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Libel and Slander: Mitigation of Damages--Constitutionality and Scope of Newspaper Libel Retraction Statute

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self-incrimination may be claimed by witnesses called before a congressional committee inquiring into communistic activities. (*Cf. Barsky* v. *United States* (1948), 167 F. 2d 241, cert. denied 334 U. S. 843, 68 S. Ct. 1511, 92 L. Ed. 1767.)[4] Previous attempts to avoid giving testimony before such groups on the ground that the questions violate the first amendment of the Constitution, in that they constitute an unwarranted intrusion by government into the prohibited areas of thought and opinion, were rejected. (*Lawson* v. *United States* (1950), 176 F. 2d 49, cert. denied, 339 U. S. 933, 70 S. Ct. 663, 94 L. Ed. 1352.) There remains to investigators the remedy of requiring production of books and records of the party, notwithstanding that such production might result in personal incrimination of the possessor. (*White* v. *United States* (1943), 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542.) Practical difficulties are presented in proving possession. Proper claiming of the privilege protects the witness from disclosure of possession since possession connects the witness with the party.

Although the incriminatory matter in the instant cases was membership in the party, this does not necessarily indicate that the party advocates overthrow of the government by force and violence. Proof of membership in the organization is but one link in the chain of evidence essential to a conviction for violation of the Smith Act. (*United States* v. *Burr, supra.*) The Circuit Court, *Rogers* v. *United States; Blau* v. *United States,* 180 F. 2d 103 (C. C. A. 10th.), upheld the conviction on the ground that membership in the Communist party is not in and of itself criminal, citing *Schneiderman* v. *United States* (1943), 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1797. That case actually held that the government had failed to carry the burden of proof in an attempt to show that the Communist Party was an organization advocating overthrow of the government by force and violence. (320 U. S. 118, 154, 158.) The court also remarked:

> "For some time the question whether advocacy of governmental overthrow by force and violence is a principle of the Communist Party of the United States has perplexed courts, administrators, legislators, and students. . . . This court has never passed on the question and it is unnecessary for us to do so now."

The status of the Communist Party under the Smith Act is currently in issue.[5] There was a real danger that petitioners might be subjected to prosecution for membership in the party. Extension of the privilege seems well applied.

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LIBEL AND SLANDER: MITIGATION OF DAMAGES—CONSTITUTIONALITY AND SCOPE OF NEWSPAPER LIBEL RETRACTION STATUTE.—From the very outset of the law of defamation, there have been conflicting views expressed in the establishment of the closely related torts of libel and slander. Opposing ideas of policy—one being our traditional concept of freedom of expression, the other our sense of justice and sympathy for those whose good name has been maligned—have been largely responsible for the somewhat arbitrary and often illogical rules set down by the courts. In the last century, the tendency seemed to be toward the extension of the law of defamation, somewhat as the early common law, but more recently the shift is toward a more restricted liability.[1] There has not, however, been any satisfactory resolution of the

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[4]See "*Applicability of Privilege Against Self-Incrimination to Legislative Investigations,*" 49 Col. L. Rev. 87, 88, n. 2, where it is stated, concerning applicability of the privilege to inquiries concerning Communist Party membership, "Unless such membership is criminal, it seems clear that the privilege affords no protection to witnesses relying on it to avoid admission of such membership."

[5]United States v. Dennis et al. (C. C. A. 2 (1950)); 183 F. 2d 201, certiorari granted, 71 S. Ct. 91.

