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INTRODUCTION

"Libel," Mr. Justice Brennan said, speaking for the Court in *New York Times v. Sullivan*,¹ "can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." Brandishing the freedoms of speech and press,² the Supreme Court responded to the contention that the Constitution does not protect libelous publications³ and began its first significant foray into the common law of defamation. Now, almost a decade later in *Gertz v. Robert Welch, Inc.*,⁴ the Supreme Court still finds itself grappling to strike the proper balance between the legitimate interests served by the law of defamation and the constitutionally protected freedoms of speech and press.

GERTZ—THE FACTS

In 1968, a Chicago policeman named Richard Nuccio shot and killed a youth named Ronald Nelson. Subsequently, Nuccio was tried and convicted on charges of second degree murder. Petitioner, Elmer Gertz, a prominent and reputable attorney, was retained by the Nelson family to represent them in the civil litigation against Nuccio. In this capacity, Gertz attended a coroner's inquest into Nelson's death, and filed a civil suit in federal district court.

¹. 376 U.S. 254, 269 (1964).
². Congress shall make no law . . . abridging the freedom of speech, or of the press. U.S. CONST. amend. I.
³. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1941). There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.
In April of 1969, an article entitled "Frame-Up" with the subtitle "Richard Nuccio and The War on Police" appeared in American Opinion. This magazine is published monthly by respondent, Robert Welch, Inc., and is affiliated with and expresses the views of the John Birch Society. The author of "Frame-Up" depicted the criminal litigation involving Nuccio as a link in the chain of a nationwide conspiracy to discredit local police forces. In the course of the article he falsely implied that Gertz was the architect of a gross miscarriage of justice and falsely implied that Gertz had a criminal record. The article also included false representations that Gertz had been an "official of the Marxist League for Industrial Democracy, originally known as the Intercolligate Socialist Society, which has advocated the violent seizure of our government," that he was "preeminent" in the "Communist National Lawyers Guild" and that he was a "Leninist" and a "Communist-fronter."  

GERTZ—THE HISTORY

After the publication of the article, petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. Respondent moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be based, apparently contending that petitioner failed to allege special damages. The court denied respondent's motion, and held that because the challenged statement imputed to petitioner a want of the requisite qualifications to practice law the complaint stated a per se case of defamation. Under Illinois law, where a complaint avers a defamation per se, actual and punitive damages may be recovered without pleading special damages.

At trial, respondent argued that petitioner was either a public official within the meaning of New York Times or more properly, that he was a public figure within the meaning of Curtis Publishing Co. v.

5. The district court stated:
   A closer examination of the article shows that its theme was more general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general. Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago Seed [an underground newspaper]. In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's exposé of the purported war on police.

7. Id.
Butts; thus a recovery of damages for a defamatory falsehood would be precluded unless actual malice could be shown. Under the actual malice test, respondent would escape liability unless petitioner could prove that the defamatory falsehood was published "with knowledge that it was false or with reckless disregard of whether it was false or not." After the evidence had been presented, but before the case went to the jury, the district court held, in effect, that Gertz was neither a public official nor a public figure. In instructing the jury, the court determined that the publication in question was libelous per se and withdrew from the jury all issues save the proper measure of damages.

After the jury verdict, respondent moved for a judgment notwithstanding the verdict. In response to this motion, the district court reconsidered its earlier ruling and decided that respondent was entitled to invoke the actual malice standard of New York Times. Despite its previous holding that Gertz was neither a public official nor a public figure the court reasoned that:

The penumbra of material protected by the guarantee of freedom of speech has been extended to include matters of public interest, whether or not public officials or public figures are involved.

Having found that the actual malice standard could be invoked, and finding insufficient evidence of actual malice, the court entered judgment notwithstanding the verdict for respondent.

