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THE LAW OF LIBEL—CONSTITUTIONAL PRIVILEGE AND THE PRIVATE INDIVIDUAL: ROUND TWO—GERTZ v. ROBERT WELCH, INC.

INTRODUCTION

Media defendants have been afforded a constitutional privilege in libel actions since New York Times v. Sullivan. The first amendment, as interpreted by the Supreme Court, has proved a barrier to recovery for a large group of plaintiffs who, under Times, must prove that the defendant published with actual knowledge of the falsity or reckless disregard for the truth. Subsequent cases have expanded this first amendment protection and have delineated the quantum of proof needed by the plaintiff to override the constitutional privilege. In Gertz v. Robert Welch, Inc., the Supreme Court broke new ground in interpreting Times and the role of the first amendment as applied to the law of libel. The new rule enunciated in the Gertz decision is that the Times standard does not apply to private individuals. Now, in suits by private plaintiffs, the states are free to impose, short of strict liability, the appropriate burden that a private plaintiff must meet in order to recover from a media defendant. Private plaintiffs, however, can no longer rely on the common law advantage of presumed damages unless they meet the rigorous Times standard.

The Court in Gertz overturned the plurality decision in Rosenbloom v. Metromedia Inc., which had allowed media defendants to apply the Times rule against private plaintiffs involved in an area of public interest. Since the Gertz holding applies to all private plaintiffs whether or not involved in an area of public interest, it is both an expansion and a limitation of the constitutional privilege. Gertz is an expansion of the first amendment generally in that private plaintiffs not involved in an area of public concern can no

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3. Id. at 347.
4. Id. at 349.
5. 403 U.S. 29 (1971).
6. Id. at 52.
longer rely on the advantage of strict liability and presumed damages; it is a limitation of the privilege as applied by Times because private plaintiffs are relieved of the burden of proving constitutional malice. By overturning Rosenbloom and limiting the common law advantage that plaintiffs have in defamation actions, the Supreme Court has created a new type of constitutional privilege applicable to private plaintiffs. This comment will examine the cases leading up to Gertz and explore how the new privilege will work against the Times rule to change the law of defamation.

CONSTITUTIONAL PRIVILEGE DEFINED AND EXPANDED

The Supreme Court created the constitutional privilege for media defendants ten years before Gertz was decided. The Times case arose when supporters of Martin Luther King ran an advertisement in the New York Times to obtain support for a right to vote campaign. The advertisement claimed misconduct on the part of the Montgomery city police. Plaintiff, city police commissioner, claimed he was libeled by the advertisement. The Supreme Court reversed, holding that:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The Court weighed the first amendment guarantees of freedom of speech and press against a public official's interest in protecting his reputation and concluded that the first amendment prohibited recovery for negligently made falsehoods about a person in his official capacity. The holding drew the constitutional dividing line squarely in front of public officials, and required them to meet a stringent standard of proof in order to recover from medial defendants. Prosser called this "the greatest victory won by defendants in the modern history of the law of torts." This victory was to grow in scope over the next ten years until it received its first major setback in the Gertz case.

Although Times was limited to public officials, sweeping dicta in the case made significant expansion inevitable. The Court

8. Id. at 258.
10. 376 U.S. at 279-80.
founded the privilege on "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment . . . ." The Court found "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open . . . ." It seems inconsistent to have placed so much emphasis on the public issues involved while limiting the holding to "public officials." Certainly, the de-segregation problem was a matter of wide public interest, but the Court was not yet willing to extend the privilege past public officials, and thus decided the case on a narrower ground although they soon expanded the scope of the public official category. The conflict between the holding and rationale made an extension past public officials seem imminent.

The Supreme Court took the first significant step toward the expansion of the Times rule in the companion cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker. The Court held that all "public figures" were to be included under the Times rule. In the first case, plaintiff Butts was the privately employed University of Georgia athletic director who was "well known and respected in the coaching ranks." Butts was accused of trying to fix a football game by the Saturday Evening Post. The second plaintiff, Walker, was a "man of some political prominence" who was reported to have led a march against federal officers who were seeking to enforce a de-segregation decision. The Court decided that both men were public figures and as such had to prove constitutional malice in order to recover. As in the Times decision the Court used broad dicta to justify a narrower holding, stating:

12. 376 U.S. at 269.
13. Id. at 270.
17. 388 U.S. at 155.
18. Id. at 136.
19. Id. at 140.
The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' that 'governments are instituted among men to secure.'

