Western New England Law Review

Volume 7 *7 (1984-1985)*
Issue 2

Article 9

1-1-1984

Bratt v. International Buisness Machines, 392 Mass. 508, 467 N.E.2d 126 (1984)

Howard A. Nunes

BRATT v. INTERNATIONAL BUSINESS MACHINES

I. INTRODUCTION

On July 16, 1984, in *Bratt v. International Business Machines*,[1] the Supreme Judicial Court of Massachusetts clarified the right of employers to use personal information about their employees. Addressing libel and invasion of privacy claims, the court defined the standards employers must follow when disclosing private employee information.[2]

The court held that employers have a conditional privilege[3] to disclose defamatory facts about an employee, if the disclosure reasonably serves a legitimate business interest in the employee's job competence.[4] In addition, the court ruled that employers can be held liable for abusing the privilege but only upon a minimum showing of recklessness, whether or not the disclosed information was medical.[5] The court also held that conditional privileges do not apply to claims brought under the Massachusetts right to privacy statute.[6] Rather, in invasion of privacy actions against an employer, an interest balancing test will be applied:[7] an employer's legitimate business interest in using private information about an employee must outweigh the intrusion on the employee's privacy.[8] The same test applies when medical information is involved.[9]

The supreme judicial court addressed these issues in response to seven questions certified to it from the United States Court of Appeals

---

1. 392 Mass. 508, 467 N.E.2d 126 (1984).

2. *Id.*

3. *Id.* at 512-13, 467 N.E.2d at 131. *See* RESTATEMENT (SECOND) OF TORTS § 593 and scope note (1977).

4. *Bratt*, 392 Mass. at 509, 512-13, 467 N.E.2d at 129, 130-31.

5. *Id.* at 509, 517, 457 N.E.2d at 129, 133.

6. *Id.* at 510, 519-20, 467 N.E.2d at 129, 135. The right of privacy statute states: "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages." MASS. GEN. LAWS. ANN. ch. 214, § 1B (West Supp. 1984).

7. *Bratt*, 392 Mass. at 510, 520-21, 467 N.E.2d at 129, 135-36.

8. *Id.* at 509-10, 520-22, 467 N.E.2d at 129, 135-36.

9. *Id.* at 522, 467 N.E.2d at 136.

for the First Circuit.[10] The action underlying this decision originated in the Superior Court for Middlesex County, Massachusetts, but was removed to the United States District Court for the District of Massachusetts on the defendant's diversity motion.[11]

II. THE FACTS

The plaintiff, Robert Bratt, was employed by International Business Machines Corporation (IBM) for approximately eight years prior to the events that generated this action.[12] During that period, Bratt occasionally complained to IBM's management[13] about the low quality of his evaluations, the sparcity of his promotions and raises, and IBM's failure to implement his suggestions for improving the company.[14] After one fruitless grievance meeting with IBM's personnel director, Bratt mentioned to his supervisor that he had been suffering from headaches, nervousness, and insomnia.[15] In response, his supervisor recommended a check-up with the corporation's physician.[16] After the doctor examined Bratt, he phoned Bratt's supervisor and reported that Bratt was "paranoid" and should see a psychiatrist.[17]

---

10. *Id.* at 508-09, 467 N.E.2d at 128. The certifed questions were:

1. "In the case of a libel claim, when defendant has a conditional privilege, does loss of that privilege through 'unnecessary, unreasonable or excessive publication,' . . . require more than ordinary negligence?" *Id.* at 512 n.7, 467 N.E.2d at 130 n.7 (citations omitted).
2. "If so, does abuse of the privilege through such publication result from something less than recklessness?" *Id.*
3. "Is the standard for abuse through excessive publication the same when the defamatory matter published is medical information?" *Id.* at 516 n.12, 467 N.E.2d at 132 n.12.
4. "Can disclosure of private facts about an employee among other employees of a corporation constitute sufficient publication to infringe the employee's right of privacy?" *Id.* at 517 n.14, 467 N.E.2d at 133 n.14.
5. "Is there a conditional privilege for legitimate business communications under the Massachusetts right of privacy statute?" *Id.* at 519 n.16, 467 N.E.2d at 134 n.16.
6. "If so, what are the standards for abuse of that privilege?" *Id.*
7. "Are the same privilege and standard for abuse applicable in the case of medical information?" *Id.* at 521 n.20, 467 N.E.2d at 136 n.20. *See* MASS. SUP. JUD. CT. R. 1:03.

