United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2134

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

v.

SHIRLEY FOLEY, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 77-0495)

Argued January 4, 1979

Decided February 20, 1980

Russell F. Canan, for appellant.

John R. Fisher, Assistant United States Attorney with whom *Earl J. Silbert* *, United States Attorney and *John*

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* United States Attorney at the time the brief was filed.

A. Terry, Assistant United States Attorney were on the brief, for appellee.

Before: BAZELON, *Senior Circuit Judge*; WILKEY, *Circuit Judge* and PARKER **, *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Senior Circuit Judge* BAZELON.

Dissenting opinion filed by *Circuit Judge* WILKEY.

BAZELON, *Senior Circuit Judge*: In this action, the appellant, the Church of Scientology of California (Church), seeks compensatory damages from four federal employees (Defendants) for their role in the preparation and dissemination of an allegedly false memorandum concerning the Church. The complaint alleges that, as a result of the memorandum, the Church and those associated with it were subject to an eight-year program of harassment and discrimination by the government. The district court read the Church's complaint as sounding only in defamation, and dismissed the suit as time barred under the applicable statute of limitations. We find that the district court erred in reading the complaint so narrowly, and we remand for consideration of the Church's other allegations.

I.

Our knowledge of the facts in this case is limited because the trial court entered a protective order barring all discovery and dismissed the complaint before any responsive pleadings had been filed. From the materials available to us, however, the following account appears.

Defendant Shirley Foley wrote the memorandum in question for the Department of Labor on November 29, 1967, as part of an effort to determine whether the Church

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

qualified as a *bona fide* religious organization for the purpose of obtaining alien employment certification for its ministers.[1] In preparing the report, Foley was furnished information by defendants Charlotte Murphy and June Norris, attorneys with the Internal Revenue Service (IRS). Their information had been acquired in prior IRS investigations of the Church.[2] Upon its completion, the memorandum was forwarded by the Department of Labor to defendant John McGill, chief of the Advisory Opinions Division, Visa Office, Department of State.[3] He

[1] Apparently, the report was written in response to a request by the Immigration and Naturalization Service (INS) for a determination whether an alien Scientologist qualified for a visa exemption as a minister of a *bona fide* religious organization. *See* 29 C.F.R. §§ 60.2(1), 60.6 (1968) (currently codified and amended at 20 C.F.R. § 656.22(g)(1) (1970)). An alien minister automatically qualifies for a visa as a "special immigrant" provided that he or she is:

> an immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose of carrying on the vocation of minister of a religious denomination, and whose services are needed by such religious denomination having a bona fide organization in the United States; [or] the spouse or the child of any such immigrant, if accompanying or following to join him.

8 U.S.C. § 1101(a)(27)(C)(i) (1976).

[2] The IRS ultimately revoked the Church's tax exemption in 1969. Internal Revenue Bulletin 1969-51 (December 22, 1969). The Church alleges that the IRS revocation was partially based on the Foley report. In 1976, after protracted litigation, *see* Handeland v. Commissioner of Internal Revenue, 519 F.2d 327, 330-31 (9th Cir. 1975), the IRS abandoned its previous position and reinstated the tax exemption. IRS Announcement 76-119, IRB 1976-37.

[3] Opinions issued by the Advisory Opinions Division guide the determinations of consular officers in granting visas to ministers of *bona fide* religious denominations. *See* 22 C.F.R. § 42.25 (1978).

in turn disseminated the report to an INS branch office where allegedly it was in part responsible for the institution of at least one visa revocation proceeding directed against an alien Scientologist minister.

The report characterized the Church as a criminal secular organization.[4] It alleged that the use of LSD and perhaps other drugs was common among members of the Church, that parents who objected to their children's conversion had been "shot but not killed," and that electric shocks were administered to converts as a ritualistic practice. The Church obtained a copy of the report in April 1975 after a contested Freedom of Information Act proceeding. Seven months later, the Department of Labor officially repudiated the report and ordered all copies of the report to be removed from its files and destroyed. In March 1977, 23 months after receiving a copy of the report, the Church filed this action.