Because of this dicta, the public figure classification seemed to be only a stopping point, and not the final resting place for the constitutional privilege. At this point, however, the constitutional dividing line in defamation actions was placed in front of public officials and public figures, and at least theoretically, behind private individuals. The Gertz case reinforced the importance of this dividing line because public figures are still required to prove actual malice, while private plaintiffs can recover actual damages on a less stringent burden of proof. In order to invoke the Times rule and avoid Gertz, defendants will argue that the particular plaintiff is a public figure, while plaintiffs will insist they are private individuals.

Another pre-Rosenbloom case, Time, Inc. v. Hill, takes on added significance in light of the Gertz decision. Plaintiff James Hill brought an action under the New York right to privacy statute claiming that Life Magazine had falsely portrayed a family experience which was made into a play. The Hill family had previously been the subject of a front page news story when they were held hostage by three convicts in their home. The Court held that a plaintiff involved in an area of public interest could not recover under the New York privacy statute without meeting the Times standard of proof. Following the trend of expansion under Times, the Hill decision seemed inevitable.

The Court again used broad dicta to justify such a holding limited to invasion of privacy actions, stating:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs essential as those are to healthy government.

As will be explained, the Hill case takes on added significance under Gertz for the private plaintiff who has an area of his private

20. Id. at 149. As will be seen, the lower courts picked up on his dicta to justify an extension of Times, before Rosenbloom was decided.
21. The court in Gertz left the question of liability to the states, but they strongly implied a negligence standard. 418 U.S. at 348.
23. Id. at 376-77.
24. Id. at 387-88.
26. 385 U.S. at 388.
life opened up to the public. In some circumstances he may be forced to by-pass a defamation action and bring an invasion of privacy suit having to contend with the Hill barrier.

While the category of plaintiffs covered by Times expanded, the standard of proof various plaintiffs were required to meet remained relatively stable. To prove constitutional malice, the plaintiff had to show that the false statements were made with a “high degree of awareness of their probable falsity.”

The Court stated that mere ill will was not enough if the defendant did not know what he was publishing was false. Public officials and public figures had to meet the same standard of proof. What the plaintiff really had to prove was “scienter,” but the Court nevertheless retained the term “malice” to denote the unprotected class of calculated falsehoods.

Few plaintiffs have been able to meet the constitutional burden, even in response to a motion for summary judgment by the defendant. The plaintiff in Curtis met the necessary standard because of “serious deficiencies in investigatory procedure.” The information on which the article was written was gained from an insurance salesman who claimed to have overheard a phone conversation in which the plaintiff was seeking to fix a football game. Despite adequate time to investigate since this was not “hot news,” nothing was done to verify the report. Barry Goldwater was allowed to recover against a magazine which accused him of being mentally ill. There was substantial evidence that the defendant had falsified letters and reports in order to malign Goldwater’s reputation.

30. PROSSER, supra note 11, at 821.
33. Id. This would seem to contradict the statement made in Times that investigatory failure is not sufficient to justify malice. New York Times Co. v. Sullivan, 376 U.S. 254, 287 (1964).
order to recover, most plaintiffs had to place themselves in a constitutionally excluded category; the malice standard proved to be a virtual bar to those who could not.

**THE LAST EXPANSION OF TIMES**

**THE PUBLIC INTEREST TEST**

In *Rosenbloom v. Metromedia Inc.*, the Supreme Court applied the *Times* rule against a plaintiff who was neither a public official nor a public figure. Plaintiff was a previously obscure citizen who was arrested for selling obscene literature. After being acquitted of criminal charges, Rosenbloom brought a diversity action against a local radio station claiming that their news reports about his arrest were libelous. The trial court sustained an award for plaintiff. This recovery was unusual. By this time, lower courts had seized on the dicta in preceding Supreme Court cases and had held that any plaintiff involved in an area of public concern had to prove constitutional malice in order to recover. Following this trend, the appellate court reversed, holding that "the First Amendment standard of actual malice is applicable to the case . . . ".

Although Rosenbloom clearly was not a public figure.