11. *Bratt*, 392 Mass. at 509, 467 N.E.2d at 128.

12. *Id.* at 510, 467 N.E.2d at 129.

13. IBM maintained an "open door" policy grievance system whereby employees could air their complaints directly to higher management when their immediate superiors did not settle their problems satisfactorily. *Id.* at 510 & n.6, 467 N.E.2d at 129 & n.6.

14. *Id.* at 510-11, 467 N.E.2d at 129-30. The court failed to discuss the nature of Bratt's suggestions. The personnel director, however, told him that they simply were not implemented, and that, in any event, he should not be concerned with achieving any personal recognition for making suggestions, as that was "part of his job." *Id.* at 511, 467 N.E.2d at 130.

15. *Id.* at 511, 467 N.E.2d at 130.

16. *Id.*

17. *Id.*

Bratt's supervisor relayed that opinion through another supervisor to IBM's personnel director.[18]

After IBM denied another of Bratt's grievances, his supervisor noted Bratt's reaction as "distraught and crying."[19] The supervisor informed the personnel director of Bratt's behavior and the personnel director in turn distributed a memorandum to at least two other managerial persons, complete with his personal impression that Bratt had mental problems extending beyond IBM.[20] Meanwhile, Bratt's supervisor made an appointment for him with a psychiatrist. The personnel director asked the medical director to confer with the psychiatrist to determine Bratt's employment competency.[21] Bratt's suit claimed that the personnel director's memorandum libeled him, and that disclosure of his grievances and medical evaluations to inappropriate personnel violated his statutory right of privacy.[22]

III. ANALYSIS

A. *The Employer's Conditional Privilege to Publish Defamatory Information*

Before the *Bratt* decision, the supreme judicial court had recognized the existence of a privilege to publish defamatory information.[23] The privilege applied, however, only under the condition that publication be reasonably necessary for a legitimate business interest.[24] The *Bratt* court relied upon *Galvin v. New York, New Haven & Hartford Railroad* for its discussion of the nature of conditional privileges.[25] In *Galvin*, the court had explained that conditional privileges could be

18. *Id.* at 511, 467 N.E.2d at 130.

19. *Id.*

20. *Id.*

21. *Id.* at 511-12, 467 N.E.2d at 130.

22. *Id.* at 512, 467 N.E.2d at 130. *See supra* note 6.

23. *See* Galvin v. New York, N.H. & H. R.R., 341 Mass. 293, 168 N.E.2d 262 (1960). *Accord*, Underwood v. Digital Equip. Corp., 576 F. Supp. 213, 217 (D. Mass. 1983).

24. *Id.* at 296-97, 168 N.E.2d at 265-66. *See* McCone v. New Eng. Tel. & Tel., 393 Mass. 231, 235-36, 471 N.E.2d 47, 50-51 (1984) (same privilege applied to employee evaluations); RESTATEMENT (SECOND) OF TORTS § 594 (1977). The law recognizes many types of conditional privileges. *See, e.g.*, Sheehan v. Tobin, 326 Mass. 185, 190-91, 93 N.E.2d 524, 528 (1950) ("where the publisher and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further it." (quoting W. PROSSER, HANDBOOK ON THE LAW OF TORTS 837 (1941)); RESTATEMENT (SECOND) OF TORTS §§ 595-598A (1977) (conditional privileges also exist for certain personal interests, common interests, public interests, family relationships, and state officers). *See generally* 37 MASS. PRAC., *Tort Law* 143-45 (1979).