In the court of appeals, petitioner contested the court's application of the New York Times privilege to respondent's comments and, in the alternative, argued that if the privilege did apply, sufficient evidence was presented to permit the jury to find that respondent's comments were published with actual malice. The court of appeals felt that Gertz's "considerable stature as a lawyer, author, lecturer and partici-

13. The jury, thereafter awarded petitioner damages in the amount of $50,000; Id. at 999.
14. Id. at 999. The court also went on to state that:
   In affording First Amendment protection to defendant's [respondent's] publication, I reiterate that Gertz played a small part in the vast sweep of the whole article. What this court concerns itself with primarily is the public's right to become informed on a matter of public interest, rather than with any right to know about persons who have injected themselves into the limelight on that matter.
   Id. at 1000. This conclusion anticipated the rationale of the plurality opinion of the Supreme Court in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
pant in matters of public import” undermined the trial court’s assumption that Gertz was not a “public figure” as the term had been used by the progeny of New York Times. However, the court assumed that Gertz was not a public figure and “questioned whether the article, taken as a whole, and more narrowly in its references to plaintiff, was of any significant public interest.” On this basis they agreed with the district court’s holding, and cited the intervening decision of the Supreme Court in Rosenbloom v. Metromedia, Inc. as authority to extend the protection of the New York Times privilege to debate on matters of significant public interest. Furthermore, the court examined the record and affirmed the district court’s holding that the evidence presented to establish that the article was published with a high degree of awareness of its probable falsity lacked the convincing clarity that the constitutional standard of actual malice demands. Consequently, the court of appeals affirmed the decision of the district court.

The United States Supreme Court granted certiorari. The principal task of the Gertz Court was to re-examine the extent of the constitutional privilege that could be afforded a publisher or broadcaster against the liability that results from a false statement, which defames a private individual who is neither a public official nor a public figure.

**COMMON LAW BACKGROUND**

In the process of deciding Gertz, the Supreme Court in a few printed pages has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the states.

To appreciate the potential impact of this decision on the law of defamation, it is necessary to examine the common law and constitutional predecessors of Gertz. Gertz is the most recent decision in a series of decisions beginning with New York Times in which the Court has sought the proper accommodation between the law of defamation and the constitutionally guaranteed freedoms of speech and press.

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17. *Id.* at 805.
18. *Id.*
20. 471 F.2d at 805. The court cautioned that “the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject.” *Id.* at 806.
21. *Id.* at 806; see St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
25. *Id.* at 3022 (White, J., dissenting).
New York Times and its progeny largely supplanted what at common law had been recognized as the qualified privilege of fair comment on matters of public concern. By protecting what would otherwise be defamatory criticism, the fair comment privilege served the public's interest in receiving information on matters of general concern. Under this rule, if a publisher honestly believed in the truth of his comment and did not publish his comment solely with intent to injure, he could escape liability. If the fair comment privilege was applicable in a defamation suit, it was asserted by the publisher as an affirmative defense.

In almost all jurisdictions the publisher bore the burden of proving his honest belief in the comment; under the majority rule he was also required to prove the truth of the facts on which the comment was based. Comment, according to the majority rule, meant a criticism or an opinion based on facts truly stated. To remain privileged, the comment must not be supported either explicitly or implicitly by false and defamatory underlying facts. The rationale for this rule was the


27. The general rule of "fair comment" is stated in Restatement (Second) of Torts, section 606 (Tent. Draft No. 20, 1974) with the drafters' noting that the original rule had been retained from the Restatement (First) of Torts pending further constitutional developments:

606 GENERAL PRINCIPLE
(1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
(a) is upon,
(i) a true or privileged statement of fact, or
(ii) upon facts otherwise known or available to the recipient as a member of the public, and
(b) represents the actual opinion of the critic, and
(c) is not made solely for the purpose of causing harm to the other.
(2) Criticism of the private conduct or character of another who is engaged in activities of public concern, in so far as his private conduct or character affects his public conduct, is privileged, if the criticism, although defamatory, complies with the requirements of Clauses (a), (b) and (c) of Subsection (1) and, in addition, is one which a man of reasonable intelligence and judgment might make.

28. As to what generally constitutes matters of public concern see Restatement (Second) of Torts § 607 (the public acts and qualifications of public officers and candidates for office); § 608 (the management of educational, charitable and religious institutions); § 609 (literary, artistic and scientific productions); and § 610 (the conduct of persons who, by special appeal or otherwise, have offered their conduct or product to the public for approval). (Tent. Draft No. 20, 1974).

29. The leading case expressing the majority view was Post Pub. Co. v. Hallam, 59 F. 530 (6th Cir. 1893). In this case the court approved the lower court's charge to the jury which stated in its material parts:

The public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism. While criticism and comment however severe, if in good faith, were privileged, false allegations of fact were not privileged, and if the charges were false, good faith and probable cause were no defense, though they might mitigate damages.