Before the Supreme Court had decided to expand *Times* to all areas of public interest, lower courts had indicated an assumption that such was a logical extension. Furthermore, lower courts were not content with a narrow definition of public interest, choosing to interpret the term broadly. For example, an article degrading a hotel used by patrons of the Masters Golf Tournament was considered of sufficient public interest to warrant constitutional protection. A high school basketball recruiter had to prove actual malice when he was called a "flesh peddler," because the sport itself had public appeal. The operation of a mail order distributor, the Mafia, and a duffer's errant golf shot have been considered

35. 403 U.S. 29 (1971).
37. Id.
38. 415 F.2d 992, 998 (3d Cir. 1969).
40. Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970).
42. United Medical Laboratories Inc. v. Columbia Broadcasting System Inc., 404 F.2d 706 (9th Cir. 1968), cert. denied, 394 U.S. 921 (1969).
of sufficient public interest to command constitutional protection. The Illinois Supreme Court held that part of the state's constitution violated the first amendment because it required a defendant to prove good motives in order to escape liability in a defamation action.\(^4\) Before *Rosenbloom* was decided, the trial court in *Gertz* entered a judgment notwithstanding the verdict for the defendant because the private plaintiff, Gertz, was involved in an area of public interest and could not prove malice.\(^4\)

Against this backdrop, the Supreme Court's determination of plaintiff Rosenbloom's action seemed certain. It was not. Only a plurality was able to agree that a private individual involved in a public event had to prove malice in order to recover from a media defendant.\(^4\) The opinion, written by Justice Brennan and joined in by Chief Justice Burger and Justice Blackmun, indicated that the important consideration to them was the nature of the event, not the particular person involved. The plurality said that

> [If a matter is a subject of public or general interest, it cannot suddenly become less so merely because . . . in some sense the individual did not "voluntarily" choose to become involved.\(^4\)]

Because of such an assumption, the plurality decision expressly rejected the arguments which were to become the framework of the *Gertz* decision. The plaintiff argued that he was more deserving of recovery than a public official or public figure because he had not thrust himself into the public eye, and had no means of rebutting the defamatory falsehood.\(^4\) The Court decided that such assertions could not "be reconciled with the purpose of the First Amendment, with our cases, and with the traditional doctrine of libel law itself."\(^5\) The plaintiff sought to establish liability based on negligence with the necessity of proof of actual damages. The

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\(^4\) Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969) (invalidating ILL. Const. art. II, § 4 (1870) insofar as it was inconsistent with Times).


\(^4\) *Id.* at 43.


Court rejected the negligence standard because it would “inevitably cause self-censorship,” and a limitation to actual damages without the Times standard would leave “the First Amendment insufficient elbow room within which to function.”

Justice Black and Justice White concurred in the judgment, but for different reasons. Justice Black expressed the view that the first amendment prohibits “recovery of libel judgments against the news media even when statements are broadcast with knowledge they are false.” Justice White argued that the constitutional privilege should only extend to a full report of official activities, including private individuals if necessary. The official action in Rosenbloom was the arrest of the plaintiff. Because of this official action, Justice White would require plaintiff to meet the Times test; he did not interpret Times to require a full extension to all matters of public interest.

The dissents of Justices Harlan, Marshall, and Stewart were significant because of their particularly strong opposition to the basic assumptions espoused by the plurality. They agreed with the plaintiff's argument that liability should be based on a showing of negligence with a limitation of recovery to actual damages. Justice Harlan, however, argued for allowing punitive damages, while Justices Marshall and Stewart sought to have them abolished. Justice Marshall and Justice Stewart were to become part of the majority in Gertz which upset the Rosenbloom plurality.

Despite the fact that the plurality decision legitimized an extension of the Times rule to all areas of public interest, two countervailing considerations should be noted. First, the plurality decision was not binding on the lower courts. The second consideration is an important caveat by the Court:

We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media.