25. 341 Mass. 293, 168 N.E.2d 262 (1960).

abused, and thereby forfeited, "by an unnecessary, unreasonable or excessive publication of the defamatory matter,"[26] such as loud and repeated pubic accusations in the presence of a growing crowd of onlookers.[27] The court, however, had not fully defined the standard by which such abuse had to be proved, although it stated that "actual malice" was not required.[28] Nonetheless, the *Bratt* court looked to *Galvin* for guidance, inasmuch as it seemed "to favor recklessness or 'malice in fact' as the standard."[29]

In determining what should be the minimum standard for abuse, the *Bratt* court looked to Massachusetts case law and the RESTATEMENT (SECOND) OF TORTS.[30] The court relied upon *Retailers Commercial Agency, Inc., Petitioners*,[31] in which it had held that "[m]alice in uttering false statements may consist either in a direct intention to injure another, or in a reckless disregard of his rights and of the consequences that may result to him."[32] The supreme judicial court has also found knowledge of falsity,[33] lack of reason to believe the truth,[34] or reckless disregard for the truth[35] of a publication to constitute abuse of a conditional privilege. These holdings, combined with the Restatement's annunciation of the policy reasons behind conditional privileges,[36] led the court to conclude that nothing less than reckless-

---

26. *Id.* at 297-98, 168 N.E.2d at 266.

27. *Id.* In *Galvin*, several railroad policemen confronted a fellow officer with loud accusations of theft. The incident occurred on a street corner, and attracted a crowd of fifty or sixty. *Id.* at 294-95, 168 N.E.2d at 264-65.

28. *Id.* at 297, 168 N.E.2d at 265-66. Earlier cases established that actual malice or "malice in fact" would constitute abuse of a conditional privilege. *See* Doane v. Grew, 220 Mass. 171, 176, 107 N.E. 620, 621-22 (1915).

29. *Bratt*, 392 Mass. at 513, 467 N.E.2d at 131 (referring to the statement in *Galvin*: "We think that the time has now come to recognize that there can be an abuse of a conditional privilege by conduct which cannot fairly be classified as express or actual malice." Galvin v. New York, N.H. & H. R.R., 341 Mass. 293, 298, 168 N.E.2d 262, 266 (1960)). *See* 37 MASS. PRAC., *Tort Law* 157 (1979).

30. *Bratt*, 392 Mass. at 514-15, 467 N.E.2d at 131-32.

31. 342 Mass. 515, 174 N.E.2d 376 (1961).

32. *Id.* at 521, 174 N.E.2d at 380 (quoting Gott v. Pulsifer, 122 Mass. 235, 239 (1877)).

33. Tosti v. Ayik, 386 Mass. 721, 726, 437 N.E.2d 1062, 1065 (1982).

34. Sheehan v. Tobin, 326 Mass. 185, 192, 93 N.E.2d 524, 529 (1950) (citing Atwill v. Mackintosh, 120 Mass. 177, 183 (1876)).

35. Tosti v. Ayik, 386 Mass. 721, 726, 437 N.E.2d 1062, 1065 (1982). *Accord* Ezekiel v. Jones Motor Co., 374 Mass. 382, 390, 372 N.E.2d 1281, 1287 (1978).