Hallam, supra at 539.
danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their character [which] outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof.30

The minority position, exemplified by the case of Coleman v. MacLennan,31 extended the fair comment privilege to protect false statements of fact if honestly believed. The Coleman case merits close attention because its rationale was adopted for federal constitutional purposes by the Supreme Court in New York Times.32 In substance, Coleman held that facts relating to matters of public interest are themselves privileged if they are honestly believed by the publisher to be true. If the facts are privileged, even if they are false, the comments based upon these facts are also privileged if they are honestly believed.33 Therefore, for the purposes of the fair comment privilege, Coleman rejected the majority rule's distinction between fact and comment.

CONSTITUTIONAL LAW BACKGROUND

Approximately a half century later in New York Times, the Supreme Court was called upon to rule on the constitutionality of an Alabama libel law which followed the majority view that the "privilege of fair comment for expression of opinion depends on the truth of the facts upon which the comment is based."34 However, the New York Times Court felt that in keeping with the freedoms of speech and press they could not accept this distinction and stated:

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.35

Therefore, at least insofar as libel actions brought by a public official against critics of his official conduct were concerned, the common law privilege of fair comment was elevated to the level of a constitutional rule.36

30. Id. at 541.
31. 78 Kan. 711, 98 Pac. 281 (1908).
35. Id. at 273.
36. Id. at 292 n.30. The Court reasoned that since the fourteenth amendment requires recognition of a conditional privilege for honest misstatements of facts, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged as well as true statements of fact. Both defenses are of course defeasible if the public official proves actual malice. Id.
The Court stated that this federal constitutional rule 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.\(^3\)

Not only must actual malice be shown, according to the Court, but it must be shown with "the convincing clarity which the constitutional standard demands."\(^3\)

Whether actual malice is present in a given case is a matter of constitutional fact subject to review by the Supreme Court.\(^3\) The actual malice standard provides the Court with an \textit{ad hoc} balancing mechanism to determine whether a particular defendant's conduct is deserving of constitutional protection.

Under the actual malice test the plaintiff must prove, as part of his \textit{prima facie} case, that the alleged defamation was false and that it was published by the defendant knowing it was false, or in reckless disregard of its truth or falsity.\(^4\) This must be shown by clear and convincing evidence other than the language of the publication itself.\(^4\) The \textit{New York Times} actual malice test brought the law of defamation within the ambit of the first amendment, but left to its progeny the task of adjudicating on a case by case basis what publications would be protected by its dictates.

As more cases were reviewed by the Supreme Court, the roster of \textit{New York Times}-disabled plaintiffs grew. In \textit{Rosenblatt v. Baer},\(^4\) the Supreme Court broadened the public official definition and applied the \textit{New York Times} rule to a case involving a former supervisor of a county recreation area, indicating that:

\textit{[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.}\(^4\)

The Court, in \textit{Curtis Publishing Co. v. Butts} and \textit{Associated Press...
v. Walker,

extended constitutional protection to defamatory statements involving “public figures.” Butts dealt with a magazine story accusing a university athletic director of conspiring to “fix” a football game. Walker involved the distribution of a news dispatch describing events on the campus of the University of Mississippi at the time federal marshals were attempting to enforce a court decree ordering the enrollment of a black student. The dispatch, according to the Court, stated that Walker, a retired general, “had taken command of the violent crowd [on campus] and had personally led a charge against federal marshals.”

The Court agreed that neither Butts nor Walker could be classed as a public official, but felt that the New York Times rule should be extended to include public figures. The Court, thereafter, concluded that both men were public figures.

Discussion of the law as applied to “public figures” who are not public officials is complicated by the fact that the Court was divided in its opinion in these two cases. Mr. Justice Harlan remarked that Butts, by virtue of his position, and Walker, by virtue of “his purposeful . . . thrusting of his personality into the vortex of an important public controversy,” commanded substantial public interest at the time of publication.

Chief Justice Warren, in a similar vein, pointed to individuals who are “involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” The Chief Justice concluded that the uninhibited debate about the conduct of such persons and “about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’” Thus, public officials and public figures were now covered by the New York Times rule and the stage was set for the final extension of the privilege.