[1]Prosser on Torts, pp. 778 et seq.

contrary positions, despite several attempts by authorities in the law of torts, probably because of the violent policy dispute as to which direction the law should take.[2]

One aspect of defamation—that of damages—seems to have been particularly open to reflecting the ebb and flow of first one policy, then another. California, in recent years, has enacted legislation demonstrably designed to lessen liability, at least in the field of mass communication, namely, newspapers and radio and television broadcasting stations. In 1931, a retraction or correction statute, Civil Code, section 48a, applicable to newspaper libels, was enacted,[3] and in 1945, it was amended to cover slander by radio broadcast.[4]

Two recent cases, *Werner* v. *Southern California Associated Newspapers* (1950), 35 Cal. 2d 121, 216 Pac. 2d 825, and *Pridonoff* v. *Balokovich* (1950), 36 A. C. 290 and 36 A. C. 751 (1951), 223 P. 2d 854, have upheld the constitutionality of the Civil Code, section 48a, and extended its application to individuals who, in one way or another, participate in the publication of the defamatory statement. The statute, whose constitutionality had not heretofore been raised, provides that the plaintiff, within twenty days after knowledge of the publication or the broadcast, must make written demand of a correction or retraction. If a correction is not published within three weeks of such demand, in substantially as conspicuous a manner as the original defamatory statements, the plaintiff can recover general and special damages, and may also recover exemplary damages, in the discretion of the court or jury, if he pleads and proves actual malice. However, if the plaintiff fails to serve the written demand upon the publisher, he can recover only special damages.[5]

It is this last provision which raised the constitutional issue, and which served to evoke a sharp dissent from two justices of the California Supreme Court. Before the Werner and Pridonoff cases are discussed, a brief survey of the development in the field of retractions may prove helpful as a background for analysis.

At common law, a showing of special damages, i.e., actual pecuniary injury, was necessary for a recovery in slander actions, except where the defamation fitted into the category of slander *per se*, in which case injury was presumed.[6] In libel cases, however, the plaintiff might recover, in addition to pecuniary loss, general damages for the presumed injury to reputation and loss of business.[7] Further, the jury might assess exemplary or punitive damages where malice had been alleged and proved.[8]

Though a retraction of the defamatory statement is not a defense to an action for defamation, it may be introduced to rebut the malice required for punitive damages, and in mitigation of damages, provided it is full, fair, and unequivocal.[9]

In the absence of statutory provisions, a newspaper as such has no special immunity from liability.[10] Newspapers, perhaps because of their recognized potential

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[2]Paton, Reform and the English Law of Defamation, 33 Ill. L. Rev. 669, 675; Morris, Inadvertent Newspaper Libel and Retraction, 32 Ill. L. Rev. 36, 45; Veeder, Absolute Immunity in Defamation, 9 Columbia L. Rev. 463, 469-470.

[3]Cal. Stats. (1931), c. 1018, p. 2034; see S. F. v. Industrial Acc. Com., 183 Cal. 273, 279, 191 Pac. 26.

[4]In 1949, a new section was added limiting liability of radio and television broadcasting stations where due care has been exercised in the prevention of defamatory statements, or where censoring is impossible by reason of federal regulation or statute.

[5]Cal. Civ. Code, sec. 48a defines general damages, special damages, and exemplary damages, in par. 4(a), (b) and (c).

[6]Prosser on Torts, p. 798.

[7]Bohan v. Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

[8]Taylor v. Lewis, 132 Cal. App. 381, 22 Pac. 2d 569.

[9]Taylor v. Hearst, *supra*; Turner v. Hearst, 115 Cal. 394, 47 Pac. 129.

[10]Edwards v. San Jose Printing & Pub. Soc., 99 Cal. 431, 34 Pac. 128; Morcom v. San Francisco Shopping News Co., 4 Cal. App. 2d 284, 40 Pac. 2d 940.

for great harm, were once held to strict liability, even where through an honest and reasonable mistake the wrong person was defamed, or where the statement was not intended in any defamatory sense.[11]