51. 403 U.S. at 50.
52. Id. at 52.
53. Id. at 57. Justice Douglas did not take part in the decision, but he probably would have agreed with Justice Black. See Beauharnais v. Illinois, 343 U.S. 250, 267 (1951) (Douglas, J., dissenting).
54. 403 U.S. at 57.
55. Id. at 64 (Harlan, J., dissenting), 78 (Marshall and Stewart, J.J., dissenting).
56. Id. at 78 (Harlan, J., dissenting), 84 (Marshall and Stewart, J.J., dissenting).
57. See United States v. Pink, 315 U.S. 203, 216 (1941) (non-majority decision is not binding precedent); Note, Misinterpreting The Supreme Court: An Analysis of How the Constitutional Privilege to Defame Has Been Incorrectly Expanded, 10 Idaho L. Rev. 212 (1972).
about a person's activities not within the area of public or general interest.\(^{58}\)

The lower courts ignored these signposts. The mere fact that the Supreme Court was unable to muster a majority on a constitutional extension when the facts of the case clearly dealt with a matter of public interest should have caused the lower courts to reexamine their broad interpretation of the \textit{Times} rule. They did not. An explosion of the public interest category occurred as if required by \textit{Rosenbloom}.\(^{59}\) Particularly striking was \textit{Kent v. Pittsburg Press Co.},\(^{60}\) in which case a reporter examining a state prison saw plaintiff in the prison waiting room. The reporter assumed that the plaintiff was guilty of murder, although criminal charges against the plaintiff had been dropped after a long period of incarceration. The court refused to look at the status of the plaintiff; recovery was denied because prison conditions in general were a matter of public interest and the plaintiff was involved in these conditions even though he was being released.\(^{61}\)

The public interest category was broad, but was not all-inclusive; at times courts would recognize that an event was outside the area of public interest.\(^{62}\) There was a serious problem, however, with formulating meaningful guidelines. Some cases which seemed to involve an event of some public interest were excluded from the \textit{Times} test, while other cases which seemed to deal with private affairs were deemed covered by constitutional privilege.\(^{63}\) Such a situation is more than the changing manifestation of the rule as

\(^{58}\) 403 U.S. at 44 n.12.
\(^{61}\) Id. at 627.
\(^{63}\) See \textit{Sanders v. Harris}, 213 Va. 369, 192 S.E.2d 754 (1972) (private dispute between English professors was a matter of public interest); but see \textit{Firestone v. Time, Inc.}, 271 So. 2d 745 (1972) (divorce of prominent socialite held not a matter of public interest even though she had spoken to the press on the matter).
applied in different jurisdictions; it is an example of the unsoundness of the rule itself.

The problem with the public interest test is that the defendant could almost always escape liability by a broad framing of the issue or title of the article or press release. In close cases what the publisher called the article was usually decisive. For example, the activities of a disillusioned college graduate in Crete certainly is not a matter of public interest in the United States. However, if Life Magazine publishes an article about "Young American Nomads Abroad," the issue suddenly becomes one of public interest. A landlord’s eviction of a tenant is not a matter of public interest unless the defendant can show that the article about the event was really on substandard housing. Then he can publish with impunity. The subject of organized crime is a matter of public interest; thus anyone accused of involvement must meet the Times test. The article which libeled Elmer Gertz was a personal attack on Gertz and his client. In the lower courts, the defendant escaped liability because he was able to convince the court that the subject of the article was really more broad, i.e., a communist war on police. Few remarks can be as damaging to reputation as an accusation of criminal conduct, yet these statements are usually privileged.

The Gertz decision was based on the assumption "... of the legitimate state interest in compensating private individuals for wrongful injury to reputation ...." Arguably the Supreme Court has implied an interest which the state courts have not recognized. The state courts, and the lower federal courts applying state law, have been less than aggressive in restricting Rosenbloom and the range of the public interest test. If the lower courts had been more concerned with compensating plaintiffs for damage to reputation, they could have limited the public interest test where appropriate, so that the plaintiff could at least bring his case to trial rather than losing on summary judgment.

The public interest test laid down in Rosenbloom became overly broad as applied in the lower courts. It became clear that the media could fabricate their own privilege; most anything they published became a matter of public interest because of the publication.

