

## MEDIA LIBEL: FEDERAL AND NEBRASKA LAW

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Insofar as media defendants are concerned, there are two kinds of potentially libelous statements. Distinguished by the status of their subject, the two kinds of statements are, first, those relating to the "official conduct" of a "public figure" and, second, all others.

The rules of law which determine media liability can differ depending upon which kind of statement is involved. Although the state of the law in Nebraska is somewhat unclear, as a general rule the difference between the two situations can be stated, albeit oversimply, as follows: statements regarding the official conduct of a public figure may be published *unless* the statements are false and the publisher has reason to believe they are false; statements relating to private individuals and to nonofficial conduct of public figures may be published *if* either there is no apparent danger to reputation or the publisher has reasonable grounds for believing the statement is true. In the first case, information can be published absent reason to believe it is false and in the second case it can be published if there is either reason to believe it is true or lack of apparent danger to reputation.

### I. OFFICIAL CONDUCT OF THE PUBLIC FIGURE

The rule regarding statements concerning the "official conduct" of a "public figure"—the actual malice rule—can be stated as follows: A public figure cannot recover damages against a representative of the press for a defamatory statement relating to his official conduct unless he proves that the defendant made a false statement with "actual malice." This statement of the rule leaves a number of questions to be explored. Who is a public figure? What relates to his official conduct? What constitutes actual mal-

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ice? What damages may be recovered by the public figure? Who has the burden of proof?

#### THE PUBLIC FIGURE

The concept of the public figure clearly includes the public official, that is, one who holds public office.<sup>1</sup> It also includes candidates for public office, at least during the course of the election campaign.<sup>2</sup> The concept seems to include public officials at any level, elected or appointed.<sup>3</sup>

Certain otherwise private individuals who, like office holders and candidates, have invited or assumed the risk of scrutiny and comment are also considered public figures. This sort of public figure includes those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."<sup>4</sup> One who seeks to influence and to lead public opinion can thereby become a public figure.<sup>5</sup> The United States Supreme Court at one point seemed to sum up this public figure concept by referring to one who has "accepted public

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 n.23 (1964) is the landmark decision articulating a special standard for libel actions brought by public officials. See also, *Gilligan v. King*, 48 Misc. 2d 212, 264 N.Y.S.2d 309, *aff'd* 29 App. Div. 2d 935, 290 N.Y.S.2d 1014 (1968).

2. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) held that the *New York Times* rule "was intended to apply to candidates, in spite of the use of the more restricted 'public official' terminology . . ." *Id.* at 271.

3. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 n.23 (1964) (In determining "how far down into the lower ranks" the concept of public official filtered the Court ventured: "It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department."); *Rosenblatt v. Baer*, 383 U.S. 75, 87 (1966) (supervisor of a county ski recreation area may have been a public official); *Ryan v. Dionne*, 28 Conn. Supp. 35, —, 248 A.2d 583, 585 (1968) (city's delinquent tax collector). "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); The issue as to whether a party is a public official for purposes of the *New York Times* rule is a question of federal constitutional law; state law is not determinative. *Id.* at 84.

4. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). See also *Logan v. District of Columbia*, 447 F. Supp. 1328 (D.D.C. 1978).

5. This has included, for example, otherwise private individuals who have assumed leadership roles in moves to secure particular texts for use in college and high school classrooms and persons assuming leadership roles in moves to integrate or segregate. See *Johnson v. Board of Junior College Dist.*, 31 Ill. App. 3d 270, —, 334 N.E.2d 442, 447 (1975). See also *Associated Press v. Walker*, 388 U.S. 130 (1967). For a general discussion of the *Walker* case see Note, 49 S. CAL. L. REV. 1131, 1158-63 (1976).

office or assumed an 'influential role in ordering society.'"<sup>6</sup>

Also included are those who offer their services to the public as paid performers; individuals in this category become public figures for purposes of comment concerning their public performance. The basketball player, for example, assumes "the risk of publicity, good or bad . . . so far as it concerns his public performance."<sup>7</sup> Likewise, a Playboy centerfold has been held to be a voluntary public figure "with respect to her role in Playboy magazine, and for that limited purpose only . . . ."<sup>8</sup>

Public figures, as defined so far, include individuals who voluntarily and through their own purposeful action become involved in matters of public interest. The concept may be broader than that. In *Gertz v. Robert Welch, Inc.*,<sup>9</sup> the Supreme Court stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare."<sup>10</sup> The *Gertz* decision does not further explain this cryptic comment, except through a prior suggestion that this status may be related to "the notoriety of [an individual's] achievements. . . ."<sup>11</sup> This would include perhaps, assuming that their notoriety is involuntary, the Nobel Prize winner, the Mafia Chieftan, and other notorious achievers. And what about persons like the Hill family, a family of private citizens whose home was taken over and who were themselves taken hostage by a group of escaped convicts,<sup>12</sup> or the driver of a mass transit vehicle which is involved in a wreck in which hundreds are killed and injured? The answer in these sorts of cases may be that to protect himself a publisher, when consistent with sound editorial judgment, must proceed as if the subject of the statement were not a public figure.<sup>13</sup>

6. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

7. *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971).