Defendants moved for a protective order and for dismissal under the District of Columbia's one-year statute of limitations for defamation.[5] The trial judge granted defendants' motion for a protective order but allowed the Church to file an amended complaint. The amended pleading was captioned as an action for the "negligent deprivation of constitutional rights," which the Church asserted was subject to the District of Columbia's three-year limitation period for negligence.[6] Without a hearing the trial court then ruled that the action was governed by the one-year limitation period for defamation. It therefore dismissed the complaint.

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[4] This summary of the Foley report appears in the Plaintiff's Amended Complaint, Appendix (App.) at 32, and has not been disputed by the defendants.

[5] D.C. § 12-301(4).

[6] D.C. § 12-301(8).

II.

The trial court was correct in its determination that dismissal of the Church's complaint is warranted to the extent the complaint is one for defamation.[7] However, a single complaint may state multiple causes of action and thus require the borrowing and application of more than one statute of limitations.[8] A plaintiff may elect his remedies and recover when one claim, or even his central claim, is subject to dismissal for untimely filing.[9] The question therefore is whether the Church has alleged facts that might be construed to set forth a cause of action other than defamation, one for which the claims would be timely.

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[7] Because Congress has not prescribed a statutory limitation period for the Church's claims, the trial court properly determined that this action is governed by the "analogous" District of Columbia statute of limitations. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Fitzgerald v. Seamans, 553 F.2d 220, 223 n.3 (D.C. Cir. 1977).

[8] *See* Williams v. Marsh, 558 F.2d 667, 670 (2d Cir. 1977) ("well settled" that multiple causes of action may require borrowing of different limitation periods).

[9] *See* D. S. Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973) (although "wounding" action brought by victim shot by allegedly intoxicated police officer was barred by one-year limitation period of D.C. 12-301(4), a separate claim based on negligence was timely under three-year limitation period in D.C. § 12-301(8)); Shifren v. Wilson, 412 F. Supp. 1282, 1301-02 (D.D.C. 1976). *Cf.* Black v. Sheraton Corp. of America, 564 F.2d 531, 540-41 (D.C. Cir. 1977) (although defamation action was precluded by Federal Tort Claims Act, plaintiff may recover for injury to reputation in invasion of privacy and physical trespass action); Rogers v. United States, 397 F.2d 12, 15 (4th Cir. 1968) (claim that U.S. Marshal negligently permitted plaintiff to be imprisoned and beaten "is founded upon negligence even though assault or false imprisonment may be collaterally involved").

The Federal Rules of Civil Procedure require only a generalized statement of the facts, "a short and plain statement of the claim showing that the pleader is entitled to relief." [10] The liberal concepts of notice pleading do not require the pleading of legal theories.[11] Indeed, absent prejudice to the defendant on the merits, a court may deny a motion to dismiss, or even one for summary judgment, on the basis of a legal theory never advanced by the plaintiff, so long as that theory is supported by the facts alleged.[12]

When considering a motion to dismiss, a trial court is required to take as true all the allegations in a plaintiff's complaint,[13] and the complaint itself is construed in the light most favorable to the plaintiff.[14] Dismissal is improper unless it appears "beyond doubt" that the plaintiff's allegations do not state any valid claim for relief. As the Supreme Court put the test:

> [I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[15]

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[10] Fed. R. Civ. P. 8(a).

[11] Siegelman v. Cunard White Star, 221 F.2d 189 (2d Cir. 1955).

[12] Dotschay v. National Mutual Ins. Co., 246 F.2d 221, 223 (5th Cir. 1957); International Distributing Corp. v. American District Telegraph Co., 569 F.2d 136, 139 (D.C. Cir. 1977).

[13] Cruz v. Beto, 405 U.S. 319 (1972).