36. Policy considerations require an unrestricted flow of certain types of information to facilitate and maintain our social and economic structure. In some cases, the threat of defamation liability might impair communication in situations in which society wishes to encourage free communications. RESTATEMENT (SECOND) OF TORTS Vol. 3 at 258 (1977). *See Bratt*, 393 Mass. at 515 n.11, 467 N.E.2d at 132 n.11; 37 MASS. PRACT., *Tort Law* 143 (1979). *See also* DiSilva v. Polaroid Corp., No. 83-W631, slip op. (Mass. App. Div. Jan. 4,

ness could establish abuse of a conditional privilege.[37]

At the time the court considered the *Bratt* suit, the question of whether medical information should be treated similarly to other defamatory information, for the purposes of conditional privileges, had not yet been determined in Massachusetts. The *Bratt* court found that it should,[38] recognizing that employers "have a legitimate need . . . to determine whether or not their employees are professionally, physically and psychologically capable of performing their duties."[39] Any defamatory information disclosed during the process of making such a determination, therefore, is conditionally privileged and the recklessness minimum standard obtains.[40]

B. *The Employee's Right to Privacy*

Separate from his common law libel claim, Bratt raised an invasion of privacy claim under the Massachusetts right of privacy statute.[41] Earlier, the supreme judicial court had interpreted the statute as "proscrib[ing] the required disclosure of facts about an individual that are of a highly personal or intimate nature when there exists no legitimate countervailing interest."[42] The court had not previously decided,

---

1985) (civil rights laws may require employers to investigate complaints of discrimination, thereby necessitating by law the use of potentially defamatory information concerning the alleged offender).

37. *Bratt*, 392 Mass. at 515-16, 467 N.E.2d at 132. Any standard less than recklessness, such as negligence, would defeat the very purpose of the conditional privilege. *See supra* note 36.

38. *Bratt*, 392 Mass. at 516-17, 467 N.E.2d at 132-33. *See* Hoesl v. United States, 451 F. Supp. 1170, 1176 (N.D. Cal. 1978); Leonard v. Wilson, 150 Fla. 503, 505, 8 So. 2d 12, 13 (1942); Cochran v. Sears, Roebuck & Co., 72 Ga. App. 458, 461, 34 S.E.2d 296, 298 (1945).

39. *Bratt*, 392 Mass. at 516, 467 N.E.2d at 133 (quoting Hoesl v. United States, 451 F. Supp. 1170, 1176 (N.D.Cal. 1978)). While the *Bratt* court relied heavily upon *Hoesl* for this principle, it did not go so far as to agree with the *Hoesl* court that the employer has a *duty* to make such determinations of fitness. *Hoesl*, 451 F. Supp. at 1176. *See infra* note 61 and accompanying text.

40. *Bratt*, 392 Mass. at 517, 467 N.E.2d at 133. Interestingly, the court discussed two principles peculiarly applicable to the facts of *Bratt*: first, many courts would not find an "oblique or hyperbolic" imputation of mental disorder defamatory; and second, a clear statement to an employer that an employee had a specific mental condition that made him incompetent was "defamatory on its face." *Id.* at 516 n.13, 467 N.E.2d at 133 n.13 (quoting Hoesl v. United States, 451 F. Supp. 1170, 1172-73 (N.D. Cal. 1978)). Other than stating that it agreed with these principles, the court offered no explanation for positing them. One may speculate, however, that the court meant them as helpful, albeit unsolicited, suggestions to the federal court for the proper disposition of the case.

41. *Bratt*, 392 Mass. at 517-19, 467 N.E.2d at 133-34. *See supra* note 6.

42. *Bratt*, 392 Mass. at 518, 467 N.E.2d at 133-34. The Massachusetts legislature apparently intended to give the courts complete control over the development of privacy law, an area with great potential for growth in proportion to the expansion of modern technology. The broad wording of the statute gives the judiciary considerable room in

however, whether intracorporate communication constitutes sufficient publication to violate a plaintiff's statutory right of privacy.[43] Because no definite precedent existed, the court sought guidance from analogous cases. One case had held that the right of privacy statute prohibited employers from requesting "unreasonably intrusive, personal information" from their employees by intracorporate questionnaire.[44] In another case, transmittal of defamatory material to geographically separate divisions of the same company had constituted publication for the purposes of a libel action.[45] Reasoning from these cases, the court concluded that an employer's disclosure of private information to the employee's fellow workers constituted sufficient publication under the statute.[46]

Unlike libel actions, however, "Massachusetts case law does not recognize a conditional privilege, as such, for legitimate business communications under the right of privacy statute."[47] Since no conditional privilege exists, no need arises for a standard of abuse.[48] Nevertheless, the court did not bar the employer's right to use per-

---

which to work. *See supra* note 6. *See* Note, *The Massachusetts Right of Privacy Statute: Decoy or Ugly Duckling?*, 9 SUFFOLK L. REV. 1248, 1252-54 (1975).