8. *Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442, 445 (E.D. Pa. 1978).

9. 418 U.S. 323 (1974).

10. *Id.* at 345.

11. *Id.* at 342.

12. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967). A novel and a screen play were based upon this incident. Neither named the real captives. When *Time* magazine subsequently identified the Hill family, they sued for invasion of privacy. The United States Supreme Court reversed the state court judgment in favor of the Hills, stating that the lower court on remand should instruct the jury that the *New York Times* rule is the standard by which to judge the defendant's statement. Note, however, that the Hills sued *Time* for invasion of privacy, not for libel. *Id.* at 394-96.

13. The inherent vagueness in this part of the definition of public figure, and the necessity for the publisher to make judgments in this unpredictable area, with its consequent inhibitive effect, has been criticized as insufficiently protective of

## OFFICIAL CONDUCT

How far into the life of a public figure can the media go before losing the protection of the actual malice rule? What constitutes official conduct? In regard to the public official or candidate for public office, the Supreme Court has stated that the actual malice test applies to statements relating to "the formal discharge of official duties."<sup>14</sup> This "extends to 'anything which might touch an official's *fitness for office*. . . .'"<sup>15</sup> The Court cited as examples " 'dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.' "<sup>16</sup>

Regarding the individual who, while not a public official, has become a public figure through voluntary involvement in a public issue in an attempt to influence its outcome, the actual malice test applies to any statement which might touch on his fitness as such an advocate.<sup>17</sup> Again this would include matters akin to the form in which his advocacy is manifested, that is, illegal or violent action or the like, conflict of interest or other improper motivation, dishonesty, untrustworthiness, and so forth.

Regarding the public figure who thrusts himself before the public for pay, the actual malice test applies to a publication which calls attention to or comments on the public performance.<sup>18</sup> Regarding those "exceedingly rare" persons, "truly involuntary public figures", the concept "official conduct," and, therefore, the application of the actual malice test, no doubt in some similar way relates to that set of facts or circumstances which conferred the public figure status.

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first amendment rights. Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723, 45 (1978).

Regarding the general topic of the public figure, see generally Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment*, 26 HASTINGS L.J. 777, 787-95 (1975); Note, 69 Nw. U.L. REV. 960, 965 (1975).

14. 418 U.S. at 344.

15. *Id.* at 344-45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (emphasis added)).

16. 418 U.S. at 345.

17. See *id.* at 345.

18. *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971). See text at notes 8 and 10 *supra*.

## ACTUAL MALICE

A third question raised by the rule—the rule that a public figure cannot recover damages against media defendants for defamatory statements relating to his official conduct unless the statements are false and the public figure proves that the defendants made the statements with actual malice—is what constitutes actual malice? The first point to be made here is that the United States Supreme Court has stated as a matter of federal constitutional law that to be defamatory the statement must be false.<sup>19</sup> In addition to proving that the statement is false, the public figure plaintiff must prove that the statement was made with actual malice—“with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>20</sup> Reckless disregard has been held to require a high degree of awareness that the statement is probably false.<sup>21</sup>

The Supreme Court has stated: “[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained *serious doubts as to the truth* of his publication.”<sup>22</sup>

The Fifth Circuit Court of Appeals has held that some suspicion as to falsity must be shown to establish reckless disregard.<sup>23</sup> Negligence is not enough.<sup>24</sup> Failure to investigate is not enough.<sup>25</sup>

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19. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74, (1964) (“Truth may not be the subject of either civil or criminal sanctions where the discussion of public affairs is concerned.”) The *Nebraska* cases are in accord, *see Bartels v. Retail Credit Co.*, 185 Neb. 304, 311, 175 N.W.2d 292, 297 (1970).

20. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1969); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

21. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

22. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (emphasis added).

23. *Time, Inc. v. McLaney*, 406 F.2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969).

24. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Here the Court stated that “reckless conduct is not measured by whether a reasonably prudent man would have published . . .” *Id.* The *New York Times* rule has been characterized as a constitutional privilege to negligently misstate defamatory facts on matters of public interest about public officials. Silver, *The “Higher Truths” of Art, and The First Amendment*, 126 U. PA. L. REV. 1065 (1978).

25. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also Walker v. Pulitzer Publishing Co.*, 394 F.2d 800, 805 (8th Cir. 1968).

It has been stated that a partial consequence of such a rule could be “to dissuade a publisher from making an investigation [in regard to statements about the official conduct of public figures], since by so doing he incurs the risk of establishing the awareness of falsity which may expose him to liability.” *Troman v. Wood*, 62 Ill. 2d 184, —, 340 N.E.2d 292, 298 (1975). The Supreme Court of Iowa has noted

Actual antagonism or contempt is not enough.<sup>26</sup> Even intent to inflict harm is not enough to constitute actual malice; there must be an intent to inflict harm through falsehood.<sup>27</sup>

#### DAMAGES AND BURDENS OF PROOF

In Nebraska the medium's liability is limited to the damage actually suffered by the plaintiff. The Nebraska Supreme Court has consistently held that punitive damages are not allowed in this state.<sup>28</sup> On this subject of damages, the United States Supreme Court has held that states may not allow punitive damages against media defendants "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."<sup>29</sup> But, as just noted, the Nebraska rule is already stronger than that and were a libel action filed in federal court state law would govern as to the measure of damages.<sup>30</sup> If a retraction is printed, and cer-

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the reasoning of the *Troman* court with some interest. *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 158 (Iowa 1976). In *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), the Texas Supreme Court stated that such a rule "encourages the irresponsible publisher not to inquire." *Id.* at 819.

26. *Pauling v. Globe-Democrat Publishing Co.*, 362 F.2d 188, 198 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

27. *Henry v. Collins*, 380 U.S. 356, 357 (1965).

28. *Miller v. Kingsley*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1975); *Riewe v. McCormick*, 11 Neb. 261, 265, 9 N.W. 88, 89-90 (1881).

In the case of a television or radio defendant, this conclusion is strengthened by a rarely interpreted Nebraska statute which provides: "In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved." NEB. REV. STAT. § 86-603 (Reissue 1976).

Punitive damages are damages allowed, in addition to those actually suffered, as punishment to the defendant, as a deterrent to others, and to sweeten the pot for the plaintiff for any additional injuries suffered by reason of the aggravating circumstances of defendant's maliciousness. The United States Supreme Court has never ruled out the recovery of punitive damages against media defendants. In fact, they seem to have implicitly approved such recovery in suits by private individuals; *Gertz* ruled that absent a showing of actual malice the private individual's recovery is limited to damages actually suffered. *See also* *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159-60 (1967), *reh. denied*, 389 U.S. 889 (Per Mr. Justice Harlan with three Justices concurring and the Chief Justice concurring in result) ("the Constitution presents no general bar to the assessment of punitive damages in a civil [libel] case"). *But see* *Mahev v. Hughes Tool Co.*, 384 F. Supp. 166, 169 (C.D. Cal. 1974) (where the plaintiff is a public figure and liability is founded on actual malice, the Constitution precludes the award of punitive damages) (citing authorities). *See* note 38 and accompanying text *infra*.

29. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974).

30. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 12 (1973). Federal law would govern as to the measure of damages in two situations, neither of which apply here: First, where the federal suit is not a diversity action but is brought under a federal statute; and, second, where an award of punitive damages is necessary to fully protect and preserve a constitutional right. As an example of the latter situation, one might have a cause of action when one's right to vote is infringed. It would be difficult to prove damages, so punitive damages can be awarded to protect

tain specific statutory conditions are satisfied, then, under Nebraska law, damages are limited even further.<sup>31</sup>

The burden of proof in this sort of case is on the public figure.<sup>32</sup> He must prove that the statement is false and that the publisher either knew it was false or published in "reckless" disregard of whether it was false or not.<sup>33</sup> This is no surprise. The noteworthy feature of this element of the problem is that the plaintiff's

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the constitutional right. The same could be true in certain employment discrimination cases. Where necessary to protect and preserve a constitutional right, not only could the federal court award punitive damages, but also state courts and state administrative agencies could do so in spite of Nebraska's general rule otherwise. *Gilliam v. City of Omaha*, 331 F.Supp. 4, 8 (D. Neb. 1971), *rev'd on other grounds*, 459 F.2d 63 (8th Cir. 1972), *on remand*, 388 F.Supp. 842 (D. Neb. 1975), *aff'd*, 524 F.2d 1013 (8th Cir. 1975).