[14] Martin v. King, 417 F.2d 458 (10th Cir., 1969).

[15] Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Thus, the trial court is under a duty to determine if the allegations provide for relief on any possible theory.[16] The presumption against a dismissal on the pleadings is intensified when, as with the non-defamation claims here, an asserted theory of liability presents novel legal issues that ordinarily should be resolved only after discovery and a trial on the merits.[17]

These general principles governing motions to dismiss apply with equal force where the basis of the motion is an allegation that all of the claims found in a complaint are time barred.[18] In the instant case the appellees thus bear the heavy burden of proving that the Church's complaint does not raise any timely claims.

III.

The Church's complaint avers that the report contains statements that the defendants knew, or with the exercise of due diligence should have known, were false. It further avers that the defendants on their own initiative caused the report to be compiled and maintained with the purpose and intent of directly and proximately causing the Church to be subjected to harassment and persecution by numerous governmental agencies for an eight-year period between 1967 and 1975. The report is alleged to have deprived the Church of its rights to establish and freely exercise its religion, to have violated the Church's

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[16] Quinonez v. National Ass'n of Secs. Dealers, Inc., 540 F.2d 824 (C.A. 5th, 1976); Bonner v. Circuit Ct. of the City of St. Louis, Missouri, 526 F.2d 1331 (C.A. 8th, 1975), *certiorari denied*, 424 U.S. 946; U.S. v. Howell, 318 F.2d 162 (C.A. 9th, 1963).

[17] Shull v. Pilot Life Ins. Co., 313 F.2d 626, 629 (5th Cir. 1963). *See generally* 5 Wright & Miller, Federal Practice and Procedure, § 1357 (1969).

[18] 5 Wright & Miller, Federal Practice and Procedure § 1357 (1969).

due process rights, to have hindered its ability to attract contributions and enlist adherents, and to have required the Church to expend large sums for legal and related expenses to retain or regain its rights. Although, as the lower court held, these allegations set forth an action in defamation,[19] the complaint focuses not only on the defendants' role in disseminating the Foley report after it had been prepared (defamation), but also on their role in compiling and maintaining the report.[20] The Church

[19] To state a cause of action for defamation, plaintiff must allege the defamatory nature of a communication to some third person, that the communication referred to the plaintiff, that the third party understood the defamatory nature of the communication and its reference to the plaintiffs, and (in most circumstances) malice. *See generally* W. Prosser, Law of Torts § 112, at 737-76 (4th ed. 1971). When the communication imputes the commission of a crime, as in the instant case, damages are presumed and a claim of injury or the proof of special damages is unnecessary. *Id.* at 754-56, 762-63.

[20] The most important distinction between the two torts is that communication, an essential element of an action for defamation, is unnecessary for an action based upon the tortious compilation and maintenance of records. Communication is relevant to the latter claim only for determining the propriety and amount of damages.

This distinction was the basis of the Third Circuit's opinion in Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974). In *Quinones*, the court reversed the dismissal of a Federal Tort Claims Act complaint alleging that a federal agency had violated its duty to maintain accurate employment records by disseminating unfavorable references to prospective employers of a former employee. The court rejected the argument that the libel and slander exception to the FTCA precluded a damage action for negligent maintenance. The court reasoned that "[i]t is not the publication of the incorrect employment history and record that serves as the foundation of the plaintiff's complaint; it is the method in which the defendant maintained the record of his employment that is being criticized." *Id.* at 1276. As this court held in Black v.

claims that the defendants' actions constitute a breach of their duty to ensure that government files compiled and maintained under their personal supervision are truthful and accurate. The Church went to considerable lengths in its complaint to detail the duty, the breach thereof, proximate cause, and damage resulting from defendants' allegedly tortious actions.