68. 418 U.S. at 348-49.
69. See Comment, supra note 58, at 213.
Gertz v. Robert Welch, Inc.—A New Departure

In 1968 Frank Nuccio, a Chicago policeman, shot and killed Ronald Nelson while on duty. Frank Nuccio was convicted of murder in the second degree. Ronald Nelson’s family brought a civil action against Nuccio retaining Elmer Gertz as counsel. The John Birch Society’s magazine editor sent Alan Stang to investigate the matter. Stang published his findings in the April 1969 issue of *American Opinion* in the article, “Frame Up—Richard Nuccio and the War on Police.” Elmer Gertz played no part in the criminal proceeding and did not discuss the issue with the press. Nevertheless, Alan Stang implicated Elmer Gertz as being part of a nationwide communist conspiracy to discredit local police. The article falsely accused Gertz of being

... an official of the Marxist League of Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.71

Elmer Gertz was also labeled a “Communist Fronter” and a “Leninist” by the article. He was accused of being an officer in the Communist National Lawyers Guild, which allegedly caused the disruption of the Democratic National Convention.72

These statements at best “contained serious inaccuracies.”73 Gertz is a prominent Chicago attorney who had never been a member of the Marxist League. He brought a diversity libel action in United States District Court against Robert Welch Inc., the publisher of *American Opinion*.74 The jury returned a verdict for plaintiff which was vacated when the defendant successfully moved for a judgment notwithstanding the verdict. The district court said that “[t]he penumbra of First Amendment protection falls ... on ... Gertz.”75 On appeal, the Seventh Circuit found that Gertz was probably a public figure, but went on to decide on public interest grounds.76 The appellate court, bolstered by the recent *Rosenbloom* decision, affirmed finding a “significant public interest in the subject matter of the article.”77

70. 418 U.S. at 326.
72. 418 U.S. at 326.
73. Id.
75. Id. at 1000.
76. 471 F.2d 801, 805 (7th Cir. 1972).
77. Id.
The Supreme Court granted certiorari and the majority decision written by Justice Powell took a new approach to the problems of who is covered by the constitutional privilege, and what a plaintiff must do to overcome the protected person's privilege. The Court considered a broader range of defamed plaintiffs in framing the issue:

The principle issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.\(^7\)

There was no specific mention of private plaintiffs involved in an area of public interest. By implication, the Court showed that it was going to consider the issue of constitutional privilege as applied to all private plaintiffs. The wider scope of the issue was carried into the holding:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.\(^7\)

The Court adopted the reasoning that was rejected in Rosenbloom to justify their Gertz holding. In balancing a state's interest in compensating libeled plaintiffs against the first amendment guarantees of free press and speech, the Court found that the scales tipped in favor of redress for the private individual.\(^8\) While the first amendment requirements remain stable with all plaintiffs, the Court reasoned that the state's interest increases with private plaintiffs because they have no practical self-help remedy and have not exposed themselves to public criticism.\(^8\) For such reasons, it seemed patently unfair to require private plaintiffs to meet the same standard of proof as public officials and public figures.

The Court expressly abandoned the "public interest" test set down in Rosenbloom,\(^8\) and recognized only three categories of defamation plaintiffs: private persons, public figures, and public officials. Because under Rosenbloom a private plaintiff not involved in an area of public concern was not required to meet any constitutional standard, such a distribution of plaintiffs created a further extension of the first amendment into the law of defamation, even though courts have defined the private plaintiff category narrowly.

\(^{78}\) 418 U.S. at 332.
\(^{79}\) Id. at 347.
\(^{80}\) Id. at 343.
\(^{81}\) Id. at 344-45.
\(^{82}\) Id. at 346.
Before Gertz, a purely private plaintiff could rely on strict liability and presumed damages where the publication was defamatory on its face. While Gertz expanded first amendment protection, it also limited the Times rule because a private plaintiff involved in an area of general concern is now relieved of the burden of proving constitutional malice. Thus private plaintiffs not involved in an area of public concern must prove more to recover; private plaintiffs involved in an area of public interest, as defined by Rosenbloom, need prove less.

While private plaintiffs need only prove some degree of fault as determined by the particular state, the standard of proof required of public officials and public figures remains unchanged by Gertz. Because of the distinction, a major battle area will occur in future cases as plaintiffs argue that they fall under Gertz, and defendants insist that the plaintiff is a public figure. The Supreme Court provided some helpful guidelines for future determination of plaintiff status.

The public figure classification, as defined by Curtis, has been broken into two subcategories. A general public figure is one who has achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." To have the plaintiff included, the defendant must show "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society . . . ." Such a burden will probably assure that the category of public officials is not expanded like the public interest test under Rosenbloom. Gertz was not included in this class because mere involvement in community and professional affairs was not sufficient to classify a plaintiff as a public figure for all purposes.

