objectionable to a reasonable man of ordinary sensibilities. Where the past life of a reformed prostitute is brought before the community in a movie, a cause of action was available despite the movie's truth. (Melvin v Reid 112 Val App 285) The implicit nature of this action limits its pertinence to this report.

First, generally there must be a massive disclosure to the public for there to be a cause of action. (Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser, 39 NYU L.R. 964 at 981 (1964) In several cases, however, an action has been permitted where the sourrounding publicity was small: posting a notice of indebtedness in a store window (Brents v Morgan 221 Ky 765, 229 SW 967 (1927); or a lound proclaimation in a restaurant (Bierdman's of Springfield Inc v Wright 332 SW 2d 892 (Mo. 1959).

Second, disclosing information directly pertaining to the commission of a crime to a law enforcement agent would obviously be permissible.

A definition of "private matters" implicitly relates to subjects where there is no public interest in publication. It is for trier of fact to apply society's norms and values in determining what is private.

Third, as in defamation a privilege exists to communicate information of a kind reasonably calculated to protect or further a common or public interest. The policies which underlie the absolute and conditional privileges in defamation seems equally applicable in the context of invasion of privacy (4 Harvard L.R. 193 at 216, Samuel Warren and Louis Brandeis, "The Right to Privacy"). No case has denied the applicability of these priveleged occasions in a privacy suit. ("Libel and Related Torts", by Arthur Hanson, Vol. II, P. 209, American Newspaper Publishers Association Foundation Inc. N.Y., 1969)

Accordingly, communication to law enforcement authorities and between insurance companies is well insulated from potential liability for the invasion of privacy. Only when an insurance company publicly disseminates information which is beyond the bounds of propriety and its legitimate needs would it bring the potential of civil liability to itself.

SUMMARY

On the grounds of public policy a defense of privilege is afforded to communications that would otherwise constitute a cause of action in defamation. Privileged communications are divided into two general classes: (1) communications which are absolutely privileged and (2) communications which are qualifiedly privileged. Every state and the District of Columbia allows a defense of privilege.

Where the law recognizes an absolute privilege to exist, no civil remedy is afforded to an injured party no matter what the harm or the motive behind the communication. Where, however, a conditional or qualified privilege exists, a showing of actual malice will allow a civil recovery for an injury to a reputation.

Courts and statutes within thirty-five states and the District of Columbia have expressly ruled that a qualified privilege applies to communications made in good faith, and without malice, to police officers, for the purpose of aiding law enforcement. Ten states have not had appellate cases specificaly dealing with defamation arising from communications with law enforcement authorities. Nevertheless, courts in these state have enunciated broad principles of law which should logicaly subsume such communications and provide, at minimum, a qualified privilege.

It is for the trier of facts to determine if malice was demonstrated to overcome the defense of privilege. It is a construction of the facts on a case by case basis that demonstrates the existance of malice. One means of demonstrating malice, which will be discussed more fully in terms of

malicious prosecution, is the inferring of malice from a want of probable cause.

Courts in several jurisdictions have held that communications to prosecuting attorneys are absolutely privileged because of the need to encourage the public to report information concerning criminal activities. Communications to federal law enforcement officials regarding the suspected violation of federal law are absolutely privileged. Several other states reviewed may offer an absolute privilege to such communications.

A claim of malicious prosecution arises from the commencement of a criminal prosecution or civil action, without probable cause, with malice and terminates in a favorable manner to an injured party. Malicious prosecution is treated succinctly as little variation exists among jurisdictions. Nonetheless, this cause of action presents a serious potential liability to an insurance company.

The rules of practice defining what constitutes the commencement of an action varies among jurisdictions. The courts will look beyound the formal process to determine whether the defendant caused or assisted in causing a prosecution. Requesting a prosecutor to conduct an independant investigation will aid an insurance company in disclaiming responsibility.

In a malicious prosectution action, the lack of probable cause on the part of the defendant must be independantly established. But a lack of

probable cause may be inferred from the failure of the original action. A want of probable cause, however, may not be inferred from proof of malice.

Cases in at least 43 jurisdictions have expressly recognized that malice may be inferred from a want of probable cause. It is this intertwining evidential relationship of "probable cause" and "malice" that presents the most serious potential liability to insurance companies.