31. NEB. REV. STAT. § 25-840.01 (Reissue 1975) limits plaintiff's recovery to no more than special damages if a timely retraction is or has been published upon request. That section provides as follows:

(1) In an action for damages for the publication of a libel by any medium, the plaintiff shall recover no more than special damages, unless correction was requested, as herein provided, and was not published. Within twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by registered mail specifying the statements claimed to be libelous and specifically requesting correction. Publication of a correction shall be made within three weeks after receipt of the request. It shall be made in substantially as conspicuous a manner as the original publication about which complaint was made. A correction, published prior to receipt of a request therefor, shall have the same force and effect as if published after such request. The term special damages, as used in this section, shall include only such damages as plaintiff alleges and proves were suffered in respect to his property, business, trade, profession or occupation as the direct and proximate result of the defendant's publication.

(2) This section shall not apply if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication.

*Id.*

The Nebraska Supreme Court has suggested that where no attempt is made to comply with this statute, a logical assumption is that, regardless of whether malice was alleged in the plaintiff's complaint, the cause of action is predicated on actual malice. *Whitcomb v. Nebraska State Educ. Ass'n*, 184 Neb. 31, 35, 165 N.W.2d 99, 101 (1969). For another recent Nebraska case construing this statute *see Vodehnal v. Grand Island Daily Independent*, 191 Neb. 836, 218 N.W.2d 220 (1974).

32. *New York Times v. Sullivan*, 376 U.S. 254, 283-84 (1964); *Greenbelt Coop. Publishing Ass'n v. Bresler*, 396 U.S. 6, 8 (1970). *See also* *Whitcomb v. Nebraska State Educ. Ass'n* 184 Neb. 31, 165 N.W.2d 99 (1969), where the Nebraska Supreme Court stated:

Previous to the amendment in 1957 of section 25-840, . . . when a publication was libelous per se, malice was presumed. The presumption made a prima facie case on malice so that the burden of rebutting the presumption was on the defendant. In 1957, the following was added to the statute: "The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication." This changed the law by eliminating any presumption of malice and transferring the burden to the plaintiff on that issue.

*Id.* at 35, 165 N.W.2d at 101 (citations omitted).

33. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Greenbelt Coop.*

burden *may* be more rigorous than the usual civil burden of establishing the elements of one's case by a preponderance of the evidence. A seemingly more stringent burden was stated by a three-judge plurality of the United States Supreme Court in *Rosenbloom v. Metromedia, Inc.*<sup>34</sup> as the burden of proving actual malice "with convincing clarity."

In summary, the public figure cannot recover damages in a suit against a representative of the press for a statement relating to the public figure's official conduct unless he proves that the statement was false and was made either with the knowledge that it was false or with some serious doubt as to its truth. If the plaintiff can prove those elements, then he can recover damages actually suffered and, under Nebraska law, at least, no more.

## II. THE PRIVATE INDIVIDUAL AND NONOFFICIAL CONDUCT OF THE PUBLIC FIGURE

In the case of libel actions by public figures against media defendants, the United States Supreme Court has announced relatively specific national rules which govern recovery. In the case of a private individual's allegations of defamation, the Court has stated that within certain limits it will be left up to the states to formulate their own rules.<sup>35</sup> The odd thing is that while *Gertz* does say that the law regarding the defamation of private individuals will be left to the states, it lays down certain minimal restrictions which wipe out most of this part of the law of libel as most recently pronounced in Nebraska. Nebraska is left with the authority to formulate its own rules but cannot maintain its rules as last announced. In effect, Nebraska is virtually left without a law of libel in suits by private individuals against media defendants.

### THE LIBELOUS STATEMENT AND DAMAGES

Under the most significant recent Nebraska case on the subject, *Rimmer v. Chadron Printing Co.*,<sup>36</sup> a defendant libels a plaintiff by attributing to the plaintiff the commission of a crime, bringing upon the plaintiff public ridicule, disgrace, or hatred, or causing men of virtue to balk at associating with the plaintiff.<sup>37</sup> Ac-

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*Publishing Ass'n v. Bresler*, 398 U.S. 6, 8 (1964); *Rose v. Koch*, 278 Minn. 235, —, 154 N.W.2d 409, 421 (1967).

34. 403 U.S. 29, 55 (1971).

35. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

36. 156 Neb. 533, 56 N.W.2d 806 (1953).

37. The rule in *Rimmer* is:

A publication is libelous per se if the nature and obvious meaning of the language is such as to impute to a person the commission of a crime, or to

ording to *Rimmer*, if the words used by the alleged libelant, considered in their ordinary and popular sense, had such an effect, they exposed the medium to a libel action by a private individual. This sort of definition of a libelous statement is constitutionally valid.

As in the case of the public figure suit, damages here are limited to those which the plaintiff can prove were actually suffered.<sup>38</sup> There is nothing unconstitutional about such a damage limitation.

