

# Libel Law

## A. Summary of Libel Law

### 1. Introduction

Nebraska libel law derives from court cases decided in this state and in the United States Supreme Court, from statutes found at Nebraska Revised Statutes sections 25-208, 25-839, 25-840 and 25-840.01, and from the First Amendment to the United States Constitution. Basically, libel law is a series of checks and balances between the concept of free speech and the concept of the right to personal reputation.

In an ordinary case, a libel claim has four elements which the plaintiff must allege and prove: (1) a false and defamatory statement concerning the plaintiff ("defamatory" means tending to injure one's reputation); (2) a publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either some sort of damage, or proof of a kind of statement that the law recognizes inherently damages a plaintiff.

In cases where a person is a public official and acting in an official capacity, or a public figure who has voluntarily put himself in the spotlight, then almost all of the applicable law derives from the United States Supreme Court decisions and the First Amendment to the Constitution. In those cases, particularly New York Times v. Sullivan decided in 1964, and the many cases which have explained that case, such a complaining party is required to prove that the defendant not only published a false fact, but that the defendant actually knew of the falsity or at least had very strong doubts of the truth of what was being published. That is the concept of "actual malice."

In private figure cases, where a person who is neither a public official nor a public figure complains of libel, the burden is still on the plaintiff to show not only that a false fact was published of him which would damage his reputation, but also that it was a result of some degree of fault although not fault so extreme as "actual malice." In most states, it is necessary for the plaintiff still to prove that negligence on the part of the publisher resulted in that publication of the falsehood. In some states the plaintiff must prove gross negligence or something like that, which is a higher degree of fault.

The Nebraska Supreme Court has not yet defined exactly what standard will apply here but one should assume that if it can be proved that your reporters, editors and/ or publisher breached the normal professional standard of care in gathering, editing and publishing a news or informational item, then if it is false, a private figure who is damaged thereby might succeed in a libel case. In other words, assume that mere negligence may well become the standard of fault required to be proved in Nebraska unless, and until, the Nebraska Supreme Court decides otherwise.

Nevertheless, it should be understood that a totally innocent error where due care was used

and yet the error still occurred, is not actionable in libel. Some fault has to be proved.

## 2. Prevention of Libel.

- a. Sources. If you have only a single source and that source insists on confidentiality, then you are in a dangerous situation if you print reputation-injuring material. Because if you are sued for libel, you will face the moral and possibly legal choice of either disclosing your source contrary to your promise, or losing the libel case because you are unable to satisfy the judge and jury that you used due care to find the truth. If at all possible, obviously it is best to find a source who will back you up, and better yet find two sources at least one of which is unimpeachable, for highly damaging material which must be printed. The quality of sources is also important, which means that their reputation, background, previous dependability, likelihood to have true information, and similar factors ought to be taken into account in evaluating material which is reputation-injuring.
- b. Care with Headlines, Syntax and Captions. It is quite possible to have a perfectly good story turned in and then have it made libelous accidentally by a careless headline, by an editing error whereby the words are turned around or even typographically changed, or where the caption of a photograph, for example, is switched or inaccurately placed or worded. There should be extreme care used especially with headlines, because even though you are entitled to the context of the whole story, a highly libelous headline sometimes will be so damaging that even the context will not cure the problem.
- c. Letters to the Editor. The publisher is liable for libel in letters to the editor, and therefore care especially must be taken with letters to the editor on emotional subjects, customer complaint or "action line" stories and the like. If highly damaging statements of fact are in a letter to the editor about some person or company, it is wise to treat it with care. Either find an independent means to verify the truth of the statement, force the writer of the letter to the editor to supply sufficient proof, or edit out the libelous material, normally after consultation with the writer of the letter.  
Many newspapers use letters to the editor which were signed, but the signature was withheld. The Nebraska Shield Law permits you to withhold that name, and that law has been tested in that context. But withholding the name of the author simply means that the newspaper itself will take all the "heat" in the event there is a libel or breach of privacy case. Letters to the editors have furnished the material for numerous libel cases all around the country and while they are an extremely important and necessary part of a newspaper, in most people's view, nevertheless they require special attention and "libel proofing."
- d. Jokes and Cartoons. Sometimes the law of libel has little sense of humor. A highly satirical joke or cartoon has occasionally been made the subject of a successful libel lawsuit. There is a great deal of defense allowed to newspapers