The developing law of privacy may present additional difficulties in the future. The constitutional right of privacy protects a citizen's expectation of privacy in relation to local, state and federal government action in areas such as abortion and pornography. As yet, the Supreme Court has not recognized, clearly, a right to control information about oneself. The issue will arise and the protection of the individual must be balanced against the welfare of the state in encouraging parties to come forward with information of criminal violations.

The Fair Credit Reporting Act indirectly hampers communications to law enforcement authorities by reducing the willingness of parties to come forward or share information because of a fear of disclosure. The Fair Credit Reporting Act gives a consumer limited rights to know what is in the files that are kept and disseminated about him. In the event a cause of action is brought under the Act, the identity of sources must be disclosed. A source of information or informer must rely on the legal representation of an insurance company and the proper functioning of the judicial system to protect his identity. Again, the law is not designed to encourage people to come forward and is not designed to combat organized car theft.

Simply stated, the common law right of privacy connotes the "right to be left alone" and protects unwarranted invasion upon an individual by another individual or nongovernmental organization. The common law right of privacy is in reality an umbrella term that covers four distinct interests of an individual--two of which are relevant to this report.

A cause of action in privacy is recognized when there is a prying and intrusion into private matters. The concept focuses on the manner of intrusion and whether it would be found objectionable by a reasonable man. This is a limit on the investigatory practices of insurance companies. Insurance companies are not police investigatory forces and should not attempt to be as they lack the mandate that can only be derived from the people. The common law right of privacy is a proper limit on the aggressiveness of private investigations.

A cause of action in privacy may also exist for the public disclosure of private matters. Communications to law enforcement officials and between insurance companies is well insulated from potential liability. Only when an insurance company publicly disseminates information which is beyound the bounds of propriety and its legitimate needs would it bring the potential of civil liability to itself.

The law of privacy provides substantial and legitimate parameters on the actions of insurance companies. The law of privacy will prevent abuses of discretion on the part of an insurance company but still permit and encourage communications between an insurance company and police authorities. If an insurance company merely relates its suspicions to a prosecutor no cause of action will arise under the

common law of privacy. On the other hand, the abuses of excessive investigation and public dissemination will be arrested. Thus, an absolute privilege can be given to insurance companies who relate information privately to police authorities while the interests of the individual are protected by the common law right of privacy.

RECOMMENDATIONS

INSURANCE COMPANIES

Insurance companies are a natural mechanism for channeling, in an organized fashion, the voices of consumers victimized by auto theft. Insurance companies are in a strategic position to gather and analyze crime information. The key to the combatment of auto theft is the utilization of information.

The potential civil liability of insurance companies appears, at first sight, to be more a problem of perception than of historical occurrence. No appellate case was found where an insurance company was sued for communicating information concerning the commission of a crime to law enforcement authorities. Those present at the National Workshop on Auto Theft Prevention, however, expressed a strong belief that there did exist a reluctance on the part of insurance companies to assist law enforcement authorities in many cases.

Regardless of whether these fears are justified by the state of existing laws, several observations must be made. Insurance companies are "conservative institutions" that will be reluctant to act when risks are perceived. Their "conservative" character is a function of a natural practice of risk avoidance and will not be altered by legislative fiat. Only if the potential risks, and the perception of such risks, is reduced will such institutions undertake the critical role they alone can play in combating auto theft and organized crime. Even more fundamental is the need to develop a coordinated policy of information gathering, analysis and utilization.

A. Internal Management

Either internally or in coordination with outside parties, an insurance company must declare to itself that the reduction of auto theft and accompanying insurance fraud is a corporate goal. Managerial attention must be focused on the problems of auto theft.

A review procedure or committee should be established to insure that communications with law enforcement authorities are conducted without malice and with probable cause. Where a police investigation is sought because of "experienced suspicion", rather than hard evidence, management or in-house counsel should insure that the company's personnel act in good faith and not from private ill will. Such a reviewing body should seek to present all relevant information in a confidential manner. A procedure of review and a circumspect manner of communication, protecting the privacy of individuals, demonstrates the good faith of an insurance company to a jury. Furthermore, police response to a complaint is heightened by the respect and confidence placed in the complainant.