But in at least twenty states,[12] statutes have been enacted purporting to lessen the liability of newspapers for inadvertent libel when a retraction is published. There seems to be no dispute about the competency of the Legislature in making retraction a bar to the recovery of punitive damages.[13] Beyond this, there is conflict. Some of these statutes provided that the plaintiff shall recover only "actual damages," but they have been construed to exclude only exemplary damages, thus, in effect, leaving the common law intact.[14] Three other statutes which specifically confined recovery to special damages suffered in respect of property, business, trade, profession, or occupation, and excluded recovery for damages to reputation or character, were held unconstitutional.[15] On the other hand, a Minnesota case,[16] upholding the Minnesota statute, decided that no constitutional provision was violated by prohibiting the recovery of money damages for the presumed injuries to reputation which are not pecuniary in nature. However, it should be noted that the operation of the statute was limited to cases of "good faith," which not only went to the absence of malice, but also to the absence of negligence.[17]

California Civil Code, section 48a, goes further and limits recovery to special damages in any case where there has been retraction, or denies recovery beyond special damages where the plaintiff has failed to demand retraction in compliance with the statute. It should be noted here that the original retraction statute enacted in 1931 dealt only with libelous matter published in good faith, without malice, and under a mistake as to the facts, but the 1945 amendment includes no requirement of establishing defendant's good faith as a prerequisite to freedom from liability for general damages.

The Werner case arose before the Pridonoff case, and will be discussed first.

The defendant newspaper in the Werner case had allegedly publishd a libel[18] to the effect that the plaintiff had been convicted of a felony and sentenced to prison. The plaintiff failed to allege special damages or compliance with section 48a, and the trial court sustained defendant's demurrer and dismissed the action. On appeal, the District Court of Appeal, one judge dissenting (206 Pac. 2d 952), decided that the statute was unconstitutional as violating the speech responsibility clause and the equal protection clause of the California Constitution and also the equal protection and due process clauses of the United States Constitution, Amendment XIV. The court reasoned that the common law liability of libel was intended to be incorporated in the speech responsibility clause of the California Constitution, and that any statute attempting to limit that liability was depriving the plaintiff of a property right without due process of law.[19] The California Supreme Court, Justices Carter and Schauer writing separate dissents, reversed in favor of the defendant, and upheld the statute.

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[11]Hulton & Co. v. Jones, 2 K. B. 44; Taylor v. Hearst, *supra.*

[12]See list in 33 Minn. L. Rev. 609, 614.

[13]Comer v. Age Herald Pub. Co., 151 Ala. 613, 44 So. 673; Pentuff v. Park, 194 N. C. 146, 138 S. E. 616.

[14]Ellis v. Brockton Pub. Co., 198 Mass. 538, 84 N. E. 1018; Comer v. Age Herald Pub. Co., *supra*; Osborn v. Leach, 135 N. C. 628, 47 S. E. 811; Meyerle v. Pioneer Pub. Co., 45 N. D. 568, 178 N. W 792; Webb v. Call Pub. Co., 173 Wisc. 45, 180 N. W. 263.

[15]Hanson v. Krehbiel, 68 Kan. 670, 75 Pac. 1041; Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W 731, 13 A. L. R. 799; Osborn v. Leach, *supra.*

[16]Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936.

[17]Thorson v. Albert Lea Pub. Co., 190 Minn. 200, 251 N. W 177.

[18]See Cal. Civ. Code, section 45, for definition of libel.

[19]23 So. Cal. L. Rev. 89; 34 Minn. L. Rev. 249; 99 U. of Penn. L. Rev. 107.

Civil Code, section 48a, was held not in contravention of California Constitution, article I, section 9, since the constitutional provision was not intended to guaranty a remedy to those injured by the defamation, but only to make clear that the right of free speech does not guaranty immunity from liability to those who abuse it. The issues of the due process clause and the equal protection of the laws were examined by the court, and the majority opinion stated that the Legislature might reasonably conclude that the public interest in the dissemination of news outweighed the possible injury to a plaintiff from the publication of a libel, and might properly encourage and protect news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation, upon the publication of a retraction. Since, at common law, it was conclusively presumed that general damages resulted from the publication of a libel, the Legislature could reasonably conclude that recovery of damages without proof of injury constituted an evil. It was pointed out that the Legislature had already attacked the evils of unfounded litigation, by abolishing certain causes of action altogether, namely, alienation of affection, criminal conversation, seduction of a person over the age of legal consent, and breach of promise to marry. The court refused to presume that in reaching a decision, the Legislature acted on improper motives in choosing between conflicting policies. On the contention of arbitrary and unreasonable classification, the majority stated that legislative classification is reasonable if there are differences between the classes established, and the differences are reasonably related to the purposes of the statute. The distinction between newspapers and radio on the one hand and all other forms of news dissemination and publication in general on the other was held a reasonable exercise of the legislative process, and not arbitrary or improper.