In a second and more specialized class is the individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." At first blush it would seem that Gertz would meet

83. Prosser, supra note 11, at 771.
84. Id. at 763.
85. 418 U.S. at 351.
86. Id. at 352.
87. Id.
88. Id. at 351.
this test because he brought a civil action based on a highly publicized murder trial. The Supreme Court, however, interpreted the category more narrowly than the old public interest test, holding that Gertz fell out of its bounds because, "[h]e plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." Evidently mere involvement in an area of public interest is not enough to get placed in the class; probably the plaintiff must distinguish himself within the area of the controversy.

The Gertz case has changed the basis of liability in defamation actions by private individuals. Under Times, the common law rule of strict liability remained unchanged, although the plaintiff still had to show malice. Gertz has traded an abandonment of the strict liability rule for the malice standard under Times. The Court did not say what the proper basis of liability should be, but they strongly implied a negligence standard.

Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. If negligence is going to be the standard, the plaintiff may still have a difficult time recovering especially if the defamatory statement came from a press release which a reasonably prudent editor would not have inspected. Breach of duty may be hard to prove in many cases when the burden of prevention is great in relation to the risk that an innocent looking statement is defamatory, but the plaintiff is given a better chance under Gertz to get his case to the jury.

The common law recognized an exception to the strict liability standard for distributors of defamatory material. A distributor was held liable only if he breached the normal negligence standards. This breach was hard to establish because he was not held to a duty to inspect all of the publications which he distributed. Arguably a publisher who receives information from an independent third party is acting as a distributor, but courts have not recognized this similarity. Despite the strict standards that publishers have

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89. Id. at 352.
90. Prosser, supra note 11, at 771.
91. 418 U.S. at 347.
92. Id. at 348. See also Chief Justice Burger's dissent at 355.
93. Prosser, supra note 11, at 773.
94. See, e.g., Peck v. Tribune Co., 214 U.S. 185 (1909) (ad showing plaintiff, who did not drink, endorsing whiskey); Szalay v. New York American
generally been held to, there has been a constant undercurrent against strict liability for the publisher especially when he could not have known the statement was false.96 One court refused to apply strict liability against a publisher who received reliable information from a trustworthy news service.98 Commentators have long argued that strict liability in defamation actions is inconsistent with modern tort concepts of fault.97 Although the general rule has been to hold a defendant strictly liable, the Supreme Court's adoption of a negligence standard in defamation actions by private plaintiffs is neither a radical departure from tort law in general nor defamation law in particular.98

Along with proving liability based on negligence comes the necessity of proving actual damages. Most courts have held that when a defamatory statement is apparent on the face of a publication, the plaintiff need not prove actual damage in order to recover. Damages are generally presumed from the fact of the publication itself. Under Gertz, the rule has changed for private plaintiffs bringing a cause of action against media defendants. The private plaintiff must either prove actual damages or meet the Times standard. In the balance between recovery for libel and the first amendment, the states only have an interest in compensating for actual injury. The Court said:

[W]e 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 for the truth.99

Because of the first amendment,

[i]t is necessary to restrict defamation plaintiffs who do not prove

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95. See, e.g., Memphis Commercial Appeal, Inc. v. Johnson, 96 F.2d 672 (6th Cir. 1938); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939) (refusal to extend strict liability where it would be unjust).
96. Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933).
97. See, e.g., Note, Negligence in the Law of Defamation, 29 HARV. L. REV. 533 (1916); Note, Liability for Defamatory Words Intending to Apply to Another Person but Reasonably Applicable to the Plaintiff, 38 HARV. L. REV. 1100 (1925).
99. 418 U.S. at 349.
knowledge of falsity or reckless disregard for the truth to compensation for actual injury. 100

"[A]wards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." 101 Thus the private defamation plaintiff has two avenues of relief. He can attempt to prove constitutional malice or he can introduce evidence to show that the libelous statement injured him.