43. The court noted that the phrasing of the question assumed that publication was necessary for an invasion of privacy. While warning that such an assumption might not be valid, the court answered the question in the context given. *Bratt*, 392 Mass. at 517 n.14, 467 N.E.2d at 133 n.14.

44. Cort v. Bristol-Myers Co., 385 Mass. 300, 307-08, 431 N.E.2d 908, 912 (1982) (questionnaire submitted to regional sales personnel aimed at uncovering reason for poor sales). *Cf.* Broderick v. Police Comm'r of Boston, 368 Mass. 33, 44, 330 N.E.2d 199, 206 (1975), *cert. denied*, 423 U.S. 1048 (1976) (police commissioner's questionnaire, regarding certain officers' misconduct at a police social event, did not infringe on officers' right of privacy because activities were done in public and, *a fortiori*, were not private).

45. Riceman v. Union Indemnity Co., 278 Mass. 149, 151-52, 179 N.E. 629, 630 (1932) (letter accusing plaintiff of bootlegging was mailed in Boston to other divisions of insurance company in New York and Kansas City).

46. *Bratt*, 392 Mass. at 519, 467 N.E.2d at 134. The court noted that the Massachusetts concept of the tort of invasion of privacy differs from the Restatement version. The latter requires communication of private information to the public at large, whereas the former requires mere disclosure of personal facts. *Id.* at 519 n.15, 467 N.E.2d at 134 n.15; RESTATEMENT (SECOND) OF TORTS § 652D (1977).

47. *Bratt*, 392 Mass. at 519-20, 467 N.E.2d at 135. The court cited no authorities, and the author could not find any, to support this bald assertion. Perhaps the court was drawing a logical conclusion, i.e., since no conditional privilege can coexist with a reasonableness balancing test, then no such conditional privilege exists. *See infra* text accompanying note 49.

Although making such a clear-cut conclusion obviously answered the First Circuit's fifth question in the negative, the court proceeded to explain what standard stood in place of the conditional privilege, thereby qualifying its answer. *Bratt*, 392 Mass. at 521 & n.20, 467 N.E.2d at 136 & n.20. *See supra* note 10.

48. The court thus declined to answer the sixth certified question. *Bratt*, 392 Mass. at 521, 467 N.E.2d at 136. *See supra* note 10.

sonal information about its employees. "[B]ecause [the right to privacy statute] only proscribes unreasonable interference with a person's privacy, legitimate countervailing business interests in certain situations may render the disclosure of personal information reasonable and not actionable under the statute."[49] Hence, the test to be applied in ascertaining whether an interference is unreasonable requires a balancing between "the seriousness of the intrusion on the employee's privacy" and "the employer's legitimate interest in determining the employees' effectiveness in their jobs."[50] Courts have used essentially the same balancing test to determine priority between conflicting legal rights in most situations.[51]

When medical information is involved, however, the presence of an additional policy consideration alters the proportional weight of the interests involved under the balancing test.[52] The *Bratt* court acknowledged that Massachusetts does not recognize a doctor-patient evidentiary privilege.[53] In fact, the supreme judicial court has tended to disfavor "claims of privilege" that seek to inhibit judicial exploration of the truth.[54] Nonetheless, the *Bratt* court recognized that there is a legitimate "public interest in preserving the confidentiality[55] of a

---

49. *Bratt*, 392 Mass. at 520, 467 N.E.2d at 135. The court dismissed the remarkable similarity between its description of when an invasion of privacy might be reasonable and when a conditional privilege for business interests might exist by admitting that the standard "may, in some instances, be the same," but claiming to "prefer to adhere to the language of our cases." *Id.* at 521 n.19, 467 N.E.2d at 136 n.19.

