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Torts-Libel-Constitutionality of Retraction Statute Eliminating General Damages Recovery

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TORTS—LIBEL—CONSTITUTIONALITY OF RETRACTION STATUTE ELIMINATING GENERAL DAMAGES RECOVERY—Following publication of allegedly libelous statements made by defendants during a televised news broadcast, plaintiff commenced an action to recover damages. Defendants' motion to strike the allegations of general and punitive damages was granted by the trial court since the complaint did not allege that defendants intended to defame plaintiff, or that defendants refused to publish a requested retraction of a non-intentional libel, both of which are conditions precedent to recovery of such damages under the Oregon statute.[1] Plaintiff failed to plead further and judgment was entered for defendants. On appeal to the Oregon Supreme Court, *held*, affirmed. The plaintiff's failure to com-

1 ORE. REV. STAT. § 30.160 (1955) which provides:

"(1) In an action for damages on account of a defamatory statement published or broadcast in a newspaper, magazine, other printed periodical, or by radio, television or motion pictures, the plaintiff shall not recover general damages unless: (a) A correction or retraction is demanded but not published as provided in ORE. REV. STAT. § 30.165; or (b) The plaintiff proves by a preponderance of the evidence that the defendant actually intended to defame the plaintiff. (2) Where the plaintiff is entitled to recover general damages, the publication of a correction or retraction may be considered in mitigation of damages."

ply with the statute for general damages recovery was fatal to the cause of action, and the substitution of a retraction for an allowance of general damages does not violate the Oregon Constitution or the fourteenth amendment of the federal constitution.[2] *Holden v. Pioneer Broadcasting Co.*, 365 P.2d 845 (Ore. 1961).

At common law it was generally held that a plaintiff defamed by libel may recover general damages—presumed injury to reputation—without pleading or proving actual damage.[3] However, with the exception of certain categories of imputation, it has been held that where extrinsic facts are necessary to prove the imputation conveyed, such libel "per quod" is not actionable without proof of special damages—actual injury to reputation.[4] But where the plaintiff can recover general damages, a retraction by a publisher precludes an allowance of punitive damages absent actual malice, and such retraction may also be shown in mitigation of general damages.[5] The recent advent and rapid growth of various types of mass communication media has created a need for new and appropriate rules of law, both substantive and procedural, in the defamation area.[6] Common law libel doctrines, complicated by problems of strict liability,[7] chain liability,[8]

2 The statute was attacked as violating the equal protection clause of article I, § 20, of the Oregon Constitution, and the equal protection and due process clauses of the fourteenth amendment to the Constitution of the United States. The central point of attack was upon article I, § 10, of the Oregon Constitution which states: "Every man shall have remedy by due course of law for injury done him in his person, property or reputation." The court in upholding the statute held in reference to article I, § 10, that the legislature can modify or limit remedies consistent with the Oregon Constitution, and even if not, a retraction is a substantial equivalent of general damages.

3 PROSSER, TORTS § 93 (2d ed. 1955). See generally Veeder, *History and Theory of the Law of Defamation* (pts. 1–2), 3 COLUM. L. REV. 546 (1903); 4 *id.* 33 (1904); Comment, 69 HARV. L. REV. 875 (1956).

4 See authorities cited note 3 *supra*.

5 See, *e.g.*, Turner v. Hearst, 115 Cal. 394, 47 Pac. 129 (1896); Meyerle v. Pioneer Publishing Co., 45 N.D. 568, 178 N.W. 792 (1920); Webb v. Call Publishing Co., 173 Wis. 45, 180 N.W. 263 (1920).

6 See Chafee, *Possible New Remedies for Errors in the Press*, 60 HARV. L. REV. 1 (1946); Donnelly, *The Law of Defamation; Proposals for Reform*, 33 MINN. L. REV. 609 (1949).

7 Hulton & Co. v. Jones, [1909] 2 K.B. 444, *affirmed*, [1910] A.C. 20. See PROSSER, TORTS § 94 (2d ed. 1955). Closely related is liability imposed for repeating a defamation. The principal case is a good example, as the defendant television station published a grand jury report in a news broadcast. See principal case at 846. *See, e.g.*, Wood v. Constitution Publishing Co., 57 Ga. App. 123, 194 S.E. 760 (1937), *aff'd mem.*, 187 Ga. 377, 200 S.E. 131 (1938) (defendant liable for publishing press agency dispatches); Atkinson v. Detroit Free Press Co., 46 Mich. 341, 9 N.W. 501 (1881) (liability resulted from publishing opinion of third person). In Rogers v. Courier Post Co., 2 N.J. 393, 66 A.2d 869 (1949), the defendant newspaper quoted an assistant prosecutor who made defamatory statements, and although accurate and fairly reported without malice, the court held defendant liable.