The requirement of actual damages is a logical outgrowth of a negligence cause of action; the law of presumed damages has come under fire. 102 In the labor relations field, the Supreme Court has already recognized the need for proof of actual damages in defamation actions. 103 Some plaintiffs will undoubtedly not be able to prove enough actual damages to make their action worthwhile. Inability to prove damages may reflect more than just the particular plaintiff's problems of finding competent evidence. The fact may be that there is no evidence available. The inability to prove damages may reflect the fact that the plaintiff's reputation has not been injured. Huge presumed damage awards may have been based on the assumption that the larger the publication, the greater the damage to reputation. Just the opposite conclusion should be reached in cases where the defamatory matter has been published so far from the plaintiff that his reputation could not have been injured in any meaningful way. Thus, when a plaintiff is unable to prove actual damages, he may be proving how absurd presumed damages were in the first place.

First amendment guarantees make limiting the size of recovery sensible in order to prevent self-censorship by the media. Allowing the private plaintiff the advantage of presumed damages when the defendant has acted maliciously seems ill-advised. The frame of mind of the defendant does not effect the injury to the plaintiff's reputation. Most cases hold that the good faith of the defendant only has a bearing on punitive damages. 104 Some cases have allowed a greater recovery of actual damages because of the malice of the defendant, but because of increased injury to the plaintiff's

100. Id.
101. Id. at 350. It seems the Court is abandoning its own goal here, i.e., ending supervision of the lower courts by ad hoc balancing. Id. at 343.
104. C. McCORMICK, DAMAGES 435 (1935); D. DOBBS, REMEDIES 519 (1973).
feelings not because of greater damage to reputation. When the
damage to reputation is the same, it seems illogical to allow one
plaintiff the advantage of presumed damages, while the other must
show an injury "by competent evidence."

The Gertz majority also restricted the award of punitive damages
to plaintiffs who can meet the Times test. Since Gertz added
the Times standard to the common law requirement for the re-
cov ery of punitive damages, a private plaintiff must prove ill will
or intent to do harm in the traditional sense, and the fact that
the defendant had knowledge of or recklessly disregarded the fal-
sity. These categories are not mutually exclusive. A plaintiff who
can sustain the heavy burden of proving constitutional malice
should have little trouble showing traditional malice. However, the
higher standard should significantly reduce the number of punitive
damage awards, considering how difficult the Times standard has
been to meet in the past. Without easily obtainable punitive
damages, the Gertz victory could be a hollow one for private plain-
tiffs. In terms of reducing self-censorship, the limitation of punitive
damages has a far reaching effect. Publishers will be relieved of
the fear of having their conduct punished by awards of punitive
damages which are often much higher in cost than awards for
actual injuries.

Probably because the Court was dealing with a basis of liability
that was expected to be developed by the states themselves, they
refused to exercise the right of de novo review of the facts which
they had invoked in dealing with first amendment questions, and remanded.

Justice Blackmun cast an important vote when he abandoned
his position taken in Rosenbloom and concurred with the majority
in Gertz. He changed his position in order to create a majority
decision and because he believed that the limitation of presumed
and punitive damages removed the possibility of self-censorship.

105. See, e.g., Cook v. Patterson Drug Co., 185 Va. 516, 39 S.E.2d 304
106. 418 U.S. at 350.
107. Id.
108. PROSSER, supra note 11, at 9-10.
110. 418 U.S. at 353.
111. Id. at 354.
Chief Justice Burger, in his dissent, stated he would reinstate the jury verdict for the plaintiff on the narrow grounds that the right to counsel requires a strong public policy against invidious identification of a lawyer with his client. Justice Douglas dissented and remained consistent with his absolutist view that there is no constitutional leeway for any recovery in libel actions against media defendants. Justice Brennan also dissented, remaining faithful to his opinion in *Rosenbloom*. He continued to find the negligence standard too flexible to protect the first amendment guarantees, regardless of the status of the plaintiff.

Justice White also entered a dissent, arguing that private individuals should not be constrained by any constitutional limitations in recovering from media defendants and that liability without fault should be retained. Justice White found no real threat to the media from libel actions brought against them by private plaintiffs. Thus he would not destroy the doctrine of presumed damages or require that the plaintiff meet a constitutional standard in order to win punitive damages. Justice White's dissent is consistent with his concurring opinion in *Rosenbloom* because in *Gertz*, as opposed to *Rosenbloom*, there was no official action to tie the plaintiff to the *Times* rule. Like Chief Justice Burger, Justice White would reinstate the jury verdict for the plaintiff and reverse the court of appeals.

