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## NOTES

### EVIDENCE OF A REFUSAL TO RETRACT IN ACTIONS OF LIBEL

At common law a retraction of defamation could be a complete defense only if made immediately after the utterance. The question as to whether it was complete enough to negate the original utterance was one of fact for the jury.<sup>1</sup> In action for slander, a refusal on the part of the defendant to retract a statement of his when requested to do so by the plaintiff was admissible as evidence of the defendant's actual malice.<sup>2</sup> In actions of libel, a refusal to retract when requested was also admissible to show the actual malice of the defendant,<sup>3</sup> as was evidence of continued publication of the libelous matter after a request for retraction.<sup>4</sup> In these actions express or actual malice must be found by the jury to have existed before punitive damage can be awarded the plaintiff.<sup>5</sup> An unreasonable delay

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1. *Trabue v. Mays*, 3 Dana 138, 28 Am.Dec. 61 (Ky. 1835).

2. *Klewin and another v. Bauman*, 53 Wis. 244, 10 N.W. 398, 11 A.L.R. 674 (1881).

3. *Thibault v. Sessions et al*, 101 Mich. 279, 59 N.W. 624, 130 A.L.R. 858 (1894).

4. *Crane v. Bennett*, 77 App.Div. 102, 79 N.Y.S. 66 (1902); affirmed 177 N.Y. 106, 69 N.E. 274 (1905).

5. *Stokes v. Morning Journal Association*, 72 App.Div. 184, 76 N.Y.S. 429, 92 A.L.R. 1129 (1902).

in printing a retraction may aggravate the damages.<sup>6</sup> Delay is a question for the jury to decide as to what a reasonable time would be for the correction, after the defendant acquired knowledge of the falsity of the publication.<sup>7</sup> However, the publisher can show the delay was caused by acts of the plaintiff in order to mitigate the damages.<sup>8</sup>

In general, the common law rules on retraction and refusal to retract have been codified in most jurisdictions with only slight changes by the statutory law. The trend in these changes seems to follow the California legislation in limiting the plaintiff's damages to actual damages, if the libel was caused by some mistake on the part of the defendant, and actual malice is not otherwise proved. The California statute limits the plaintiff's damages to actual damages unless he can prove that he requested a retraction be made by the defendant and the defendant has refused to comply.<sup>9</sup> The statute which the State of Nevada has enacted is the most modern in the field, going beyond retraction, it allows the plaintiff a right of reply to any libelous matter in the form of a denial or correction. This reply must be printed free of charge by the defendant and the statute places criminal liability on him if he refuses to allow the plaintiff to reply.<sup>10</sup> The only Wyoming statute pertinent to the subject has a reply feature which is limited to publication of reports of certain specified proceedings before legislative and judicial bodies. These reports are to be privileged unless the plaintiff can prove that the defendant refused to publish the plaintiff's explanation or contradiction, or the final outcome of the proceeding after the plaintiff has requested they be published.<sup>11</sup>

It appears that Wyoming, because of the absence of statutes on the subject, will follow the common law on the question of refused retractions. The law on the subject can be broken down generally into two categories, placing what is often called a duty on the defendant to retract (1) when requested to do so by the plaintiff and (2) when there is no request by the plaintiff.

When the plaintiff has asked the defendant for a retraction three distinct problems arise; what constitutes a request, how much of the request is admissible as evidence, and whether the defendant has a duty to retract after a request has been made. The question sometimes arises as to what constitutes a request for retraction. It has been held that a letter which contained many self-serving declarations and a threat to sue was not a request for a retraction.<sup>12</sup> The plaintiff cannot by telegram request a meeting with the publisher to arrange for a retraction and have

6. *Bradley v. Cramer et al*, 66 Wis. 297, 28 N.W. 372 (1886).

7. *Ibid.*

8. *Lorimer v. News Syndicate Co., Inc.*, 268 App.Div. 188, 49 N.Y.S.2d 234 (1944). rehearing denied 50 N.Y.S.2d 674 (1944).