8 A cause of action at common law arises for each publication of the defamatory statement to each different person. As this proved too harsh when applied to mass news media, a doctrine was developed that an entire edition of a newspaper or a

and the possibility of extortionate suits, when added to the ever-present difficulty of measuring damages,[9] have served as an effective deterrent to the free dissemination of news to the public. Further highlighting the precarious position of a publisher has been the fact that even the exercise of due care would not always prevent the publication of defamatory statements, from which liability followed.[10] As a result, many state legislatures have enacted retraction statutes[11] which provide a substitutionary remedy for general damages, thereby precluding the application of the otherwise onerous general damages burden thrust upon news publishers for unintentional libels. But when state legislatures have so acted, the state courts have usually either held the statutes invalid as unconstitutional[12] or interpreted them to permit recovery of all but punitive damages,[13] thereby frustrating the manifest legislative policy. For example, in Minnesota where a retraction statute was upheld, it was held to apply only if the defendant proved that the libel was published in good faith, a term interpreted to mean freedom from fault, including negligence.[14] The principal case follows the affirmative path set by *Werner v. Southern Cal. Associated Newspapers*,[15] which upheld a retraction statute in the face of constitu-

magazine was to be regarded as a single publication for which only one cause of action would lie within a state. The significant limitation on the "single publication" rule, however, is that it does not cross a state line; hence, conceivably, one could have fifty causes of action. This presents the unsettled question of what law would apply to each cause of action. For a discussion of "chain libel" suits, see Prosser, *Interstate Publications*, 51 MICH. L. REV. 959 (1953).

9 See McCORMICK, DAMAGES § 117 (1935).

10 *See, e.g.*, Coffey v. Midland Broadcasting Co., 8 F. Supp. 889, 890 (W.D. Mo. 1934); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933). See also Keller, *Federal Control of Defamation by Radio*, 12 NOTRE DAME LAW. 134, 154, 172 (1936); Vold, *Defamation by Radio*, 19 MINN. L. REV. 611, 632 (1935).

11 See Note, 36 ORE. L. REV. 70, 71 (1956) for a complete classified list of retraction statutes by states.

12 *See, e.g.*, Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041 (1904) (plaintiff deprived of a remedy without "due course of law" under Kansas constitution); Park v. Detroit Free Press Co., 72 Mich. 560, 40 N.W. 731 (1888) (denial of equal protection); Neafie v. Hoboken Printing & Publishing Co., 75 N.J.L. 564, 68 Atl. 146 (1907) (legislature has no power to eliminate remedy for injured reputation); Byers v. Meridian Printing Co., 84 Ohio 408, 95 N.E. 917 (1911) (plaintiff deprived of a remedy without due process of law).

13 See, *e.g.*, Comer v. Age Herald Publishing Co., 151 Ala. 613, 44 So. 673 (1907) in which a retraction statute which provided for a recovery of "actual damages" only after a retraction was construed to permit both general and special damages. *Accord*, Ross v. Gore, 48 So. 2d 412 (Fla. 1950); Ellis v. Brockton Publishing Co., 198 Mass. 538, 84 N.E. 1018 (1908); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904); Meyerle v. Pioneer Publishing Co., 45 N.D. 568, 178 N.W. 792 (1920). *Cf.* Moore v. Stevenson, 27 Conn. 13 (1858), in which actual damages was construed to mean special damages but malice was held to encompass negligence as well as any wrongful state of mind. See note 1 *supra*. As to the "mangling" of retraction statutes by judicial interpretation, see Morris, *Inadvertent Newspaper Libel and Retraction*, 32 ILL. L. REV. 36 (1937).

14 Allan v. Pioneer-Press Co., 40 Minn. 117, 41 N.W. 936 (1889).

15 35 Cal. 2d 121, 216 P.2d 825 (1950), *appeal dismissed*, 340 U.S. 910 (1951), 38 CALIF. L. REV. 951 (1950). See also Annot., 13 A.L.R.2d 252 (1950).

tional attacks. The California statute, though its coverage is not so broad,[16] went a step farther than the Oregon statute in question. In California, a retraction is a substitute for general and punitive damages in the case of deliberate and malicious as well as inadvertent libel.[17] Thus, in those states where the constitutionality of the retraction statute has been upheld, and where they have been construed and applied without significant judicial abrogation, the plaintiff is left with a right only to special damages—actual pecuniary injury—in most cases impossible, or at least quite difficult, to prove, and to a retraction which may or may not be a suitable remedy for his damaged reputation.