and cartoonists on the basis that they are writing only satirically and expressing an opinion, but nevertheless it is not impossible to make a libel case out of a cartoon or other humorous material, if in fact it does contain a false statement of fact injuring a reputation. A picture could imply a false statement of fact even though it be a mere cartoon. While there is a great protection for political criticism and public issue humorous comment, nevertheless this is an area where the libel-conscious editor needs to do some good preventive work. Nationally distributed cartoons are generally "libel-proofed" nationally, and are relatively safe.

- e. Balancing News Stories. It is important where a reputation-damaging story is about to be run to try to obtain a comment from the subject. If the answer is no comment, print that. If the subject denies the material, print that. If the subject threatens a lawsuit, make very sure your sources are verifiable and that the truth is with you. If you can't be confident of that, either get legal help or work some more on the story before it runs. By balancing news stories, one should not necessarily attempt a balance in the terms of space given to each side. It is simply a matter of trying to get the other side of the story if there is one and giving it fair play where available. On stories which appear to injure the reputation of a person or business enterprise, one extra editing even at the page proof stage may knock out a dangerous typographical error or something that simply missed being caught on the first rewrite. That extra editing also would be evidence of due care and would help avoid a claim of negligence.
- f. Proper Use of Retraction Statute. Under Nebraska law, even if a publisher prints a libel, the publisher will be subject only to "special" damages (i.e., out-of-pocket losses), if a retraction is not timely printed. Do not, however, retract and admit fault if, in fact, you are not satisfied that there was genuine error. Under Nebraska law, a libel plaintiff can recover general reputation damages, notwithstanding the publication of a retraction, if the plaintiff can prove the original publication was motivated by "malice," that is, hatred, ill-will, spite, so admitting falsity can work against the publisher in such a case. Nevertheless, in any case where an actual error is pointed out, whether it be for libel, or simply for newspaper integrity purposes, the retraction statute is extremely useful both in defusing the situation and in limiting damages in many cases. It is a highly valuable tool in libel prevention.
- g. Settlement by Apology. Closely related to the retraction statute is a settlement done by personal apology where an error has been made. It is important in such cases to try to bring the matter to a close at the time the apology is rendered; that is, try to get a written agreement that the matter is deemed to be at a close. It can be counterproductive to offer "nuisance settlements" on any libel cases. Those encourage additional claims and also encourage lawyers to start filing more cases. If a cash settlement is ever considered, it should only be after extremely close scrutiny of the liability and damages issues with the assistance of your insurer, if any, and counsel.
- h. Libel Insurance. Despite the cost, libel insurance may well be a wise move for

most publications in view of the extremely high cost of defending a libel case even successfully. Using a fairly high deductible can help keep the premium within reason.

### **3. Defense Theories After Litigation is Filed**

- a. The Story Was Substantially True.
- b. The Publisher Used Due Care to Avoid the Error but it Inadvertently Occurred Anyway.
- c. The Story was Essentially Opinion, not Assertion of Fact.
- d. Absolute or Qualified Privilege. There is an absolute privilege in very few cases for newspapers to print such libels. Senators have an absolute privilege when they are on the floor of the Unicameral, and persons reporting alleged wrongs to professional supervisory bodies such as the bar association, etc., have an absolute privilege. Lawyers and witnesses have a privilege also during the course of legal proceedings to make statements that might otherwise be libelous in the absence of having actual knowledge of falsity, or having an intention to injure someone. A qualified privilege attaches to the printing of information taken accurately from any public record, at least where one does not know it to be false.
- e. Retraction. This defense is a partial defense, limiting damages to special or out-of-pocket losses except where malice is proved against the publisher.
- f. No Actual Damage to Reputation Proved. Plaintiffs frequently, indeed almost uniformly, exaggerate their loss of reputation for strategic, litigation-aimed reasons.
- g. If the Plaintiff is a Public Figure or Public Official, the Lack of Knowledge of Falsity. or Lack of "Malice" in the Constitutional Sense, is a Defense. Burden of proving such malice is always on the plaintiff.
- h. Reportorial Privilege. (Correct quotation from a reliable source). In this regard, attribution is extremely important, both, as a matter of preventive action and, in some cases, as a defense to a libel suit after being filed. In other words, it may be defensible to quote a highly reputable source of information even if, later on, that information turns out to be false and libelous. This defense is not commonly honored but has been used successfully on a few occasions. It is akin to a "privilege" to trust such a source. In some recent cases, the reliance on an established news wire service is deemed to be non-negligent, if an error is present in the wire services copy.