44. 388 U.S. 130 (1967).
45. Id. at 140.
46. Justice Harlan wrote the opinion of the Court in which three Justices joined. Chief Justice Warren concurred in the result reached by Justice Harlan giving the Court a majority of five, however, he disagreed with Justice Harlan's reasoning. The Chief Justice based his decision on the rationale that the New York Times actual malice standard should apply to both public figures and public officials. Since four Justices concurred in the Chief Justice's reasoning, his opinion stated the principle that extended the New York Times privilege to public figures. It should be noted, however, that Justices Black and Douglas acquiesced in the Chief Justice's view to enable the Court to reach a majority position on the extension of New York Times to public figures, but they maintained their long held position “that the First Amendment was intended to leave the press free from the harassment of libel judgments.” Id. at 172 (Black, J., concurring in Walker, dissenting in Butts).
47. Id. at 155.
48. Id. at 164 (Warren, C.J., concurring).
49. Id.
ROSENBLOOM v. METROMEDIA, INC.50

George Rosenbloom, a distributor of nudist magazines, was twice arrested in police actions to enforce obscenity laws. Various news reports of his arrest were broadcast by defendant radio station characterizing plaintiff as a "smut distributor" and "girlie book peddler" and stating that plaintiff's lawsuit against the city was an attempt "to force the police to lay off the smut literature racket." Rosenbloom, claiming that these broadcasts contained defamatory falsehoods, sued the station for libel.51

In Rosenbloom the Supreme Court had to decide whether the New York Times rule would apply to invalidate a state civil libel action where the plaintiff was neither a public official nor a public figure, and where the plaintiff took no voluntary action to thrust himself into the vortex of public discussion. Mr. Justice Brennan announced the opinion of the Court52 and was joined by two other Justices in holding that:

[A] libel action . . . by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.53

In effect, the decision of the Court in Rosenbloom extended "constitutional protection to all discussion and communication involving matters of public or general concern without regard to whether the persons involved are famous or anonymous."54 To determine whether the New York Times test would apply in a given case, courts would no longer look to the status of the individual, but instead would focus on

50. 403 U.S. 29 (1971).
51. Id. at 36.
52. Mr. Justice Black and Mr. Justice White, while disagreeing with the reasoning of the plurality opinion, concurred in the result giving the Court a majority of five out of the eight Justices who heard the case. Justice Black reaffirmed his view that the First Amendment protects the news media from libel judgments even when statements are made with knowledge that they are false. Id. at 57 (Black, J., concurring). Justice White based his concurrence on narrower ground stating that:

[The First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view.

Id. at 62 (White, J., concurring).
53. Id. at 52.
54. Id. at 44. In the RESTATEMENT (SECOND) OF TORTS § 618 comments a and b (Tent. Draft No. 20, 1974), the authors' state that under the Rosenbloom decision the Court decides whether the subject of a defamatory falsehood is a matter of public or general interest. While the jury determines whether the publisher's conduct constituted New York Times malice, this decision is subject to appellate review since this "fact" is one on which constitutional rights depend.
the event in which the individual was involved. According to the Supreme Court in *Rosenbloom*, the preservation of the constitutional guarantee of freedom of expression will not permit any distinction between public figures and private individuals involved in matters of public import. The "public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety".\(^5\)

The *Rosenbloom* decision left many unanswered questions. First, it seemed to instill the news and broadcast media with the power to determine the scope of their own constitutional protection. Whether the *New York Times* privilege attached to a given case became a matter of circular reasoning. The media could claim the privilege for any publications concerning matters of public interest and concern; but in many cases, the sole fact that a news story was disseminated by the media made the publication a matter of public interest and concern. Conversely, if the media were not to be the sole arbiter of this standard, then the courts would have to decide in each case what events were worthy of public concern. In the words of Mr. Justice Marshall, this approach would involve the courts in the dangerous business of deciding "what information is relevant to self-government."\(^5\)

Secondly, under *Rosenbloom* a private individual seemed to have no defamation remedy if he was mistakenly included in an event that the media deemed worthy of the public interest.\(^5\) Thirdly, *Rosenbloom* is a long way down the road from *New York Times*, where the actual malice standard was conceived to prevent local juries from awarding

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55. 403 U.S. at 43.
56. Id. at 79 (Marshall, J., dissenting).
57. In Alpine Construction v. Demaris, 358 F. Supp. 422 (N.D. Ill. 1973) the trial judge emphasizes this problem by stating:

> It seems strange that to falsely accuse a man of homosexuality or stealing from his employer invokes stricter standards of accountability than to name him an associate of the crime syndicate. Such however is the clear holding of *Rosenbloom*.