9. Civil Code of the State of California §§ 48a (1941).

10. N.C.L. § 10506 (1931).

11. Wyo. Comp. Stat. §§ 3-8201, 3-8202 (1945).

12. *Bird v. Press Publishing Co.*, 154 App.Div. 491, 139 N.Y.S. 88 (1913).

the telegram admitted as evidence of a request for a retraction.<sup>13</sup> Admission into evidence of an alleged request for retraction, and which is in fact not such, may be reversible error.<sup>14</sup>

As to how much of the request for a retraction is admissible into evidence, the courts have usually held that only as much of it as is pertinent to the actual retraction request itself is admissible. Self-serving declarations in a letter sent by the plaintiff's attorney to the defendant were held inadmissible, and only such of the letter as pertained to the actual request for retraction were admissible.<sup>15</sup> The plaintiff cannot have a request for a retraction of more things than he is entitled to have retracted admitted into evidence.<sup>16</sup> A request sent by registered mail which has been returned unclaimed cannot be given in evidence, but the envelope is evidence of a refusal to communicate with the plaintiff on the part of the defendant.<sup>17</sup> If the defendant stipulates at the trial that there was a request for retraction, the request will not be shown to the jury unless the plaintiff can prove that it was the same one that reached the defendant.<sup>18</sup>

It has been stated that the defendant has a duty to publish a retraction when it is requested.<sup>19</sup> A refusal to retract by the publisher will warrant a jury in finding that he acted with a wanton disregard to the rights of the plaintiff, which is sufficient for them to award the latter exemplary damages.<sup>20</sup> However, it was held in a case where the plaintiff brought suit against the owner and publisher of a newspaper, that the defendant could not be charged with the malice evidenced by the refusal of one of his sub-editors to publish a retraction requested by the plaintiff.<sup>21</sup> The court, by way of dicta, indicated that had the defendant himself refused to make the retraction the jury might have found that to be actual malice.<sup>22</sup> This appears to be the majority rule followed today in the absence of statutes on the question. Some statutes, such as the Florida statute, place a time limit on the defendant in which he must publish the retraction after notice of the libelous article is given to him by the plaintiff.<sup>23</sup>

When there has been no request for a retraction, the courts must decide whether a request must be made before malice can be shown and whether evidence of a retraction can be admitted in mitigation. Generally, when a person is libeled, he need not make a request for a retraction in

13. *Farr et al. v. Bramblett et al.*, 132 Cal.App.2d 36, 281 P.2d 372 (1955).

14. *Bird v. Press Publishing Co.*, supra note 12.

15. *Varvaro v. American Agriculturist, Inc.*, et al. and *Lumia v. same*, 22 App.Div. 213, 225 N.Y.S. 564 (1927).

16. *Aronson v. Baldwin*, 178 Mich. 565, 146 N.W. 206, 58 A.L.R. 1176 (1914).

17. *World Oil Co., Inc. v. Hicks et al.*, \_\_\_\_\_ Tex \_\_\_\_\_, 75 S.W.2d 905, A.L.R. 1167 (1934).

18. *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 47 N.W. 562 (1890).

19. *Palmer v. New York News Publishing Co.*, 31 App.Div. 210, 52 N.Y.S. 539 (1898).

20. *Ibid.*

21. *Isaac W. Edsall Agt. James Brooks, and others*, 33 How.Pr. 191 (N.Y. 1866).

22. *Ibid.*

23. *Metropolis Co. v. Croasdell*, 145 Fla. 455, 199 So. 658 (1941).

order to be allowed to prove a failure to retract on the part of the defendant as evidence of bad faith. When the publisher of the libel learns of the falsity of the article through other sources, the courts may still deem that he has a responsibility to publish a correction, and a failure to do this can be admitted into evidence to show his malice or bad faith.<sup>24</sup> Evidence of a publisher's refusal to publish free the statement of others, who are not implicated in the libel, as to their belief in the innocence of the plaintiff can be sent to the jury on the question of the good faith of the conduct of the defendant.<sup>25</sup> While the defendant had no legal obligation to publish such a belief gratuitously, his refusal in that case tended to disprove an allegation that his intent was to give the public the true news about the plaintiff.<sup>26</sup> If the defendant discovers that other publishers of the same alleged libel have retracted it, he will be allowed to submit evidence of any inquiry that he has made as to the reasons he did not also retract.<sup>27</sup>

On the other hand, if the defendant prints a retraction even though the plaintiff has not requested it, he can offer the retraction to mitigate damages.<sup>28</sup> This is because the defendant, having libeled the plaintiff, supposedly has a duty to make a retraction.<sup>29</sup> There is some conflict as to whether a retraction printed by the defendant, after plaintiff has instituted a suit against him will be admitted into evidence, and when it is decided that it will, for what purpose it may be admitted.<sup>30</sup> The purposes for which it is admitted are generally limited to those of mitigation of punitive or exemplary damages which would result from actual malice.<sup>31</sup> The usual test applied for relevancy of evidence in these cases is whether it tends to disprove a wanton or malicious disposition on the part of the publisher, but will never reduce the plaintiff's actual or compensatory damages no matter how praiseworthy the motives of the defendant.<sup>32</sup> The relative value of the retraction under such circumstances usually depends on the promptness of the correction after the suit is filed by the plaintiff.<sup>33</sup> After the suit was filed, however, an offer made by the defendant to print the statement of the plaintiff would not be admitted by the Georgia court to mitigate damages.<sup>34</sup>