The existence *vel non* of the Church's non-defamation claims turn on whether the appellees had a duty to use due care in the preparation and maintenance of the government files at issue. In general, "[w]hen an agency of the United States voluntarily undertakes a task, it can be held to have accepted the duty of performing that task with due care." [21] And, we have previously recognized the duty of some government agencies to use due care in maintaining files.[22] Here, because of the limitations imposed on discovery by the trial judge and the dismissal of the Church's action at the pleading stage, there are significant gaps in the record. Most critically, we do not know the legislative or regulatory authority under which the defendants prepared, maintained and utilized the Foley memorandum. Consequently, it is impossible at this stage to determine definitively whether the appellees owed a duty of due care to appellant. But

Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977), a contrary argument "mistakes particular items of damages for the tortious wrong alleged in plaintiff's complaint." *Id.* at 540.

[21] Rogers v. United States, 397 F.2d 12, 14 (4th Cir. 1968). *See also* Quinones v. United States, 492 F.2d 1269, 1278 (3d Cir. 1974); Gibson v. United States, 457 F.2d 1391, 1394 (3d Cir. 1972).

[22] *See* Tarlton v. Saxbe, 507 F.2d 1116 (D.C. Cir. 1974) (duty to use due care in the maintenance of criminal records under 28 U.S.C. § 534 (1976)); Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) (same). *Cf.* Chastain v. Kelley, 510 F.2d 1232 (D.C. Cir. 1975) (duty to correct erroneous FBI administrative records).

precisely because of this uncertainty, we believe the district court erred in refusing to allow the appellant to develop its non-defamation claim. Both the ordinary duty of an agency to perform its tasks with due care,[23] and the spirit that animates the Federal Rules supports construing the Church's complaint so as to avoid the premature termination of litigation.[24] We, therefore, conclude that it was improper for the district court to refuse to allow the appellant to develop its claim.[25]

In so holding, we expressly decline to find that the appellant has a right of action arising under the Constitution. However, the allegation that the challenged governmental activity adversely affects individual rights secured under the Constitution accentuates the importance of due care in this context. Our decisions in *Tarlton v. Saxbe*[26] and *Menard v. Saxbe*[27] are instructive on this point. In those cases, we held that the FBI had a duty to maintain accurate criminal records in the exercise of its recordkeeping functions pursuant to 28 U.S.C. § 534 (1976). We based our holding on our perception that the records at issue involved "a particularly sensitive area of the law, concerning the developing relationship between values of individual privacy and the record-keeping functions of the executive branch."[28] We found that in such an area of the law the responsibility to maintain records included a corollary responsibility to take reasonable care to avoid injury to innocent citizens. We were reluctant, absent the clearest statement of Congressional policy, to reach a contrary ruling that would impute to Congress an intent to authorize the FBI to harm innocent individuals. Our reluctance was intensified by the grave constitutional issues that would be raised by any such Congressional grant.[29]

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[23] *See* note 21 *supra*.

[24] *See* Section II *supra*.

[25] Judge Wilkey argues in dissent that "[a]ll of the elements of an action for defamation are present on the face of the complaint." Dissent at 3. We agree. But Judge Wilkey moves from this common ground to the assertion that the complaint "should be construed as one for defamation *only*." Dissent at 3 (emphasis added). We disagree. It is elementary that the same transaction and occurrence may give rise to more than one cause of action. Judge Wilkey's assertion depends upon the proposition that "[t]he mere compilation and maintenance of inaccurate information . . . standing alone inflicted no injury or impact on the appellant and thus gave rise to no independent claims for relief." Dissent at 4. No support is offered for this proposition. In fact, the case law is to the contrary. *See, e.g.*, Quinones v. United States, 492 F.2d 1269 (3d Cir. 1974).

In attempting to distinguish *Quinones*, Judge Wilkey alleges that applying it to the case at hand "misinterprets the nature and substance of the wrong appellant alleges" because "communication . . . *is* the foundation of appellant's claim for relief." Dissent at 4 n.12. But, this statement begs the issue of whether the appellant's complaint can be read as stating a cause of action distinct from defamation, one expressly authorized by the *Quinones* case. Moreover, in reading the appellant's complaint so narrowly, Judge Wilkey ignores the principle that a court faced with a 12(b)(6) motion must extend every favor to the pleading party. *See* pages 6-7 *supra* and nn.11-18.