### **4. Closing Comment on Libel**

The danger of libel is a real one, even in Nebraska where we do not allow "punitive" damages to be collected by anyone but it is, at least, as dangerous to allow concern over libel to shut off necessary news, information and opinion. The Nebraska Supreme Court has been relatively favorable to libel defendants and there are very few successful libel

cases against the records of Nebraska newspapers. Attention to detail, special care for stories which, obviously, injure reputation and a general sensitivity to the potential defenses and to writing courteous, prompt retractions will defuse the vast majority of all libel problems in this state.

Where a particular story is troublesome but it is, nevertheless, highly important that it be printed, there is almost always a way. The extra work to come up with an additional source, careful use of language to create a "libel-proof" way to say the truth, and an honest attempt to balance out the story by getting the adversely affected side's viewpoint will permit the newspaper to do its job without libel jeopardy.

## **B. Retractions**

**25-208. Actions for libel, slander, malpractice, and recovery of tax.** The following actions can only be brought within the periods stated in this section: Within one year, an action for libel or slander; and within two years, an action for malpractice which is not otherwise specifically limited by statute.

In the absence of any other shorter applicable statute of limitations, any action for the recovery of any excise or other tax which has been collected under any statute of the State of Nebraska and which has been finally adjudged to be unconstitutional shall be brought within one year after the final decision of the court declaring it to be unconstitutional. This section shall not apply to any action for recovery of property tax.

The changes made to this section by Laws 2000, LB 921, shall apply to causes of action accruing on and after July 13, 2000.

**25-839. Libel or slander; how sufficiently pleaded; burden of proof.** In an action for a libel or slander it shall be sufficient to state generally that the defamatory matter was published or spoken of plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts showing that the defamatory matter was published or spoken of him.

**25-840. Libel or slander; truth as defense; effect of actual malice.** In the actions mentioned in section 25-839, the defendant may allege the truth of the matter charged as defamatory, prove the same and any mitigating circumstances to reduce the amount of damages, or prove either. 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.

### **25-840.01. Libel; invasion of privacy; damages; retraction; effect.**

1. In an action for damages for the publication of a libel or for invasion of privacy as provided by section 20-204 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 or to have invaded privacy as provided by

section 20-204 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 therefore, 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 or her 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 the actual malice, and actual malice shall not be inferred or presumed from the publication.

### C. Nebraska Privacy Act

**20-201. Right of Privacy; legislative intent.** It is the intention of the Legislature to provide a right of privacy as described and limited by sections 20-201 to 20-211 and 25-840.01, and give to any natural person a legal remedy in the event of violation of the right.

**20-202. Invasion of privacy; exploitation of a person for advertising or commercial purposes; situations; not applicable.** Any person, firm, or corporation that exploits a natural person, name, picture, portrait, or personality for advertising or commercial purposes shall be liable for invasion of privacy. The provisions of this section shall not apply to:

1. The publication, printing, display, or use of the name or likeness of any person in any printed, broadcast, telecast, or other news medium or publication as part of any bona fide new report or presentation or noncommercial advertisement having

a current or historical public interest and when such name or likeness is not used for commercial advertising purposes;

2. The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other distribution of literary, musical, or artistic productions or other articles of merchandise or property when such person has consented to the use of his or her name, portrait, photograph, or likeness on or in connection with the initial sale or distribution thereof so long as such use does not differ materially in kind, extent, or duration from that authorized by the consent as fairly construed; or
3. Any photograph of a person solely as a member of the public when such person is not named or otherwise identified in or in connection with the use of such photograph.

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