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Evidence - Discovery against the Government - Governmental Privilege to Withhold the Contents of Official Documents

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ants in either a tort or contract action because of a single wrongdoing.

Pecuniary harm is usually the element present in contract actions. Therefore it is much disputed whether recovery should be allowed where damages resulted only from mental anguish caused by the breach of contract.[7] The weight of authority[8] asserts damages will be awarded for mental anguish which the promisor had reason to anticipate and which was caused by the wanton or reckless breach of contract.

North Dakota has held,[9] as does the instant case, that no damages can be recovered for a shock or outrage to the feelings caused by a breach of contract. Compensation for mental disturbance may be had only in the presence of physical injury.[10]

A North Dakota statute provides that damages must be the amount that will compensate the injured party.[11] Moreover, they must be clearly ascertainable or there can be no recovery.[12]

North Dakota, then, is in alignment with the minority rule espousing refusal of recovery for mental anguish resulting from a breach of contract. Perhaps North Dakota should change its position and allow recovery for mental anguish caused by factors other than physical injuries. This would certainly be more just to many plaintiffs who are denied recovery under North Dakota law today.

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EVIDENCE—DISCOVERY AGAINST THE GOVERNMENT—GOVERNMENTAL PRIVILEGE TO WITHHOLD THE CONTENTS OF OFFICIAL DOCUMENTS.—Plaintiff, a member of the Air Force, was the sole survivor of an airplane crash. He brought an action against the company which manufactured the aircraft to recover for his injuries. The Secretary of the Air Force was requested by plaintiff's counsel to release a copy of the Air-

7. **Compare** O'Meallie v. Moreau, 116 La. 1020, 41 So. 243 (1906) (Recovery); and Bailey v. Long, 172 N.C. 661, 90 S.E. 809 (1916) (Recovery); **with** Hall v. Jackson, 24 Colo. App. 225, 134 Pac. 151 (1913) (No recovery); and Adams v. Brosius, 69 Ore. 513, 139 Pac. 729 (1914) (No recovery).

8. Westesen v. Olathe State Bank, 78 Colo. 217, 240 Pac. 689 (1925); McConnell v. United States Express Co., 179 Mich. 522, 146 N.W. 428 (1914); Burrus v. Nevada-California-Oregon Ry., 38 Nev. 156, 145 Pac. 926 (1915).

9. Russell v. Western Union Telegraph Co., 3 Dak. 315, 19 N.W. 408 (1884) (Recovery, however, may be had for breach of a marriage contract).

10. **Id.** at 409.

11. N.D. Cent. Code § 32-03-09 (1961).

12. **Ibid.**

craft Accident Investigation Report, for it contained information pertinent to the case. The Secretary refused the request, whereupon the plaintiff caused a subpoena duces tecum to be issued for the purpose of obtaining the document. A motion to quash the subpoena was filed by the Secretary who asserted that under Air Force Regulations[1] the material sought by the subpoena was privileged. The United States District Court, District of Columbia denied the motion. While the court declined to pass upon the question of privilege, it *held* that the needs of the plaintiff to obtain the document outweighed the considerations assigned by the Secretary. *In re Zuckert,* 28 F.R.D. 29 (1961).

With current increases in the volume and scope of governmental activity, many occasions arise wherein the government may be in possession of documents, reports, or other data, necessary to the cause of the private litigant. Private parties, however, seeking to subpoena records held by government agencies are frequently met by a claim that the agency is privileged not to disclose documents in its possession.[2]

The government's privilege against revealing state secrets of a military[3] or diplomatic[4] nature is well established in the law of evidence. In these cases the interest of the individual litigant must bow to the interest of governmental security. The government has also repeatedly claimed that Section 22 of Title 5 of the United States Code[5] gives a general statutory immunity to the documents of a governmental agency, whenever it has promulgated regulations prohibiting disclosure. The validity of regulations promulgated under this statute to restrict use of governmental records was established in the

1. Air Force Regulation 62-14, § 49 (1960). "In many instances the occurence of an accident requires an investigation for purposes other than accident prevention. It is Air Force policy that the reports listed in this paragraph will be used only to determine all factors related to aircraft accidents. . . . The reports just mentioned . . . are privileged documents."