In conclusion, the plaintiff in a libel action can show that the defendant failed or refused to retract a libelous publication as evidence of actual malice on the part of the publisher defendant. Only if there has

24. *Augusta Chronicle Pub. Co. v. Arrington*, 42 Ga. 746, 157 S.E. 394 (1931).

25. *Barnes v. Campbell & a.*, 60 N.H. 27 (1880).

26. *Ibid.*

27. *Bathrick v. Detroit Post and Tribune Co.*, 50 Mich. 629, 16 N.W. 172, 155 A.L.R. 1353 (1883).

28. *Coffman et al. v. Spokane Chronicle Pub. Co. et al.*, 65 Wash. 1, 117 Pac. 596 (1911).

29. *Ibid.*

30. *Dalziel v. Press Pub. Co.*, 52 Misc.Rep. 207, 102 N.Y.S. 909, 13 A.L.R. 797 (N.Y. 1906); *contra*, *Byrne v News Corp.*, 195 Mo.App. 280, 190 S.W. 933 (1916) and *Evening News Association v. Tyron*, 42 Mich. 549, 4 N.W. 267 (1880).

31. *Dalziel v. Press Pub. Co. Ibid.*

32. *Ibid.*

33. *Ibid.*

34. *Constitution Pub. Co. v. Way*, 94 Ga. 120, 21 S.E. 139 (1874).

been actual malice may the plaintiff recover punitive damages. There seems to be no duty on the plaintiff to request a retraction, in the absence of statutory law on this point, and he still can prove a failure to retract on the part of the defendant if he can prove that the defendant had actual knowledge of the falsity of the publication. There seems, therefore, to be an affirmative duty on the publisher of libelous material to print a retraction if requested by the person libeled or if he discovers from other sources that the article is false, as a failure to retract will be evidence of his bad faith.<sup>35</sup> The laws surrounding retraction should attempt to restore the reputation of the individual defamed. Often times it appears that the courts are more concerned with compensating him for the damage to his reputation. Damages in this unrealistic approach are difficult to ascertain. A better procedure would seem to be to have the aggrieved individual request the retraction within a certain time limit after the publication of the item. The publisher should then draft a retraction, and submit it to the requester for his approval. Then, upon the publishing of the retraction so approved, the damages of the defamed person should be limited to his actual damages, in the absence of proof of a definite intent on the part of the publisher to knowingly and maliciously attack the individual. Several states have adopted portions of this proposed solution, but none have a combination of all of these measures of retraction procedure. However, the problem of two parties who are antagonistic toward one another will still be encountered, preventing a solution which will be satisfactory to both parties. A right to reply will run into similar difficulties as the publisher may believe that the reply goes too far considering the original publication. Such irreconcilable conflicts must still be resolved by the courts.

ROBERT J. HAND

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#### ADMISSIBILITY OF TESTIMONY RE FACTS INCLUDED IN CONFIDENTIAL ACCIDENT REPORTS

A statutory privilege has been enacted in most states to the effect that motor vehicle accident reports made by individuals to the state motor vehicle department shall be "without prejudice to the individual so reporting."<sup>1</sup> Such statutes normally provide that the reports themselves

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35. For an interesting treatment of the laws of retraction from the standpoint of a newspaper man, see Steigleman, Walter, *The Newspaper Man and the Law*, 314 ff. (1915).

1. E.g., Cal. Veh. Code § 488 (Supp. 1951); Ga. Code Ann § 68-315 (e) (Supp. 1951); Iowa Code § 321.271 (1950); Mich. Comp. Laws § 257.624 (1952 Supp.); Minn. Stat. Ann § 169.09 (13) (Supp. 1951); Wyo. Comp. Stat. §§ 60-631 (1945), as amended. The Wyoming statute, which is typical, reads as follows: (a) All accident reports made by persons involved in accidents shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other State agencies having use for the records for accident prevention purposes, or for the administration of the laws of this State relating to the deposit of security and proof of financial responsibility by persons driving or the owners of motor