[26] 507 F.2d 1116 (D.C. Cir. 1974).

[27] 498 F.2d 1017 (D.C. Cir. 1974).

[28] Tarlton v. Saxbe, 507 F.2d 1116, 1121 (D.C. Cir. 1974) (footnotes omitted).

[29] Judge Wilkey attempts to distinguish *Tarlton* and *Menard* from the case at bar by noting that they were criminal cases. Dissent at n.4. But Judge Wilkey does not deny that in those cases, a duty to maintain accurate files was imposed without regard to whether the inaccurate information had been communicated. Moreover, the sensitivity of the court to the need for accurate files in the criminal area does not

Such concerns argue even more forcefully for the existence of a duty to compile and maintain accurate files concerning whether an organization is a bona fide religious group. Although such determinations are constitutionally permissible in order that "secular organizations may not unjustly enjoy the immunities granted to the sacred,"[30] they require a degree of delicacy even greater than that at issue in *Tarlton*.[31] The Constitution itself, with its concern to avoid government suppression of religious belief, arguably may create the duty to make such determinations with the necessary due care.[32] We do not resolve that issue. But, at the least, the presence of a threat to important constitutional interests requires us—as it should have required the district court—to permit the appellant to make its case that Congress, in passing the statute that authorized the activity of the appellees, intended to require due care in its execution.

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belie the need for a similar sensitivity where important constitutional rights are potentially involved, as in this case.

[30] Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

[31] *See* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (First Amendment prohibits government inquiry into truth or falsity of religious belief; sincerity is proper inquiry). Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[32] Although we do not reach the constitutional issue in the present case, it is well established that damages may be recovered directly under the Constitution for violations of both First and Fifth Amendment rights. *E.g.*, Davis v. Passman, —— U.S. ——, —— (1979) (Fifth Amendment); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281-86 (1977) (First and Fourteenth Amendments); Dellums v. Powell, 566 F.2d 167, 194-96 (D.C. Cir. 1977) (First Amendment); Paton v. La Prade, 524 F.2d 862, 869-72 (3d Cir. 1975) (First Amendment).

IV.

Appellees' arguments against the recognition of a duty of due care in this context are unpersuasive. Their reliance on *Barr v. Matteo*[33] as evidence of a "national policy" that government employees should not be hampered in their writing has been significantly undercut by the Supreme Court's holding in *Butz v. Economu*.[34] Furthermore, the burden imposed on federal employees by our holding is minimal. Unlike the files at issue in *Tarlton*, we are not confronted by a system containing millions of files whose contents were determined by local officials beyond the jurisdiction of the court. Federal, not local, employees possessed the factual information necessary to substantiate the Foley report and federal employees were responsible for its ultimate disposition. Although these distinctions obviously do not serve to render considerations of cost and administrative efficiency insignificant, they do serve to lessen the burden imposed by a duty of due care.

That the Foley report already has been expunged from the Department of Labor's files does not undermine the Church's tort claims. Plaintiffs generally have standing to bring an action for the negligent maintenance of

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[33] 360 U.S. 564 (1959).

[34] 438 U.S. 478 (1978). Though the decision in *Butz* treated specifically a claim to absolute immunity for federal *executive* officials, the principles it enunciated are no less applicable to lesser employees of the federal government.

