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## Retraction Statutes: A Change in the Law of Libel

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## CASE COMMENTS

RETRACTION STATUTES:  
A CHANGE IN THE LAW OF LIBEL

Historically, the publication of a libel was actionable without pleading and proving any special damages.<sup>1</sup> Injury to the plaintiff's reputation was presumed, and so he could recover general damages. Three types of damages may be involved in a libel action: general, special, and punitive. The major elements of general damages are injury to reputation,<sup>2</sup> loss of business,<sup>3</sup> bodily injury and wounded feelings.<sup>4</sup> Special damages, on the other hand, can only be recovered when the injury is a direct pecuniary or material one.<sup>5</sup> Proof of special damage is extremely difficult, and American decisions sustaining such claims are few.<sup>6</sup> Finally, if the evidence shows that the defendant was wanton or malicious, punitive damages are recoverable in addition to damages given for compensation.<sup>7</sup> The theory of awarding punitive damages is that they are imposed on the defendant as a penalty. At common law, publication of a retraction would defeat a claim for punitive damages but served only to decrease the amount of general damages recoverable by the defamed party.<sup>8</sup>

The common law of libel has been often criticized,<sup>9</sup> particularly in the area of unintentional defamation where seemingly excessive damages have sometimes been recovered from responsible publishers. This dissatisfaction resulted in the sporadic enactment of statutes

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<sup>1</sup>*Thorley v. Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (1812). Mansfield stated in this case he that could see no valid reason for distinguishing slander from written defamation but was bound by a long established precedent.

<sup>2</sup>*Craney v. Donovan*, 92 Conn. 236, 102 Atl. 640 (1917).

<sup>3</sup>*Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S.E. 472 (1912).

<sup>4</sup>*Pion v. Caron*, 237 Mass. 107, 129 N.E. 369 (1921).

<sup>5</sup>*McCormick*, Damages § 114 (1935).

<sup>6</sup>The courts generally require the defamed party to plead and prove the character of the acts which have caused the damage with a greater degree of definiteness than is normally required in pleading damages. *McCormick*, Damages § 115 (1935). The same conditions are required in England as well. "As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done." *Ratcliff v. Evans*, [1892] 2 Q.B. 524, 532 (C.A.).

<sup>7</sup>*McCormick*, Damages § 118 (1935).

<sup>8</sup>*Meyerle v. Pioneer Pub. Co.*, 45 N.D. 568, 178 N.W. 792 (1920).

<sup>9</sup>See Note, 69 Harv. L. Rev. 875, 891 (1956).

limiting the recovery of general damages where the publisher of the libel has published or offered to publish a retraction.<sup>10</sup> Legislatures enacting such statutes consider retraction to be the same as exculpation and, therefore, this alleviates the need for general damages. Proponents of the retraction statutes contend that "exculpation in the eyes of the world is not accomplished by quiet entry of judgment on musty court rolls."<sup>11</sup> The strong desire to disseminate news rapidly in a world of nearly instantaneous communication will necessarily result in some unavoidable mistakes. Though there is no exact statistical information available, it is believed that responsible news media readily retract any false statements which are published. By providing for retraction in lieu of general damages, publishers are relieved of the danger of excessive verdicts and extortion by unscrupulous plaintiffs.

However, numerous writers are somewhat critical of the various retraction statutes.<sup>12</sup> They believe that retraction is never an entirely adequate remedy, for rarely does a retraction reach all who heard the defamation. Even though retraction often may be a sufficient remedy in the case of an inadvertent libel, there seems to be no justification for allowing publication of a retraction to relieve a malicious defendant.<sup>13</sup>

The Supreme Court of Oregon in *Holden v. Pioneer Broadcasting Co.*<sup>14</sup> applied a retraction statute<sup>15</sup> that radically changes the common law of libel. Under the Oregon statute the plaintiff may recover such special damages as he can prove to have suffered as a result of the defamatory statement, but general damages are not recoverable unless a correction or retraction was demanded and refused, or the plaintiff proves that the defendant actually intended to defame him.

<sup>10</sup>For a comprehensive compilation of American retraction statutes see Leflar, *Legal Remedies for Defamation*, 6 Ark. L. Rev. 423, 436-40 (1952).

<sup>11</sup>Morris, *Torts* 294 (1953).

<sup>12</sup>See for instance Chafee, *Possible New Remedies for Errors in the Press*, 60 Harv. L. Rev. 1, 17 (1946); Morris, *Inadvertent Newspaper Libel and Retraction*, 32 Ill. L. Rev. 36 (1936); Note, 69 Harv. L. Rev. 875, 944 (1956).

<sup>13</sup>See 38 Calif. L. Rev. 951 (1950).

<sup>14</sup>356 P.2d 845 (Ore. 1961). The defendant's primary ground of attack was on the constitutionality of the Oregon statute. In *Holden* the Statute was upheld by a 4-3 decision. This constitutional attack has long been a serious deterrent to the adoption of strong retraction statutes. A statute eliminating the recovery of general damages by a defamed party runs the risk of depriving him of property without due process of law. This subject is developed at great length in Morris, *Inadvertent Newspaper Libel and Retraction*, 32 Ill. L. Rev. 36 (1937). In addition see 23 So. Cal. L. Rev. 89 (1949); 36 Ore. L. Rev. 70 (1956); 38 Calif. L. Rev. 951, 954 (1950).