Alpine, supra at 423. The *Gertz* Court discussed this same problem in response to Gertz's argument that even if the *Rosenbloom* standard applied to the article in question, this article involved the murder trial of Nuccio in which petitioner did not participate. Therefore, Gertz contended that since the misstatement of fact was involving him in the article at all, the statements were not protected insofar as they concerned him. The Supreme Court agreed with the court of appeals in rejecting this argument. The seemingly innocent mistake of confusing Gertz's role in the criminal litigation should not destroy the privilege otherwise available for calling Gertz a communist-fronter. The content of the latter statement should have alerted the publisher to the danger of injury to reputation. To hinge the availability of the privilege on the former statement that carried no warning of substantial danger of injury to reputation would, in effect, deny the privilege. Therefore, they found no reason to distinguish between the false misstatements. *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997, 3002 n.4 (1974).
large recoveries and thereby censoring newspaper comments on the conduct of public officials. Finally, if Rosenbloom was extended to its logical limits, the states would be prevented from protecting any individual defamed by the news or broadcast media. It was these and other considerations that led to the Court's decision in Gertz.

**Gertz v. Robert Welch, Inc.—The Holding**

In the Gertz case the Supreme Court held that respondent could not invoke the New York Times privilege by claiming that the false and defamatory statements concerning Gertz involved a matter of public or general interest. The Court found the actual malice standard of New York Times inapplicable in the case of a petitioner who was neither a public official nor a public figure. In effect, Gertz rejected the extension of the New York Times test, proposed by the Rosenbloom plurality, to private individuals involved in matters of public concern. Accordingly, the Court reversed the trial court judgment entered for respondent and ordered a new trial on the grounds that the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury.

In explaining its decision to remand for a new trial, the Court held in summary that in a defamation action by a private individual against a publisher or broadcaster, a state is precluded from imposing:

1. liability without fault in the case of a publication that makes substantial danger to reputation apparent;
2. damages without proof of actual damages; or
3. punitive damages where no New York Times malice is shown.

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60. Id.
61. Id. at 3013.
62. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997 (1974). Mr. Justice Powell authored the majority opinion in which Justices Rehnquist, Stewart and Marshall joined. Mr. Justice Blackmun wrote the concurring opinion needed to give the Court a majority of five though stating that he still adhered to the view that the Rosenbloom decision was a proper extension of the New York Times doctrine. His reasons for joining the majority opinion were two-fold. First, by eliminating presumed and punitive damages in the absence of New York Times malice, he felt the Court removed the danger of self-censorship present in traditional libel actions. Second, he felt the profound importance inherent in a clearly defined majority position in the defamation area. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3013-3014 (1974) (Blackmun, J., concurring).
Mr. Chief Justice Burger dissented on the grounds that the majority's position constituted an unwarranted interference with the orderly development of the law of defamation insofar as private citizens were concerned and characterized their position as a "new doctrinal theory which has no jurisprudential ancestry." Gertz, supra, at 3014 (Burger, C.J., dissenting). He would have remanded the case for reinstatement of the jury verdict on what seemed to be respondent's interference with the right to counsel...
This holding left intact the actual malice standard of *New York Times* and its application to publishers and broadcasters of falsehoods defamatory of public officials and public figures. However, the Court stated:

"The States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 63

**THE BASIS OF THE HOLDING**

A search of the development of the *New York Times* doctrine for clues to the Court's decision in *Gertz* reveals that the *Gertz* Court has borrowed extensively from the opinions of Mr. Justice Harlan. Justice Harlan measured the legitimate needs served by the law of defamation against the strictures of the first amendment. In balancing these competing interests he proposed that the level of fault required on the part of the publisher to defeat the constitutional protection provided speech be varied with the status of the person defamed. 64 This is the approach adopted by the *Gertz* Court.