Notably, the *Bratt* court consistently ignored the words "substantial or serious," which appear in the simply worded statute. *See supra* note 6. The court also failed to address the disjunctive grammatical structure of the sentence in which those words appear, i.e., "unreasonable, substantial *or* serious interference" (emphasis added). The grammar implies three types of interferences with privacy, whereas the court discussed the statute as though it encompassed only one.

50. *Bratt*, 392 Mass. at 520, 467 N.E.2d at 135. *See* Cort v. Bristol-Myers Co., 385 Mass. 300, 308, 431 N.E.2d 908, 913 (1982).

51. *See, e.g.*, Hastings & Sons Publishing Co. v. Treasurer of Lynn, 397 Mass. 812, 817-18, 375 N.E.2d 299, 303-04 (1978) (municipal employees' privacy interest in payroll records falls to taxpayers' superior interest in knowing the salaries); Harrison v. Humble Oil & Refining Co., 264 F. Supp. 89, 92 (D.S.C. 1967) (debtor/employee's privacy interest falls to creditor/third party's superior legitimate business interest in seeking payment from debtor's employer by disclosing the debt to him).

52. *Bratt*, 392 Mass. at 523, 467 N.E.2d at 137.

53. *Id.* at 522 n.22, 467 N.E.2d at 136 n.22. *See* Kramer v. John Hancock Mut. Life Ins. Co., 336 Mass. 465, 467, 146 N.E.2d 357, 359 (1957).

54. Cronin v. Strayer, 392 Mass. 525, 532-33, 467 N.E.2d 143, 148 (1984). *See* P.J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 174 (5th ed. 1981).

55. In the context of the statutorily established psychotherapist-patient evidentiary privilege, *see infra* note 56, the proposed Massachusetts Rule of Evidence define a confidential communication as one "not intended to be disclosed to third persons, except persons present to further the interest of the patient in consultation, examination, or interview,

physician-patient relationship."[56] This public interest assumes that a patient ought to feel free to tell his doctor all information necessary for proper treatment, secure that the information will go no farther than the doctor's office.[57]

Because of the public policy concern, the court would generally allow disclosure of confidential medical information only "under . . . compelling circumstances, . . . to a person with a legitimate interest in the patient's health."[58] The court noted, however, that a difference exists between the ordinary confidences of a patient to his private physician and those of an employee to his employer's company doctor.[59] In the latter case, traditional notions of the doctor-patient relationship do not apply.[60] Because the employer pays the company doctor for the specific purpose of evaluating the employee's fitness to work, the physician's primary duty flows not to the patient but to the employer.[61] The employer's interest in aspects of the employee's health

---

persons reasonably necessary for transmission of the communication, or persons who are participating in the diagnosis and treatment. . . ." MASS. R. EVID. 503(a)(3) (Proposed Official Draft 1980), *reprinted in*, 8 MASS. LAW. WEEK. 1231 (September 1, 1980). *See* Commonwealth v. Clemons, 12 Mass. App. Ct. 580, 583 n.2, 427 N.E.2d 761, 764 n.2 (1981); *Bratt*, 392 Mass. at 523 n.23, 467 N.E.2d at 137 n.23.