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law and are bound to obey it.' [Citation omitted.] *Id.* at 506.

records only when such maintenance results in "injuries and dangers" that are "plain enough." [35] Almost always that injury or danger is based on the possibility or probability of harm resulting from the dissemination of the records. When, as here, dissemination and consequent injury allegedly has already occurred, expungement is not remedial or even relevant to the plaintiff's claims. Although commendable, the Department of Labor's actions in expunging the Foley report does not serve to extinguish the Church's claims.[36]

We also find no basis for defendant's assertion that this tort claim is improper because it was not brought against the actual custodian of the records, the head of the administrative agency involved. This practice was merely the consequence of the desired remedy in other cases—an alteration of an existing record—and not due to any substantive limitation on liability. The defendants allegedly were responsible for the compilation and maintenance of the report. The defendants have not suggested, nor have we been able to discover, any rationale that would justify relieving them of liability because they may not have been the actual custodians of the Foley report.[37]

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[35] Sullivan v. Murphy, 478 F.2d 938, 970 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *see* Paton v. LaPrade, 524 F.2d 862, 867-68 (3d Cir. 1975); Menard v. Sacbe, *supra*, 498 F.2d at 1023.

[36] In the case when no injury as yet has occurred, expungement in fact may be the only proper remedy. We express no opinion on this issue.

[37] *Cf.* Carter v. Carlson, 447 F.2d 38, 361 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1972) ("[A] government officer, like any other person, is liable at common law for his torts, even if they are committed within the scope of his employment.").

We also find no merit in the defendant's claim that expungement is the single remedy for the negligent compilation and maintenance of files. The ordinary and almost invariable remedy for tort claims is damages.[38] To paraphrase Justice Harlan, "[f]or people in the [Church's] shoes it is damages or nothing." [39] It would be anomolous to limit the remedy for the Church's tort claim to the equitable remedy of expungement.[40] In *Davis v. Passman*, the Supreme Court recognized that "the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." [41] Once it is recognized that a statute creates an implied

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[38] *Cf.* Bivens v. Six Unknown Federal Narcotics Agencys, 403 U.S. 388, 395 (1971).

[39] *Id.*

[40] Finally it should be noted that we reject the defendants' argument that this action accrued on November 29, 1967 when the memorandum was written. Defendants' deliberate concealment of this memorandum, as evidenced by its reluctant production only after a contested FOIA proceeding, tolls the operation of the limitation period until that date. Although state law controls in determining the applicable limitation period, federal law determines when the period begins to run. Martin v. Merola, 535 F.2d 191, 195 n.7 (2d Cir. 1976) (per curiam). The settled federal rule is that fraud or deliberate concealment of material facts relating to defendant's wrongdoing tolls the statute until plaintiff discovers, or by reasonable diligence could have discovered the basis of the lawsuit. Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977); Fitzgerald v. Seamans, 180 U.S.App.D.C. 75, 83, 553 F.2d 220, 228 (1977); Jones v. Rogers Memorial Hospital, 143 U.S.App. D.C. 51, 442 F.2d 773 (1971); W. J. Emmett v. Eastern Dispensary & Casualty Hospital, 396 F.2d 931, 936-37 (D.C. Cir. 1967).

[41] Davis v. Passman — —U.S. ——, —— (1979).

right of action, courts have wide discretion in fashioning available relief.[12]

CONCLUSION

Our holding is a limited one, due in part to the fact that the inquiry below was truncated. The defendants have not asserted, and the plaintiff was not permitted to ascertain, the statutory or regulatory basis of the activities challenged in this case. We therefore cannot determine the existence *vel non* of a duty of due care under the relevant provision. However, we do discern a general duty of government to perform its tasks with care—a duty we have previously held applicable to the compilation and maintenance of files. And, we are alert to enforce that duty especially where important constitutional interests might be compromised by less diligence. In the instant case, the district court erred in not reading the appellant's complaint liberally so as to permit the development of a cause of action other than defamation. We do not pass on the merits of that claim, and it may be that the district court will find that the relevant statute or regulation does not embody the general duty described here. But we do hold that the plaintiff must be allowed to develop its case.

Reversed and remanded.

[12] Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies."). Bell v. Hood, 327 U.S. 678, 684 (1946) ("[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal court may use an available remedy to make good the wrong done.")