According to this view, the state's interest in redressing an injury to the reputation of a defamed person is inversely proportional to the level of protection the Constitution will afford a defamatory falsehood; the more limited the state's interest in an individual's reputation, the more extensive the constitutional privilege a publisher can claim. 65 Thus, the *Gertz* "public person" doctrine focuses on the status of the person defamed.

The *Gertz* Court distinguishes private individuals from public persons by looking at their respective ability to rebut defamatory charges. The Court indicates:

"Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than [sic] private individuals normally enjoy." 66

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63. Id. at 3010.


66. Id. at 3009.

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Hence, the Court concludes that the higher vulnerability to injury intrinsic in the societal position of ordinary citizens evidences a correspondingly greater state interest in their protection.

The Court draws a second distinction between private individuals and public persons. The Court reasons that since private individuals come to public attention through circumstances not of their own making, they cannot be considered to have waived any protection the state might afford them from irresponsible publicity. In the Court's view this is not true of public officials because

[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.

Similarly, but possibly to a lesser extent in the case of public figures, the Court indicates that they too "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." The Court reasons that the communications media is justified in assuming that public persons have voluntarily exposed themselves to an increased risk of injury from defamatory falsehood.

By introducing this assumption of risk concept into defamation law, the Court distinguishes the case of private individuals from public persons, stating that in the case of the former no such assumption on the part of the media is justified. Therefore, since the private individual does not have ready access to the media to rebut defamatory comments, and since he does not voluntarily expose himself to public scrutiny, in the Court's view:

He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.

Hence, not only is the private individual more vulnerable to injury, but he is also more deserving of recovery. Consequently, the Court feels

67. Id. at 3009-3010.
68. Id. at 3009.
69. Id. at 3009-3010.
70. Id. at 3010.
71. Id.
72. Id.
73. Justice Brennan takes issue with the majority's distinction between public persons and private individuals. First, he believes, as to the vast majority of cases involving public persons, their opportunity for rebuttal is conditioned on the same factor as that of a private individual: the unpredictable event of the media's continuing interest in the story. Secondly, he believes that risk of public exposure is an essential incident of life
the states are justified in imposing a more onerous standard of conduct on the potential publisher of a defamatory falsehood concerning a private individual.

**LIABILITY WITHOUT FAULT**

In withdrawing the boundaries of the *New York Times* doctrine to pre-*Rosenbloom* limits, the Court had to formulate a workable standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual. The Court concluded:

[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability . . . .

On the one hand, the Court felt that this approach would recognize the legitimate state interest underlying the law of defamation—compensation of individuals for harm done by defamatory falsehoods. On the other hand, the Court felt that this approach would shield the communications media from the rigors of strict liability for defamation.

Thus, a private individual allegedly defamed by a broadcaster or publisher would not have to prove knowing falsity or reckless disregard of the truth. However, he would have to prove some degree of fault on the part of the broadcaster or publisher in airing a defamatory falsehood in order for liability to attach.

Liability without fault represents a marked departure from the principles underlying the common law of defamation. The concept of fault has a confusing place in the common law of defamation. At common law there are six instances in which the publisher of a defamatory statement may be at fault:

1. in communicating the statement to a person other than the plaintiff;
2. in making a particular statement;
3. in referring to the plaintiff;
4. in conveying a defamatory meaning;
5. in failing to realize the statement's falsity; and
6. in failing to realize the statement could damage the plaintiff's reputation.

in a society which values freedom of expression. Furthermore, Justice Brennan feels these unproved generalizations are too insubstantial a reed on which to rest a constitutional distinction. *Id.* at 3019 (Brennan, J., dissenting).

74. *Id.* at 3010.
75. *Id.* at 3011.
76. *Id.* at 3010.
77. See generally Restatement (Second) of Torts (Tent. Draft No. 20, 1974) §
As to each of these six instances, except the first, the common law imposes liability despite the lack of culpable intent or negligence on the part of the defendant. Therefore, at common law, if a defendant either intentionally or negligently communicates a defamatory falsehood to a third person and he is reasonably understood to defame the other, he is subject to strict liability.