#### FAULT

The Nebraska Supreme Court's last statement on fault held that if the words used fit the above definition they constituted "libel per se", that is, the mere making of such a statement, without more, constituted libel.<sup>39</sup> This would mean that it makes no difference that the libelous statement is a result of careless or nonnegligent error on the part of an employee or agent of the defendant. The defendant could still be held liable.

In *Gertz*, the United States Supreme Court said that the states can adopt their own standards "so long as they do not impose liability without fault. . . ."<sup>40</sup> The Court there noted that this is a caveat against strict liability. Liability may not disregard the care taken by the publisher to ensure the accuracy of his statement. Although the United States Supreme Court has never further clarified this statement, never provided more clear guidance as to where the line must be drawn as a matter of constitutional law, it is clear that wherever the line is drawn *some fault* must be found *somewhere*. Wherever the line is drawn, it changes Nebraska law.

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subject him to public ridicule, ignominy, or disgrace, or to render him contemptible or ridiculous in public estimation, or to expose him to public hatred or contempt, or to hinder virtuous men from associating with him.

*Rimmer v. Chadron Printing Co.*, 156 Neb. 533, 535, 56 N.W.2d 806, 808 (1953) (citations omitted).

*But see* dissenting opinion of Judge McCown in *Whitcomb v. Nebraska State Educ. Ass'n*, 184 Neb. 31, 40, 165 N.W.2d 99, 104 (1969) (McCown, J., dissenting). The Nebraska Supreme Court in the last term stated that "[i]n determining whether the language of a publication was libelous the statement is to be interpreted in its ordinary and popular sense." *Silence v. Journal Star Printing Co.*, 201 Neb. 159, 163, 266 N.W.2d 533, 536 (1978). The court however did not discuss further what constitutes libel per se.

38. *See* notes 30-32 and accompanying text *supra*. Though it added nothing to Nebraska law, in *Gertz*, the Supreme Court's first limitation on state libel rules was that absent a showing of actual malice the private individual's recovery is limited to damages actually suffered. 418 U.S. at 350.

39. *Rimmer v. Chadron Printing Co.*, 156 Neb. 533, 536, 56 N.W.2d 806, 808 (1953).

40. 418 U.S. at 347.

## TRUTH

In Nebraska one cannot be convicted of criminal libel unless the prosecution proves that the allegedly libelous statement is false and malicious.<sup>41</sup> In a civil damage action for libel, the rule as last announced by the Nebraska Supreme Court is different.<sup>42</sup> Truth, that Court said, did not constitute a defense to a civil action where the plaintiff also proved that the publication went to print without good motives and for unjustifiable ends.<sup>43</sup>

The question now is how, as a matter of federal constitutional law, truth or falsity fits into these cases. Must state law require proof of falsity as an element of the plaintiff's case? Would it be enough for state law to recognize truth as a defense in all cases involving media defendants? Will a rule which does neither be constitutional? The answer to the latter two questions, while not entirely clear, seems to be negative; neither rule would be constitutional.

In *Gertz* the United States Supreme Court stated that the statements therein involved "serious inaccuracies," and the Court's analysis focused in on "the appropriate standard of liability for a publisher or broadcaster of *defamatory falsehood* injurious to a private individual."<sup>44</sup> The implication here is that there is another kind of defamatory statement, one which is true. At the same time, and particularly in context, the Supreme Court's clear implication was that as a matter of constitutional law the false kind of defamation is the only kind for which recovery can be had against a media defendant.<sup>45</sup> The answer seems to be that, whatever rules Nebraska adopts, in cases of defamatory media speech falsity must be an element of the plaintiff's case.

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41. NEB. REV. STAT. § 28-440 (Reissue 1975). *Razee v. State*, 73 Neb. 732, 737, 103 N.W. 438, 440 (1905), while speaking of truth as a defense to criminal libel, perhaps because no one argued otherwise, does recognize that the statute "plainly requires that the libelous article must be both false and malicious." See also NEB. CONST. art. I, § 5 ("in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."). For discussion of § 28-440, see text at note 66 *infra*.

42. *Whitcomb v. Nebraska State Educ. Ass'n*, 184 Neb. 31, 165 N.W.2d 99 (1969) (If the defendant proves the truth of the statement, then the plaintiff must prove malice.).

43. *Id.* at 35, 165 N.W.2d at 101. The difference between the two tests appears to be that the criminal standard consists of a conjunctive test while the civil standard is guided by a disjunctive test.

44. 418 U.S. at 326, 345-47 (emphasis added).

45. *Id.* See also notes 19-33 and accompanying text *supra* regarding falsity as an element of the plaintiff's case where the statement concerns the official conduct of a public official.