**Invasion of Privacy as an Alternative**

A private individual who is not involved in an area of public interest has been swept into the realm of constitutional privilege by *Gertz*. If a private plaintiff is unable to prove negligence and actual damages, or constitutional malice, he will not be able to recover in a defamation action against a media defendant. He may, however, recover in an invasion of privacy action if the public interest test is not over-expanded.

*Time, Inc. v. Hill* brought one aspect of invasion of privacy actions under the first amendment, holding that matters of public interest are covered by the *Times* rule. The Court in *Hill* expressly excluded areas outside of the public interest.

This limitation to newsworthy persons and events does not of course foreclose an interpretation of the statute to allow damages

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112. Id.
113. Id. at 355.
114. Id. at 361.
115. Id. at 369.
116. Id. at 396.
where “Revelations may be so intimate and so unwarranted in view
of the victim's position as to outrage the community's notions of
decency.” [citations omitted] This case presents no question
whether truthful publication of such matter could be constitution-
ally proscribed.118

Thus, the public interest test established by Rosenbloom, when
applied to invasion of privacy actions, remains in a different form
even after Gertz. A private plaintiff unable to prove the Gertz
requirements could recover in an invasion of privacy action if some-
thing about his private life were published, because he would not
be required to show negligence or actual damages.119 Lower courts
have recognized that Hill is inapplicable to a plaintiff not involved
in an area of public interest.120 However, as it was under Rosen-
bloom, public interest has been an expansive concept. One court
held that a story about the poverty of a family whose father had
died in a bridge accident eleven months earlier was a matter of
public interest.121

In light of Gertz, courts should restrict the ambiance given to
the public interest test in order to permit recovery when private
matters have been invaded.122 Hopefully the expansion of the
public interest test which took place under Rosenbloom will not
be repeated.

CONCLUSION

There are at least two explanations for the Supreme Court's re-
treating from the extension that occurred under Times. One reason
is the change in the membership of the Court. Justices Powell and
Rehnquist have replaced Justices Black and Harlan. The former
pair sided with the majority in Gertz, while Black would have
almost certainly dissented. The other reason is less concrete.

118. Id. at 383 n.7.
119. Prosser, supra note 11, at 814.
120. See Taggart v. Wadleigh-Maurice Ltd., 489 F.2d 434 (3d Cir. 1973)
(plaintiff filmed emptying latrines); Briscoe v. Readers Digest Ass'n Inc.,
4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34 (1971) (article about how plain-
tiff hi-jacked a truck eleven years earlier).
121. Cantrell v. Forest City Publishing Co., 484 F.2d 150 (6th Cir. 1973),
rev'd on other grounds, 95 S. Ct. 465 (1975). The Court implied that a
Gertz-type analysis may soon be applied to invasion of privacy actions. Id.
at 469.
122. See generally Nimmer, The Right to Speak From Times to Time:
First Amendment Theory Applied to Libel and Misapplied to Privacy, 56
Cal. L. Rev. 935, 959 (1968).
Under Rosenbloom, the lower courts over-extended Times with the implied acquiescence of the Supreme Court. Once public interest was set as the constitutional test, an outward expansion was inevitable. The Supreme Court has always recognized the importance of allowing plaintiffs to protect their reputation. If this were not true, they would have long ago embraced the absolutist views of Justices Black and Douglas.

Gertz is an equitable solution to the conflict between the first amendment and a private plaintiff's interest in his reputation. It remains to be seen, however, if private individuals have really gained anything, considering the new burden of proving fault and damages, coupled with the limitation on punitive damages. At least under Gertz the private plaintiff has a better chance of getting his case to the jury than he did under Rosenbloom. The new standards may cause some self-censorship, but publishers need not worry about an explosion of libel suits against them. The restriction of punitive damages alone will probably keep many potential plaintiffs from bringing a cause of action. To be consistent, the Court should have followed through and totally eliminated presumed damages for private individuals. Finally, since Gertz has expanded the reach of the first amendment over plaintiffs not involved in any public activity, the Supreme Court should recognize the legitimate purpose served by an invasion of privacy action, and limit the probable growth of the public interest category in that area.

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