Strict liability is introduced into defamation law by the concept of malice. Malice is presumed from the unprivileged publication of a false communication. However, malice as used in this context is a fiction, for as one court noted:

The plaintiff makes a complete case when he shows the publication of matter from which damage may be inferred. The actual fact may be that no malice exists or could be proved. Frequently . . . [defamations] are published with the best of motives, or perhaps mistakenly or inadvertently, but with an utter absence of malice. The plaintiff recovers just the same. Therefore, malice in this sense signifies nothing more than a wrongful publication of a defamatory falsehood, published intentionally without just cause or excuse.

Strict liability for defamation imposes an oppressive burden on the news and broadcast media. Since intent to communicate is their raison d'être, they are unquestionably liable for whatever harm is caused by a defamatory publication, unless the subject matter of the publication is privileged. New York Times and its progeny sought to alleviate the media's burden. If the New York Times privilege attaches to the subject matter of a defamatory publication, the plaintiff is required to show

580, and comments following. Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908) expresses the same idea in a somewhat different fashion. The court observed: Suppose a serious charge to be made. By a fiction it is presumed to be false. By a fiction malice is inferred from the fiction of falsity. By a fiction damages are assumed as the consequence of the fictions of malice and falsity. Publication only is not presumed, and until recent times the offer to show the truth of the charge as having some bearing upon liability was a sacrilegious insult to this beautiful and symmetrical fabric of fiction. Coleman, supra, 78 Kan. at 740, 98 Pac. at 291.

78. Under Illinois law the defendant gets the benefit of the innocent construction rule which binds the plaintiff to a reasonable non-defamatory meaning of the alleged defamatory communication. The leading case discussing this rule is John v. Tribune Co., 24 Ill. 2d 437, 442-43, 181 N.E.2d 105, 107-08 (1962) in which the court states that whether an article is susceptible of the construction for which the plaintiff claims is a question of law for the court. Thus, the court determines whether words are defamatory as a matter of law by reading an article as a whole and giving words their natural and obvious meaning. Where words, allegedly libelous, are capable of being read innocently they must be so read and declared non-actionable as a matter of law. See also Zeinfield v. Hayes Freight Lines, Inc., 41 Ill. 2d 345, 243 N.E.2d 217 (1969); Snead v. Forbes, Inc., 2 Ill. App. 3d 22, 275 N.E.2d 746 (1971).

actual malice on the part of the defendant. 80

The Gertz Court felt that to extend the New York Times doctrine to a private defamation plaintiff, involved in an event of public or general concern, would not fully recognize the legitimate state interest in compensating private individuals for injury caused by defamatory falsehoods. 81 However, the Court also desired to shield the media from the common law principle of strict liability. Therefore, the Gertz decision is a compromise between the knowing-falsity or reckless-disregard standard of New York Times and the rigors of strict liability. Under Gertz the states are allowed to impose liability under a less demanding standard than New York Times, but are forbidden to impose liability without fault. 82

However, the Court stated that this standard is applicable only where the substance of a defamatory statement makes substantial danger to reputation apparent. 83 In explication, the Court indicated:

Our inquiry would involve considerations somewhat different . . . 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. 84

It is not readily ascertainable how this caveat limits the Gertz decision. Justice White reads the Court as implying

that for those publications that do not make “substantial danger to reputation apparent,” the New York Times actual malice standard will apply. Apparently, this would be true even where the imputation concerned conduct or a condition that would be per se slander. 85

80. See text accompanying notes 35 through 49 supra.
81. 94 S. Ct. at 3010.
82. Id. at 3011.
83. Id.
84. Id.
85. Id. at 3031 n.27 (White, J., dissenting). The majority of the common law courts take the position that injury to the reputation of a plaintiff is presumed by law if a statement is a libel and it is defamatory on its face. Therefore, under common law rules, a libel defamatory on its face (libel per se) consists of words so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be dispensed with. Reed v. Albanese, 78 Ill. App. 2d 53, 58, 223 N.E.2d 419, 422 (1966); Mitchell v. Peoria Journal-Star Inc., 76 Ill. App. 2d 154, 159, 221 N.E.2d 516, 519 (1966). Accordingly, a libel per se is actionable without proof of special damages. Lorillard v. Field Enterprises, 65 Ill. App. 2d 65, 78, 213 N.E.2d 1, 7 (1965).