WILKEY, *Circuit Judge*, dissenting: As the majority correctly notes, this action is governed by the "analogous" District of Columbia statute of limitations.[1] That statute directs attention, however, to the *purpose* of an action for determining which specific proscription is applicable: "[A]ctions for the following *purposes* may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues." [2] And this court quite logically has construed that language as mandating an inquiry into the "nature of the injury involved rather than to the legal theories available for its redress." [3] Nevertheless the majority holds that the district court erred in not permitting appellant to develop a cause of action in negligence, premised on a possible statutory obligation on the part of the government and its employees to take reasonable precautions to assure the accuracy of its files.[4]

[1] *See* Majority op. at 5 n.7.

[2] 12 D.C. Code § 301 (1973) (emphasis added).

[3] *District of Columbia Armory Bd.* v. *Volkert*, 402 F.2d 215, 220 (D.C. Cir. 1968). In *Volkert*, plaintiff sued the supplier and architect firm responsible for the construction of the D.C. stadium after defects occurred in the stadium. Although the underlying theory of liability alleged was negligence, the *purpose* of the action was to recover damages for injury to the property. Thus the court held that the provision "for the recovery of damages for an injury to real or personal property," 12 D.C. Code § 301(3), stated the applicable limitation period.

[4] In directing the district court to explore the issue of whether the government and its employees had a statutory duty in this instance to take reasonable measures to assure the truthfulness of information in its files, the majority relies in part on this court's decisions in *Tarlton* v. *Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974), and *Menard* v. *Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), in which the court found a statutory obligation on the part of the FBI to safeguard the accuracy of information in its criminal files. Those cases do not support a

In so holding, the majority misconceives the nature of the wrong appellant alleges. In my view, this suit sounds only in defamation; its *purpose is to redress the injury* that appellant allegedly sustained to its reputation as a *result of the dissemination* of false information to third parties.[5] Thus I would affirm the district court's holding that the action was barred by the one-year statute of limitations for libel and slander.[6]

The elements in an action for defamation may be set forth as follows:

> (a) a false and defamatory statement concerning another;
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> (b) an unprivileged publication to a third party;
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> (c) fault amounting at least to negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[7]

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broad, general obligation on the part of government agencies to assure the accuracy of information contained in government files; those decisions instead were based on a specific statute that applied only to the FBI. Moreover, it was essential to the court's decisions that the FBI files consisted of *criminal* records, in part because of the court's sensitivity to the adverse legal, economic, and social effects that an individual may experience as a result of a criminal record.

[5] To the extent that appellant attempts to obtain relief against the government for the action of its employees, an action for libel or slander of course will not lie. Section 2680(h) of the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1976), grants the government immunity for suits based on libel or slander for injuries caused by government employees.

[6] *See* 12 D.C. Code § 301(8) (1973).

[7] RESTATEMENT (SECOND) OF TORTS § 558 (1976).

Apart from constitutional restraints,[8] then, an action for libel or slander may be predicated on intentional, reckless, or negligent behavior. An action for defamation is characterized *not* by whether the underlying conduct was negligent, reckless, or intentional, but by the interest sought to be protected—that of reputation. Thus "it is essential to tort liability for either libel or slander that the defamation be *communicated* to some one other than the person defamed." [9]

Applying these fundamental principles of tort law to the complaint at bar, in my view it is clear that it should be construed as an action for defamation only. Appellant maintains that defendants breached their duty to exercise reasonable care to ensure that information in the government files was truthful and accurate, and reasonably to avoid the dissemination of false information concerning appellant to government agencies and private individuals.[10] As a result, appellant avers that it has been "hindered in its ability to attract and obtain financial contributions" and in its ability "to attract and enlist parishioners and adherents in Scientology." [11]

All of the elements of an action for defamation are present on the face of the complaint: a false and defamatory statement concerning the appellant, fault amounting to negligence with respect to ascertaining the

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[8] *E.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

[9] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 766 (4th ed. 1971 (footnote omitted; emphasis added).