2. **E. g.** Mitchell v. Roma, 22 F.R.D. 217 (E.D. Pa. 1958), **rev'd** on other grounds, 265 F.2d 633 (3d Cir. 1959); Jackson v. Allen Industries, Inc., 250 F.2d 629 (6th Cir. 1957), **cert. denied,** 356 U.S. 972 (1958).

3. United States v. Haugen, 58 F. Supp. 436, 438 (E.D. Wash. 1944) "the right of the Army to disclose confidential information, the secrecy of which it deems necessary to national defense, is indisputable." **see** Vierick v. United States, 130 F.2d 945 (D.C. Cir. 1942); **In re** Grove, 180 Fed. 62 (3d Cir. 1910); **see also** Totten v. United States, 92 U.S. 105 (1875); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed. 353 (E.D. Pa. 1912).

4. Kessler v. Best, 121 Fed. 439 (1903).

5. Rev. Stat. § 161 (1875), as amended, 5 U.S.C. § 22 (1958). "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers and property appertaining to it. **This section does not authorize withholding information from the public or limiting the availability of records to the public.**" (Amendment italicized.)

leading case of *Boske v. Comingore.*[6] These regulations have the force of law,[7] and have been held to justify a subordinate's refusal to disclose documents declared confidential under departmental classifications, even under the threat of contempt citation.[8] The application of the statute and the corresponding regulations have reached a maze of government agencies.[9]

Although over the years the government has repeatedly asserted that the department head alone has the power to determine whether particular documents shall be deemed privileged,[10] the Supreme Court has been reluctant to grant such sweeping control.[11] Unless considerations of national security appear to be involved,[12] the courts have taken the position that the matter of privileged nature of documents sought should be determined by the courts.[13] The Government, as plaintiff in such an action, is subject to a motion for dismissal upon its failure to produce the document for the court to determine its privileged nature.[14] The practical problem still remains, however, as to whether a department or agency head could be held in contempt should he fail to abide by a court order to divulge requested information.[15] As far as it can be ascertained, no

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6. 177 U.S. 211 (1894); **see also Ex parte** Sackett, 74 F.2d 922 (9th Cir. 1935); Wallig v. Comet Carriers, 3 F.R.D. 442 (S.D.N.Y. 1944); Stengall v. Thurman, 175 Fed. 813 (N.D. Ga. 1910).

7. **Ex parte** Sackett, 174 F.2d 922 (9th Cir. 1935); **see also** Caha v. United States, 152 U.S. 211 (1894).

8. United States **ex rel.** Touhy v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900); **In re** Appeal of Security Exchange Commission and Timbers, 226 F.2d 501 (6th Cir. 1955); Jackson v. Allen Industries, Inc., 250 F.2d 629 (6th Cir. 1957), **cert. denied,** 356 U.S. 972 (1958).

9. In re Lamberton, 124 Fed. 446 (W.D. Ark. 1903) (alcohol tax information); O'Connell v. Olsen & Ugelstad, 10 F.R.D. 142 (N.D. Ohio 1949) (income tax returns); United States **ex rel.** Bayarsky v. Brooks, 51 F. Supp. 974 (D.N.J. 1943) (informer's qui tam action); Federal Life Insurance v. Holod, 30 F. Supp. 713 (M.D. Pa. 1945) (wage and hour information); Jacoby v. Delfiner, 183 Misc. 280, 51 N.Y.S.2d 478 (Sup. Ct. 1944) (immigration and naturalization information); Harwood v. McMurty, 22 F. Supp. 572 (W.D. Ky. 1938) (allegedly libellous information furnished to a superior by an internal revenue agent).