## THE TREND OF THE LAW IN OTHER JURISDICTIONS

Nebraska is essentially left without a law of libel as it relates to suits by private individuals against media defendants. One can speculate as to what law the Nebraska Court might adopt; there is something of a trend in other jurisdictions, as the question arises, to adopt a negligence theory. This theory states that a private individual may recover damages for a defamatory publication if: 1) The statement contains an *apparent danger* to reputation; 2) the plaintiff proves that the statement was *false*; and 3) the plaintiff proves that the defendant either knew that the statement was false or *lacked reasonable grounds for believing it to be true*.<sup>46</sup> Under this negligence theory falsity is an element of the plaintiff's case. In addition, the defendant's belief in its truth must be unreasonable and the potentially damaging nature of the statement must be apparent.

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46. *Troman v. Wood*, 62 Ill. 2d 184, —, 340 N.E.2d 292, 299 (1975). See also RESTATEMENT (SECOND) OF TORTS § 580B (1977).

Among those jurisdictions which have adopted a negligence standard of fault in civil libel actions involving private individuals and media defendants, in addition to Illinois, are Kansas (*Gobin v. Globe Publishing Co.*, 216 Kan. 223, —, 531 P.2d 76, 84 (1975)), Massachusetts (*Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, —, 330 N.E.2d 161, 168 (1975)), Ohio (*Thomas v. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, —, 334 N.E.2d 494, 499 (1974)), and Arizona (*Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, —, 560 P.2d 1216, 1222-23 (1977)). The Iowa Supreme Court has noted this trend with some interest; see *McCarney v. Des Moines Register & Tribune Co.*, 239 N.W.2d 152, 158 (Iowa 1976).

At least one court has intimated that the negligence standard is appropriate where a public figure is the plaintiff; see *Bolam v. McGraw-Hill, Inc.*, 52 A.D.2d 762, —, 382 N.Y.S.2d 772, 772 (1976). Another jurisdiction has used this standard in a case where the defendant was not a representative of the press. *Gardner v. Hollifield*, 97 Idaho 607, —, 549 P.2d 266, 269 (1976). For further discussion of the negligence standard in state courts, see Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W. RES. L. REV. 306, 312-20 (1978).

One federal court has rejected outright the negligence standard. The Sixth Circuit Court of Appeals has stated its standard thusly:

Although . . . the article was not as carefully written as it should have been, nevertheless there was no proof that the Forest City Publishing Company printed and distributed the article with any knowledge of the falsities contained in it or in reckless disregard of whether or not it was true. Absent a calculated falsehood, the publication or broadcast of material concerning an event of public interest may not result in the imposition of a judgment for damages because of falsehoods or distortions arising from negligence or poor reporting.

*Cantrell v. Forest City Publishing Co.*, 484 F.2d 150, 157 (6th Cir. 1973). See also *Newspaper Publishing Corp. v. Burke*, 216 Va. 800, —, 224 S.E.2d 132, 136 (1976); *AAFCO Heating and Air Cond. Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, —, 321 N.E.2d 580, 589 (1974), *cert. denied*, 424 U.S. 913 (1976); *Walker v. Colorado Springs Sun, Inc.* 188 Colo. 86, —, 538 P.2d 450, 457 (1975), *cert. denied*, 423 U.S. 1025 (1975). For further discussion of alternative standards to the negligence model, see Collins & Drushal, *The Reaction of the State Courts to Gertz v. Robert Welch, Inc.*, 28 CASE W. RES. L. REV. 306, 319-25 (1978).

## SUMMARY

The Nebraska Supreme Court has identified the kinds of words that can be libelous;<sup>47</sup> in addition, it has limited recovery of damages to those actually suffered.<sup>48</sup> However, in cases involving media defendants, the court's most recent statements establishing the scope of libel and the appropriate fault standard contain little which remains valid in light of United States Supreme Court pronouncements.<sup>49</sup> It is clear that the media cannot publish material known to be false. Additionally, care must be taken not to publish statements about private individuals which are false and which, through some fault of the publisher, are not known to be false. The publisher should not have reason to be suspicious of the truth of the statement. What this really means is that the reporter must not have reason to be suspicious of the truth of the statement and the employer must not have reason to doubt the reporter.

What constitutes lack of reasonable grounds for believing in the truth of a statement is not entirely clear. The following may serve as examples of the kinds of problems which might arise. A publisher may lack reasonable grounds for believing in the truth of a statement if the publisher or his agent has reason to doubt the honesty of the source of the statement. The same might be true if the statement is facially incredible, or if a statement was true as received but during its processing was negligently altered by an employee or agent of the publisher.