Justice Carter, in a vigorous and mordant dissenting opinion, attacked the majority's argument that a retraction was an effective remedy for the damage caused by defamation, especially in view of the tremendous scope of such modern media of communication and news dissemination. On the latter point, that the business of news publication necessarily made difficult the checking of all statements, and that danger of excessive damages would hamper the effectiveness of a free press, the dissent pointed out that neither these reasons nor the difficulty in adequate checking of news which must speedily be put in print should outweigh damages to an individual's reputation. The effect of the statute is to grant to newspapers and radio the power to inflict permanent injury while at the same time removing all practical possibility of recovery for such injury, since special damages are difficult of proof in most cases. Justice Schauer, also dissenting, felt that the speech responsibility clause of the California Constitution, article I, section 9, was of more than mere negative significance, and that the effect of the statute was to allow even deliberate and malicious libel to be immune from either general or punitive damages.

There was an appeal from the decision, to the United States Supreme Court, and while this appeal was pending, the Pridonoff case arose. In this case, the defendant authors, apparently not engaged in the newspaper business, had allegedly caused to be published in a California newspaper a statement that the plaintiff had engaged in certain activities, while a member of an American embassy abroad, sufficient to bring about his recall to the United States. The words were libelous in that they implied that he was not fit for his position and tended to injure him in his occupation. The plaintiff, as in the Werner case, failed to allege a demand for a correction and that no correction was published, and this was held to preclude recovery of general or exemplary damages. However, plaintiff did allege special damages, in that as a result of the publication of the libel he lost employment with a named employer for a specified period, to his damage in a named amount. Again, Justices Carter and Schauer, though concurring in the reversal in favor of the plaintiff on the grounds that allegations of

special damages were sufficiently specific to sustain a cause of action therefor, dissented from that portion of the majority decision which held that the plaintiff could not recover general or exemplary damages because of his failure to demand retraction pursuant to the provisions of Civil Code, section 48a.

The Pridonoff case came up on rehearing,[20] but not on constitutional grounds. Plaintiff had contended that by virtue of the provision requiring service of demand for correction on the publisher, Civil Code, section 48a, applied only to the newspaper publisher, and not to his employees, columnists, and other authors, and that since his action was against the individual authors of the alleged libel and not against the newspaper publisher, the statute was inapplicable in his case. But the same majority held that notwithstanding that the action was against the actual author of the article, rather than the publisher, Civil Code, section 48a, precluded recovery of more than special damages unless plaintiff serves a notice on the publisher demanding retraction, and no retraction is published. It was pointed out that only the publisher had the power to make the proper retraction, and in providing for the substitution of a retraction for general and exemplary damages, it was reasonable for the Legislature to provide that the notice be served upon him.

Justice Carter again dissented, on two grounds: (1) the statute does not apply to authors of articles or letters published in newspapers, and (2) the statute is unconstitutional. (On this latter point, raised by the dissent in the first Pridonoff case, it was felt that the ultimate validity of Civil Code, section 48a, would be decided by the United States Supreme Court. However, in the period between the first and second Pridonoff cases, a settlement was made of the plaintiff's claim in the Werner case, and the appeal had been dismissed.[21] This left the statute's validity, as determined by the highest state court, intact as of this writing.)