10. **See** 25 Ops. Att'y Gen. 326 (Moody, 1905); 40 Ops. Att'y Gen. 45 (Jackson, 1941).

11. United States v. Reynolds, 345 U.S. 1, 9-10 "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from the compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."

12. **Ibid.** also Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Haw. 1947).

13. United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), **aff'd,** 339 U.S. 940 (1950); Tobin v. Gibe, 13 F.R.D. 16 (D. Del. 1952); Zimmerman v. Poindexter, 74 F. Supp. 933 (D. Haw. 1947); United States v. Schneiderman, 106 F. Supp. 731 (S.D. Cal. 1952).

14. United States v. Cotton Valley Operators Committee, 9 F.R.D. 719 (W.D. La. 1949), **aff'd,** 339 U.S. 940 (1950).

15. 4 MOORE, FEDERAL PRACTICE, 26.25, p. 1167 (2d ed. 1950). ". . .it would not be seemly for a federal court to hold a cabinet officer or a head of a department in contempt, and certainly not for a state court to do so, and it is doubtful whether the court would have the power to take such action." **but see the** concurring opinion by Frankfurter, J. in United States **ex rel.** Touhy v. Ragen, 340 U.S. 462 (1951) at p. 473, "To hold now,

executive head has ever been cited for contempt in such circumstances.[16]

Although the 1958 Congressional amendment to the "housekeeping" statute[17] apparently intended to terminate the agencies' power to withhold information from the public under the authority of the statute,[18] this aim has not yet reached fulfillment. At least one federal case[19] since the amendment allowed a subordinate to withhold documents under an agency regulation. Thus the rule of *Boske v. Comingore* appears to continue untrammeled.

MIKLOS L. LONKAI

FEDERAL CIVIL PROCEDURE—RULE 41(b)—DISMISSAL OF A CAUSE OF ACTION WITH PREJUDICE FOR FAILURE TO APPEAR AT PRE-TRIAL CONFERENCE—The plaintiff had gained an earlier reversal from an order of a judgment on the pleadings,[1] in an action arising out of an automobile-train collision. The case was remanded after several interrogatories and two continuances were granted, one for each party. These facts alone made this the oldest civil case on the court's calendar. A pretrial conference was then set. The plaintiff's counsel attempted to obtain a rescheduling because he was out of town on a matter before the state supreme court. Nevertheless, the court exercised its inherent power of dismissal. The court felt that the plaintiff's excuse was not legitimate. On appeal the United States Court of Appeals, Seventh Circuit, *held,* one justice dissenting, that the district court did not abuse its discretion in dismissing the case. *Link v. Wabash R.R. Co.,* 291 F.2d 542 (1961).

A dismissal under rule 41(b), unless otherwise specified,

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that the Attorney General is empowered to forbid his subordinates, though within the court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle."

16. But see in Sawyer v. Dollar, 190 F.2d 623 (D.C. Cir 1951) The Secretary of Commerce, a party defendant, was held in contempt for refusing to obey a court order directing him to endorse and deliver corporate stock certificates held by him to certain parties adjudged to be the rightful owners. The Supreme Court subsequently vacated the judgment and ordered the proceedings dismissed as moot.

17. Note 5 **supra.**

18. See Hearings on Availability of Information from Federal Departments and Agencies Before a Sub-committee of the House Committee on Government Operations, 84th Cong., Ist Sess., pt. 1, at 26 (1955); H.R. Rep. 1461, 85th Cong., 2d Sess. 28 (1958); 104 Cong. Rec. 6551 (1958).

19. Hubbard v. Southern Railway Company, 179 F. Supp. 244 (M.D. Ga. 1959).

1. Link v. Wabash R.R. Co., 237 F.2d 1 (7th Cir. 1956). **cert. denied,** 352 U.S. 1003 (1957).