## III. QUALIFIED PRIVILEGE

Finally, in regard to certain reports the media have traditionally enjoyed a qualified or conditional privilege. This has meant that in regard to certain reports no plaintiff, whether public official or private individual, could recover without showing that the report was false and published with actual malice.<sup>50</sup>

In *Time, Inc. v. Firestone*,<sup>51</sup> it was held that the qualified privilege the press enjoys in reporting judicial proceedings vanishes where the suit is brought by a private individual and the report is inaccurate.<sup>52</sup> The Court remanded the cause to determine whether

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47. See notes 36-38 and accompanying text *supra*.

48. See notes 28-31 and accompanying text *supra*.

49. *E.g.*, *Rhodes v. Star Herald Printing Co.*, 173 Neb. 496, 499-500, 113 N.W.2d 658, 661 (1962); *Farmers Educ. Coop. Union v. W. Day, Inc.*, 89 N.W.2d 102, 108-09 (N.D. 1958), *aff'd*, 360 U.S. 525 (1959). This rule applies in any event when the statement involves the official conduct of a public official.

50. See notes 35-45 and accompanying text *supra*.

51. 424 U.S. 448 (1976).

52. *Id.* at 452-57.

the publisher was at fault for the publication; it was remanded in light of *Gertz* and its required showing of fault.<sup>53</sup> It would appear, however, that had the report been accurate or if the inaccuracy were not traceable to some fault of the publisher the defendant would still have enjoyed its qualified privilege.<sup>54</sup>

This qualified privilege has been applied to fair and accurate reports of legislative and judicial<sup>55</sup> proceedings, the acts of executive and administrative officials of the government,<sup>56</sup> of pending judicial proceedings<sup>57</sup> and the public and official proceedings of a public body.<sup>58</sup> It has protected publication of public records, or excerpts therefrom, to which everyone has the right of access.<sup>59</sup> Actual facts relating to the commission of a crime and facts as to arrest and charges made against a suspect have been protected by this qualified privilege so long as the publication merely reports the facts without drawing conclusions, directly or by inference, as to guilt.<sup>60</sup> For example, if a city councilman, during a council meeting made a statement referring to a private individual, and if the press fairly and accurately reported what had been said, that private individual could not recover against the press without showing both that the statement was untrue and that its publication was "malicious." If a statement goes beyond the bounds of the privilege, as defined, the general rules of libel, as discussed above, apply to that much of the statement as is not covered by the privilege.

#### IV. MISCELLANEOUS NEBRASKA STATUTES

In addition to the above general discussion, the Nebraska practitioner ought to be familiar with five relevant Nebraska statutory provisions.

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53. *Id.* at 463-64.

54. *Id.* at 455. For a general discussion of *Firestone*, see Note, 10 CREIGHTON L. REV. 351 (1976).

55. *E.g.*, *Rhodes v. Star Herald Printing Co.*, 173 Neb. 496, 113 N.W.2d 658 (1962).

56. *E.g.*, 424 U.S. at 455; *Fairbanks Publishing Co. v. Francisco*, 390 P.2d 784, 793 (Alas. 1964).

57. See note 56 *supra*.

58. *E.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 281-82 n.21 (1964).

59. *E.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975); See *O'Brien v. Tribune Publishing Co.*, 7 Wash. App. 107, —, 499 P.2d 24, 30 (1972), *cert. denied*, 411 U.S. 906 (1972).

60. *E.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). For a general discussion of the common law privileges, see W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 115, at 792 (4th ed. 1971).

## STATUTE OF LIMITATIONS

In Nebraska a libel action must be brought within one year of the date of the publication of the defamatory matter.<sup>61</sup>

## RETRACTION AND DAMAGES

The damages recoverable by the plaintiff "[i]n an action for damages for the publication of a libel by any medium", are to some extent limited unless the plaintiff requested a correction and no such correction was published or unless the plaintiff can prove that the publication was prompted by actual malice.<sup>62</sup> The Nebraska statute provides that

[w]ithin twenty days after knowledge of the publication, plaintiff shall have given each defendant a notice by registered mail specifying the statements claimed to be libelous and specifically requesting correction. Publication of a correction shall be made within three weeks after receipt of the request. It shall be made in substantially as conspicuous a manner as the original publication about which complaint was made.<sup>63</sup>

If no such request is made by the plaintiff or if such a correction is printed then the plaintiff may recover "only such damages as [he] alleges and proves were suffered in respect to his property, business, trade, profession or occupation as the direct and proximate result of the defendant's publication."<sup>64</sup> It would appear that a plaintiff could not recover any damages, for example, for mental distress or harassment suffered unless he could relate it to one of the specifically enumerated kinds of damages.<sup>65</sup> The sorts of damages enumerated above are often very difficult to prove, thus perhaps cutting off without any real remedy a number of persons so situated. This section of the statute, limiting damages, does not apply if the plaintiff can prove actual malice on the part of the defendant.<sup>66</sup>

61. NEB. REV. STAT. § 25-208 (Reissue 1975). The Nebraska Supreme Court has stated that this section begins to run upon the publication date of the material upon which the libel action is based. *Patterson v. Renstrom*, 188 Neb. 78, 79, 195 N.W.2d 193, 194 (1972).