Justice Carter, referring to the broadened scope now given to section 48a, questions the logic of classifying authors of libelous statements according to whether their statements are published by newspapers or by other means. Assuming, for the sake of argument only, that the Legislature reasonably sought to protect newspapers and radio stations from the danger of excessive damages in actions against them, because of their reputed ability to pay, and also that the Legislature could reasonably conclude that, because the effectiveness of a retraction by a newspaper with wide circulation greatly outweighed the retraction of an individual, there could properly be a basis for classifying newspapers and radio stations apart, yet individual authors are not within the class of persons conspicuously subject to unfounded and extortionate suits, nor are they engaged in the business of operating newspapers, nor are authors disseminating news.

Further, the *Comer* v. *Louisville, etc., R. R. Co.* case, 151 Ala. 622, 44 So. 676, 677, is directly in point, in that a statute[22] similar to California Civil Code, section 48a, was held inapplicable to an individual defendant, not a publisher, who had prepared an article which he had paid the newspaper to publish. The court in that case recognized the basis for protecting newspapers who are in the business of disseminating news, and the possibility of inadvertent libel, but the same basis did not apply to individuals. However, the California court, in the Pridonoff case, saw fit not to follow the Comer case.

Justice Schauer, also dissenting, reiterated his position as a staunch supporter of the constitutional freedoms of speech and press as against prior restraint, but felt

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[20] 36 A. C. 751 (1951).
[21] 19 U. S. Law Week, Feb. 6, 1951, Supplement to Index, p. 11.
[22] Act Feb. 20, 1899 (Gen. Acts, 1898-99, p. 32), amending Code 1896, sec. 1441.

that the injustices which might flow from the lack of prior restraint, should be deterred, mitigated or compensated by subsequent responsibility, general and punitive, for abuses of that right. He disagreed with the majority in the Werner case, which held that although Civil Code, section 48a, extends its protection to those who may deliberately and maliciously disseminate libels, the Legislature could reasonably conclude that it was necessary to go that far so as to effectively protect those who in good faith and without malice inadvertently publish a defamation. Justice Schauer bitterly commented that the majority was immunizing an author of a slander or libel, whether inadvertent or deliberate, so that one could maliciously compose the vilest calumny, and by merely procuring its publication in a newspaper, or by a broadcasting company, by paid advertisement or otherwise, "come within the encouraging arms of section 48a and repose securely immune from either general or punitive damages."

Having come this far, it can be stated that California has taken a most extreme position in this matter of retraction and mitigation of damages. Until cases of this kind reach the United States Supreme Court, the constitutionality of the newspaper libel retraction statute will likely stand. How far its protecting mantle shall extend is as yet uncertain, though it is clear that it is not limited to newspapers and radio stations. In the opinion of the writer, there is some validity in the argument that there is an abuse of the guaranty of the equal protection of the laws, in that in any classification made by a state legislature, must pass the test set down in *Quaker City Cab Co.* v. *Penn.* (1928), 277 U. S. 389, 406, 48 S. Ct. 553, 556, 72 L. Ed. 927, by Justice Brandeis: "In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon *a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike,* that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state and that *the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.* Subject to this limitation of reasonableness, the equality clause has left unimpaired, both in range and in flexibility, the state's power to classify for purposes of taxation." (*Emphasis added.*)

Should the constitutionality of section 48a withstand this test, it would be going beyond any other comparable statute, most of which were held invalid on lesser provisions. It would seem preferable, on policy grounds at least, that California be in accord with those other states which have enacted retraction statutes, if not in accord with the common law liability for newspaper defamation. There would be no objection, for example, were California to reestablish the former requirement of good faith, absence of malice, etc., which existed in the 1931 version of section 48a. This would be a return to the middle position between absolute liability and absolute immunity, perhaps the most workable synthesis of the problem in an otherwise unsatisfactory state of the law.

In view of current political conditions, conducive of "smear and run" tactics by an unethical few, it might be timely to recall the meaningful words of Shakespeare's Iago:

> "Good name in man and woman, dear my lord.
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name,
> Robs me of that which not enriches him,
> And makes me poor indeed." (*Othello,* Act III, Scene 3)

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