56. *Id.* at 523, 467 N.E.2d at 137. *See* Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962); Ryan v. Bd. of Reg. in Med., 388 Mass. 1013, 1013-14, 447 N.E.2d 662, 663 (1983). While no statutory rule in Massachusetts protects a doctor-patient evidentiary privilege, the court acknowledged that the legislature "implicitly" demonstrated a concern for a confidential relationship between them by several related statutes. *Bratt*, 392 Mass. at 522-23 n.22, 467 N.E.2d at 136 n.22. *See* MASS. GEN. LAWS ANN. ch. 112, § 12G (West 1983) (pertaining to non-liability of physicians for release of medical information required in the public interest); MASS. GEN. LAWS ANN. ch. 111, § 70 (West 1983) (allowing inspection of hospital records upon judicial order or proper authorization); MASS. GEN. LAWS ANN. ch. 111, § 70E (West 1983 & Supp. 1984) (confidentiality of hospital records); MASS. GEN. LAWS ANN. ch. 111, §§ 110B, 202, & ch. 111D, § 6 (West 1983) (records of fetal mortality and certain diseases are confidential); MASS. GEN. LAWS ANN. ch. 112, § 12F (West 1983) ("all information and records kept in connection with the medical or dental care of a minor . . . shall be confidential between the minor and the physician or dentist"). Note that MASS. GEN. LAWS ANN. ch. 233, § 20B (West Supp. 1984), created a statutory privilege between psychotherapists and their patients, but that the supreme judicial court thought it to be inapplicable to the facts of *Bratt*. *Bratt*, 392 Mass. at 522 n.22, 467 N.E.2d at 137 n.22. *See* Hannaway v. Cole, 2 Mass. App. Ct. 847, 848, 311 N.E.2d 924, 925 (1974) (rescript opinion).

57. *Bratt*, 392 Mass. at 522-23, 467 N.E.2d at 136-37. *See* Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 345, 349 (1962). "A personal relationship of trust and confidence must exist between a physician and his patient." Levy v. Bd. of Reg. & Discipline in Med., 378 Mass. 519, 528, 392 N.E.2d 1036, 1041 (1979).

58. *Bratt*, 392 at 523, 467 N.E.2d at 137 (quoting Hague v. Williams, 37 N.J. 328, 336, 181 A.2d 349 (1962).

59. *Bratt*, 392 Mass. at 522 n.21, 467 N.E.2d at 136 n.21.

60. *Id.*

61. *Id.* *See* Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 219, 136 N.W. 741

that bear on his job competency,[62] then, would seem to outweigh completely the employee's privacy in virtually anything he might tell the company doctor.[63]

IV. CONCLUSION

The significance of the *Bratt* decision rests on several bases. By assigning a reckless standard to abuse of conditional privileges, the court has set a fairly clear outer boundary for employers. The right to privacy balancing test established in *Bratt*, however, is unpredictable in that it requires a case-by-case analysis. Employers may, nonetheless, appreciate both aspects of the decision because the court has reinforced the recognition that employers need a certain degree of freedom in dealing with employee information, particularly medical information affecting job competency, in order to manage their businesses effectively.

Employees, on the other hand, face a diminished respect for the sanctity of personal information. They make take solace, however, in two aspects of the decision. First, the *Bratt* court did not grant employers unrestrained freedom to malign their employees. There are reasonable limits. Second, the court recognized the right of an employee to sue under the right to privacy statute for intracorporate misuse of personal information. In so doing, the court gave employees a method of protecting what right to privacy they have retained.

It is difficult to determine how the supreme judicial court will apply the new standards in future cases. One fact is clear, however: the court attempted to remain neutral in the employer/employee conflict. While recognizing that both sides possess legitimate interests in private information, the court gave neither an unfair advantage.

Howard A. Nunes

(1912) (applying principle of respondeat superior to the company doctor and the company); and Hoesl v. United States, 451 F. Supp. 1170, 1176 (N.D. Cal. 1978) (if the physician "downplays or even fails to mention a deficiency affecting [work] fitness, the employer's legitimate interest . . . is frustrated").

62. *See supra* note 39 and accompanying text.

63. The doctor, of course, continues to owe the employee a duty of reasonable care and skill according to the standards of the medical profession. *Bratt*, 392 Mass. at 522 n.21, 467 N.E.2d at 136 n.21.