62. NEB. REV. STAT. § 25-840.01(1) (Reissue 1975).

63. *Id.* This statute continues: "A correction, published prior to a receipt of a request therefor, shall have the same force and effect as if published after such request."

64. NEB. REV. STAT. § 25-840.01(1) (Reissue 1975). See notes 28-31 and accompanying text *supra*. But see *Madison v. Yunker*, 47 U.S.L.W. 2168 (filed Aug. 31, 1978), and compare the Montana constitutional and statutory provisions discussed therein with NEB. CONST. art. I, § 13 and NEB. REV. STAT. § 25-840.01 (Reissue 1975).

65. NEB. REV. STAT. § 25-840.01(1) (Reissue 1975).

66. *Id.* § 25-840.01(2).

## TRUTH AS A DEFENSE

The Nebraska statutes provide that truth shall be a complete defense to a libel action unless the plaintiff can prove actual malice.<sup>67</sup> As previously noted, the United States Supreme Court seems to require, as a constitutional imperative, that falsity be an element of the plaintiff's case in any libel action against the press.

## CRIMINAL PENALTIES

The statutes of Nebraska also provide criminal penalties for false and malicious libel. The crime is a misdemeanor, unless the libel is published in a newspaper having a general circulation.<sup>68</sup> Clearly criminal responsibility cannot be imposed on media defendants absent actual malice as defined by the United States Supreme Court, requiring actual knowledge of falsity or reckless disregard of whether published material is false or not. If the plaintiff can prove actual malice, there is nothing in the decisions of the United States Supreme Court which specifically states that criminal penalties are unconstitutional. The Court has not completely answered the question. It has stated that the "state interest in compensating private individuals for injury to reputation . . . extends no further than compensation for actual injury."<sup>69</sup> But it went on to hold that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth."<sup>70</sup> Certainly, then, the Constitution forbids criminal penalties absent knowledge of falsity or reckless disregard of truth.

## RADIO BROADCAST ACT

Television and radio stations are provided further protection under Nebraska law.<sup>71</sup> If a statement is made by anyone other than the owner, licensee or operator of said station, or an employee or agent thereof the plaintiff cannot recover unless he proves that the owner, licensee, operator, or agent failed to exercise due care to prevent the publication or utterance of such statement.<sup>72</sup> In addition, the radio or television station shall not be liable for any defamatory statement which is uttered by one other

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67. *Id.* § 25-840.

68. *Id.* § 28-440. To be of general circulation, a newspaper's circulation "must extend and be general beyond the county in which it is published." *Razee v. State*, 73 Neb. 732, 735, 103 N.W. 438, 439 (1905).

69. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-49 (1974).

70. *Id.* at 349.

71. *See* NEB. REV. STAT. § 86-601 (Reissue 1976).

72. *Id.*

than the owner, licensee or operator, or an agent or employee thereof by, on behalf of, or against any candidate for public office.<sup>73</sup> Finally, for any statement which is "part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved."<sup>74</sup> This simply restates the otherwise existing Nebraska rule.<sup>75</sup>

### CONCLUSION

While the law in Nebraska is somewhat unclear on the subject of media libel, a number of conclusions can be drawn. Statements concerning the official conduct of public officials are protected by the United States Constitution; this protection, though not absolute, is considerable. The public figure may not recover against the publishing medium when the statement complained of relates to his official conduct unless he proves that the statement is false and that it was made with knowledge that it was false or with reckless disregard of whether it was false or not.

In the case of a statement concerning either private individuals or the nonofficial conduct of a public figure the state of the law in Nebraska is considerably less clear. The bottom line is that in a libel action liability cannot be imposed on media defendants without some finding of fault. It is the degree of fault which is unclear. Strict liability, the last announced Nebraska rule, is not permissible. What the Nebraska Supreme Court will do if faced with the question again will only be answered for certain by time and circumstances.

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73. *Id.* § 86-602.

74. *Id.* § 86-603. See notes 29-31 and accompanying text *supra*.

75. See notes 28-31 and accompanying text *supra*.