<sup>15</sup>Ore. Rev. Stat. §§ 30.155-30.175 (1955).

In *Holden* the plaintiff sued to recover special, general and punitive damages for a libelous statement made by the defendants during a television broadcast. On motion of the defendants, the court struck the claims for general and punitive damages on the ground that the complaint did not allege that the defendants either intended to defame the plaintiff or refused to publish a retraction. In affirming, the Supreme Court said the Oregon statute requires "the plaintiff to plead and prove, as a condition precedent to recovery, defendants intent to defame or in the absence of such intent, the failure to retract upon demand."<sup>16</sup>

Though this decision represents a great change in the law of libel, it does not come without warning. As previously indicated, some state legislatures have sought to protect news media that retract defamatory releases from excessive verdicts. However, these efforts have been met with great hostility from the courts, for most of these retraction statutes have been held unconstitutional<sup>17</sup> or have been judicially construed so as to leave the common law virtually unchanged.<sup>18</sup> Retraction statutes may be divided into two categories: One group uses vague language that is susceptible of varying construction, while the other group expressly precludes the recovery of general damages.

A statute in the first group may read that the plaintiff shall recover only "actual damage" in the event of a retraction or an offer of the same. Most courts reviewing such a statute have construed "actual damage" to include both general and special damages.<sup>19</sup> Such a judicial construction leaves the common law unchanged, with the result, as Professor Morris says, that "the sum total of significant changes in the measure of damages when inadvertent libel has been retracted is zero."<sup>20</sup>

At least three states<sup>21</sup> have enacted statutes in the second group,

<sup>16</sup>365 P.2d at 847.

<sup>17</sup>E.g., *Hanson v. Krehbiel*, 68 Kan. 670, 75 Pac. 1041 (1904); *Park v. Detroit Free Press Co.*, 72 Mich. 560, 40 N.W. 731 (1888).

<sup>18</sup>*Ellis v. Brockton Pub. Co.*, 198 Mass. 538, 84 N.E. 1018 (1908); *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904).

<sup>19</sup>*Comer v. Age-Herald Pub. Co.*, 151 Ala. 613, 44 So. 673 (1907) (actual equals general damage); *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950) (actual damages equal general damages); *Ellis v. Brockton Pub. Co.*, 198 Mass. 538, 84 N.E. 1018 (1908) (actual damages equal general damages); *Meyerle v. Pioneer Pub. Co.*, 45 N.D. 568, 178 N.W. 792 (1920). In *Neafie v. Hoboken Printing and Pub. Co.*, 75 N.J.L. 564, 68 Atl. 146 (1907), the statute was construed to exclude the recovery of punitive damages only.

<sup>20</sup>*Morris, Inadvertent Newspaper Libel and Retraction*, 32 Ill. L. Rev. 36, 42 (1932).

<sup>21</sup>The three states with more stringent retraction statutes which have been upheld in the face of constitutional attack are California, Minnesota, and Oregon.

expressly excluding general damages in the event of a retraction or an offer of retraction. These statutes do not admit of a judicial construction that permits the recovery of general damages. Although this latter group of statutes does preclude the recovery of general damages in the event of a retraction, there is a wide divergence of opinion as to how far this protection should carry.

Under the Minnesota statute general damages are not recoverable where there is a showing of good faith coupled with a full retraction by the defendant.<sup>22</sup> However, in *Allen v. Pioneer Press Co.*<sup>23</sup> this good faith requirement was construed to include freedom from negligence as well as freedom from an improper motive. Thus the scope of this statute has been limited by the judiciary so that there is little change from the common law.

The California statute<sup>24</sup> is at the other extreme from the Minnesota act. This statute, which was applied in *Werner v. Southern California Associated Newspapers*,<sup>25</sup> allows a retraction as a defense to recovery of general damages even in the case of a deliberate and malicious libel. By limiting the plaintiff's recovery to special damages for a malicious publication, the legislature seems to have granted a license to defame, tacitly encouraging sensationalism in the press.

The Oregon statute occupies the median position between the milder Minnesota statute and the more severe California legislation. The Oregon statute has many of the good features of the other two acts and yet omits the more objectionable aspects of each. It goes further in changing the common law of libel than does the Minnesota act, but it does not offer the more drastic protection to malicious publishers provided in the California statute.

Even at common law, proof of retraction generally precluded the recovery of punitive damages.<sup>26</sup> Consistent with this rule, most of the retraction statutes are interpreted as precluding the recovery of punitive damages. The Oregon retraction statute does not mention punitive damages and the court in *Holden* specifically declined to make a determination on that issue.<sup>27</sup> It only held that the allegations of the plaintiff's complaint were not sufficient to charge the defendants with an intent to defame.

Though the various retraction statutes have not met with great

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<sup>22</sup>Minn. Stat. Ann. § 548.06 (1947).

<sup>23</sup>40 Minn. 117, 41 N.W. 936 (1889).

<sup>24</sup>Cal. Civ. Code § 48(a).

<sup>25</sup>35 Cal. 2d 121, 216 P.2d 825 (1950).

<sup>26</sup>Prosser, Torts § 96 (1955).

<sup>27</sup>365 P.2d at 851.