[10] Amended Complaint ¶ 17, *reprinted in* Joint Appendix (J.A.) at 30, 34.

[11] *Id.* ¶ 20(d), (e), *reprinted in* J.A. at 36. Appellant also claims that it was deprived of its first amendment rights. The majority expressly declined to find a right of action arising under the Constitution, however. Majority op. at 10-11.

truth or falsity of the information, publication or communication of the false statement to third parties, and injury to reputation as a result. *The allegation of negligence in the complaint thus in no way distinguishes it from one for libel or slander*; defendants' alleged failure to take reasonable measures to assure the accuracy of information within their files, which the majority finds may state an independent cause of action, is instead *only an element of the tort of defamation.* The mere compilation and maintenance of inaccurate information—whether this task was performed recklessly, intentionally, *or* negligently—standing alone inflicted no injury or impact on the appellant and thus gave rise to no independent claim for relief.[12] *Clearly the gravamen of appellant's complaint is the communication of such information to third parties.* Only when the Foley memorandum was communicated to others did appellant suffer any adverse effects for which an action might lie.[13] *It is equally*

[12] It is an elementary principle of tort law that no claim for relief accrues until some harm or injury has been sustained by one person as the result of the conduct of another. *See* W. PROSSER, *supra* note 9, at 6.

[13] In footnote 20 of its opinion, the majority cites two cases as support for its holding that the appellant may have an independent cause of action for the negligent maintenance of files: *Quinones* v. *United States*, 492 F.2d 1269 (3d Cir. 1974); and *Black* v. *Sheraton Corp.*, 564 F.2d 531 (D.C. Cir. 1977). The majority quotes approvingly the language from *Quinones* that "[i]t is not the publication of the incorrect employment history and record that serves as the foundation of the plaintiff's complaint, it is the method in which the defendant maintained the record of his employment that is being criticized." Applying that court's reasoning to this case, in my opinion misinterprets the nature and substance of the wrong appellant alleges in its complaint. To repeat, the communciation of the Foley memorandum *is* the foundation of appellant's claim for relief. Appellant suffered no impact from the mere maintenance of the files; any adverse

clear that the injury that appellant claims to have suffered—inability to obtain financial contributions and enlist adherents in Scientology—*is an allegation of injury to reputation, precisely the interest that an action for libel or slander is designed to protect.*[14]

In sum, looking, as the District of Columbia statute of limitations directs, to the nature of the wrong involved—injury to reputation as a result of the communication of false information to third parties—it seems clear that the complaint should be read as stating a cause of action for defamation only and accordingly should be governed by the one-year limitation for libel and slander.[15] Because appellant failed to bring the action

effect followed only from the communication of the report to others.

Black is readily distinguishable from the case at bar. In that case, plaintiff claimed a deprivation of his constitutional rights, as well as loss of employment and reputation as a result of the communication of information obtained from an illegal eavesdropping. Unlike the present case, the foundation of plaintiff's complaint was not the communication of information obtained, but the illegal entry and eavesdropping itself, which violated plaintiff's interest in privacy and interest in the integrity of his premises. Thus the court correctly found that the injury to reputation was only an item of damages incidental to the basic wrongs alleged—invasion of privacy and trespass.

[14] For example, one may be liable to a nonprofit corporation in defamation if the organization is dependent upon financial support from the public and the defamatory matter "tends to interfere with its activities by prejudicing it in public estimation." RESTATEMENT (SECOND) OF TORTS § 561(b) (1976).

[15] While, as Judge Bazelon emphasizes, a trial court is constrained to construe a complaint in the light most favorable to the plaintiff when faced with a motion to dismiss under rule 12(b)(6), liberal concepts of pleading do not permit the court to read into a complaint a claim for relief if, as is true in this

until twenty-three months after learning of the existence of the Foley memorandum, the action is untimely. I therefore would affirm the order of the district court.

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case, it is clear beyond doubt that *none* is stated. *See Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).