Such a management structure will also be of great assistance in facilitating communication from law enforcement authorities to insurance companies and between insurance companies. The degree of organizational formality necessary is, however, left to a determination by local management. Simply adding a layer of management will not improve communications.

B. Whom to speak with and how.

The first rule is that all communications concerning the commission of a crime be made to resposible law enforcement officials and not to the general public. Otherwise, a cause of action in common law privacy may arise.

As was noted previously, communications to federal law enforcement authorities concerning the commission of a federal offense is absolutely privileged as regards a cause of action in libel. The Federal Bureau of Investigation has jurisdiction over the transportation of vehicles across state lines and the theft of automobiles for parts, which invariably cross state boundaries. It is a very logical suposition that the theft of a relatively new or expensive car will involve a violation of federal law. Consequently this report provides notice, if any were necessary, of the propriety of contacting federal officials. Nevertheless, an action in malicious prosecution may still exist.

To minimize the risk of action in malicious prosecution, an insurance company may act in two ways. First, an internal procedure to insure that employees act without malice has been suggested. Second, request that law enforcement agents conduct an independant investigation before instituting a criminal action. An insurance company should seek to place the burden of actually instituting criminal charges upon governmental officials, not only to negate the possibility of an action for malicious prosecution but to place the burden of civil liability where the resources and responsibility properly belong.

PROSECUTORS AND POLICE

Law enforcement authorities already have a duty to protect the confidentiality of information sources. Such officials must make known their determination to do so by publicizing their efforts. Law enforcement authorities are not likely to be aware of the reluctance of persons to come forward. Police authorities can't count the number of people that don't show up at police stations.

The failure of individuals to cooperate with police authorities is related to expense, risk, indifference, inconvenience and the failure to perceive tangible benefits. To the extent that police utilize their resources to minimize perceptions of risk, parties will come forward. As the number of insurance companies are finite and easily identifiable, the amount of resources expended in such an effort to improve communications will be minimal. Furthermore, as insurance companies are natural channels of communication to the general public, the beneficial effects of such an action are multiplied.

It is therefore suggested that the Justice Department, in cooperation with state authorities, simply write a letter to insurance companies asking for their cooperation in combating auto theft. At the same time, insurance companies might be asked to identify the individuals responsible for reporting criminal activity and internal procedures for doing so.

Finally, prosecutors and police authorities should be sensitive and receptive to two mechanisms by which insurance companies may minimize potential civil liability. Firstly, to avoid actions for malicious prosecutions, insurance companies will ask law enforcement officials to institute criminal investigations and proceedings. Police authorities should undertake such responsibilities. Secondly, as regards libel,

communication to federal officials are absolutely privileged while similar communications to state authorities are likely to be only qualifiedly privileged. This report thereby recommends that insurance companies communicate with federal agents rather than state officials. This report does not recommend that federal officials preempt the field of auto theft. Where federal authorities feel that local authorities should handle a particular case, federal agents should undertake the task of contacting local offials, inform them of the particulars, and request that they follow up by asking the local insurance company for help.

LEGISLATORS

The legal structure of federal and state jurisdictions are not designed to encourage individuals to come forward and to report criminal activity. Legislators may provide legal mechanism and police resources to combat auto theft.

Insurance companies should not be protected from the ramifications of their agents intentional malice. A serious question exists as to wether it would be in the long term national interest to protect insurance companies from their error or gross error. Presently an error in judgement may draw an inference of of a want of probable cause and a subsequent inference of malice. The chain is at best tenious. It places insurance companies in the position of compelling additional review and in-depth investigation, or in being reluctant to come forward.

Alternatively, legislation that would insulate an insurance company from liability would encourage communication. Private communications to a prosecutor's office whould either be absolutely privileged or given significant weight as demonstrating good faith. The potential for abuse is minimized by the high level of training of staff attorneys in discriminating between scurious remarks and potential wrongdoing.

The following language is suggested:

> In the absence of fraud or bad faith, there shall be no liability on the part of and no cause of action of any nature shall arise against an insurance company, or any person acting on their behalf, for (1) any information furnished to a district attorney's office concerning any criminal or fraudulent act by any person or organization involving automobile theft, or (2) for its assistance in any such investigation.

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