While the deterrent effect of a retraction statute may not be as strong as the threat of a law suit and subsequent financial loss,[18] it offers significant advantages in the furtherance of truthful and comprehensive news reporting. For a retraction will, to the extent that the same audience sees it, promptly inform this segment of the public of the falsity or mistake of the original publication and therefore can arguably be more effective in repairing the plaintiff's reputation than a less publicized damage recovery through litigation at a much later date. Moreover, retraction statutes, by encouraging the publication of retractions to avoid general damages recoveries, obviate the necessity of recourse to litigation to correct misstatements.[19] Without going so far as the California statute, which includes intentional libel, the Oregon statute seems to offer the best approach.[20] It facilitates a free dissemination of news by avoiding strict liability without fault as to publishers, and also provides protection for the individual's reputation by means of a published retraction or a damage action in the case of intentional defamation. Aside from the arguments for or against retraction statutes, the principal case indicates a relaxation

16 CALIF. CIV. CODE § 48(a) covers only newspapers and radio broadcasts whereas the Oregon retraction statute includes all media. See note 1 *supra*.

17 CALIF. CIV. CODE § 48(a).

18 See Morris, *Inadvertent Newspaper Libel and Retraction*, 32 ILL. L. REV. 36 (1937). Some would argue that the power of the press to destroy is too great, and that it can better bear the loss through libel insurance. See Libel Insurance, Bus. Week, June 8, 1946, p. 61; Donnelly, *The Law of Defamation: Proposals for Reform*, 33 MINN. L. REV. 609 (1949).

19 See Chafee, *Possible New Remedies for Errors in the Press*, 60 HARV. L. REV. 1 (1946).

20 One writer has suggested a statutory right of reply is the best approach to provide a substitute remedy for general damages. See Chafee, *Possible New Remedies for Errors in the Press*, 60 HARV. L. REV. 1 (1946). *See, e.g.*, NEV. REV. STAT. § 200.570 (1960) which requires that a denial of a libelous article be published by any newspaper or periodical circulated within the state and failure to comply with the provisions of this section makes one subject to criminal penalties. The right of reply is not only subject to attack as to its feasibility, but it would not require the publisher to notify the public as to its falsity, and, in effect, the public would receive two sides to an alleged libel without knowing which is the correct view. A retraction, on the other hand, offers to the plaintiff tangible proof of the falsity of the libel for use in the future when confronted with questions concerning his reputation.

of the judicial hostility which had characterized the nullification by the courts of retraction statutes enacted at the turn of the century, and a continuation of the trend started by *Werner* to uphold such remedial legislative action.

However, even with judicial acceptance of the retraction statute concept, there remains a possibility of circumventing such statutes by resort to a different theory of tort liability, invasion of the right of privacy. Several aspects of the right of privacy, namely public disclosure of private facts and the publication of facts which place one in a false light, also concern reputation. To this extent, similarities exist between libel and the right of privacy.[21] Thus, in certain cases, the publication of a libel will offer the injured party a choice of remedies,[22] which assumes importance since an invasion of privacy also permits a recovery of general damages, truth not being recognized as a defense.[23] Perhaps the mere fact that feelings, peace of mind and privacy have been intruded upon by a libel, in addition to the injuries to reputation and character caused thereby, justifies recovery for an invasion of privacy.[24] But this apparently inconsistent result, depending on what theory the cause of action is based upon, would seemingly serve to nullify the objectives of the retraction statutes,[25] at least in certain factual settings, and, as such, is somewhat undesirable. To preclude this anomaly, the better approach would be to construe retraction statutes as pre-empting the treatment of all defamatory statements in any theory of tort thus preventing a general damages recovery through claims of a violation of the right of privacy.[26]

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[21] See Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Although the right of privacy has yet to be fully defined, Oregon has apparently recognized its existence in Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941).

[22] Plaintiff in the principal case conceivably might have used this theory of recovery. *See, e.g.*, Peay v. Curtis Publishing Co., 78 F. Supp. 305 (D.D.C. 1948); Pavesick v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911), where counts of both libel and invasion of privacy were upheld.

[23] *See, e.g.*, Reed v. Detective Publishing Co., 63 Ariz. 294, 162 P.2d 133 (1945); Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942). See generally Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[24] One could argue that if libel really invades two different interests the law can provide a choice of two alternative remedies and to limit this choice on the ground of a public predisposition for the strictness of a libel action is not a proper judicial function.

[25] This development has apparently been used and accepted in California. See Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 127 P.2d 577 (1942). *Compare* Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P.2d 441 (1953), *with* Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952). See Powsner, *Libel in Limbo: Another Conquest for the Right of Privacy?*, 30 L.A.B. BULL. 365 (1955).

[26] At least one court in dictum said that invasion of privacy was not a substitute remedy for a libel suit. Gregory v. Bryan-Hunt Co., 295 Ky. 345, 349, 174 S.W.2d 510, 512 (1943).