A libel that requires proof of extrinsic facts to establish a defamatory meaning is a libel per quod. If a statement is found to be a libel per quod, the common law will not presume injury to reputation, and in order for the statement to be actionable, the plaintiff must allege and prove special damages. Special damages in defamation law are specific pecuniary losses sustained by the plaintiff as a result of the impact of a defamation on his reputation. See, e.g., Continental Nut Co. v. Robert L. Berner Co., 393 F.2d 283 (7th Cir. 1968); Oberman v. Dun and Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972); Fleck Bros. v. Sullivan Co., 423 F.2d 135 (7th Cir. 1970).

A statement constitutes a slander per se at common law if it falls within four gener-
Justice White’s position suggests that the phrase “substantial danger to reputation apparent” is synonymous with the common law phrase “defamatory on its face.” If Justice White is correct, the Gertz standard would apply to all libels or slanders defamatory on their face, but would impose by implication the New York Times standard on all other defamations. The logical extension of this position is that any private defamation plaintiff who cannot show that a statement is defamatory on its face would bear the burden of proving actual malice in order to maintain an action. This would be true, according to Justice White, regardless of whether a statement falls within one of the four slander per se categories.\(^6\)

However, there is another possible interpretation of how the Gertz Court would decide a case if a state conditions civil liability on a factual misstatement whose content did not warn a reasonably prudent editor of its defamatory potential. The Gertz Court might be using the substantial danger to reputation terminology to qualify the meaning of liability without fault.

Mr. Justice Harlan, applying his standard of reasonable investigation to the facts of Time, Inc., v. Hill,\(^6\) considered the effect of a statement not defamatory on its face. Hill involved a magazine article falsely representing that certain fictional events happened to the Hill family. The publication was false, but it was not defamatory; therefore, the plaintiff brought suit under a New York Right of Privacy statute.\(^7\) Justice Harlan stated that since the publication involving Hill was not defamatory this “would enter into a determination of the amount of care

\(^6\) 385 U.S. 374 (1967) (Harlan, J., concurring in part and dissenting in part). Justice Brennan specifically stated in Time, Inc. v. Hill, 385 U.S. 374, 384 n.9 (1967) that many “right of privacy” cases could, in fact, have been brought as “libel per quod” —libel not defamatory on its face-actions. That the Gertz Court uses the Hill case as an example of a statement that does not warn a reasonably prudent editor of its defamatory potential lends further support to this view. 94 S. Ct. 3011.

which would have been reasonable in the preparation of the article."\textsuperscript{88} Therefore, if a publication's defamatory potential is not apparent, this would bear on the issue of the publisher's or broadcaster's fault.

A similar result was reached by Justice Harlan in \textit{Butts} and \textit{Walker}.\textsuperscript{89} In these cases Justice Harlan first introduced the phrase "a defamatory falsehood whose substance makes substantial danger to reputation apparent."\textsuperscript{90} Justice Harlan used this concept to evaluate whether the respective defendants' conduct constituted an extreme departure from the standards of investigation and reporting to which responsible publishers ordinarily adhere.\textsuperscript{91}

In \textit{Butts}, Justice Harlan decided that the seriousness of the charge or its defamatory potential required a more thorough investigation than was undertaken by the defendant. For these and other reasons he found the publisher liable. In \textit{Walker}, Justice Harlan considered that the correspondent's dispatches were internally consistent and that the dispatches were also consistent with the plaintiff's prior publicized statements. Therefore, a reasonably prudent editor could not be aware of the defamatory potential of the dispatch concerning Walker. Thus, Justice Harlan concluded that the publisher's conduct was not a departure from accepted publishing standards.\textsuperscript{92}

Therefore, the \textit{Gertz} Court, like Justice Harlan, may be using the substantial danger to reputation terminology to qualify what they mean by liability without fault. At common law, the defamer was subject to liability though he was not at fault either in referring to the plaintiff or in failing to realize his communication would be understood

88. \textit{Id.} at 409 n.6 (Harlan, J., concurring in part and dissenting in part). Justice Brennan criticized this view, stating that negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

\textit{Id.} at 389.

89. \textit{Id.} at 155.

90. \textit{Id.} at 156-59.

91. \textit{Id.} at 159. The plaintiff in \textit{Butts} was a university athletic director accused of fixing a football game. Justice Harlan found that the story concerning Butts did not require immediate publication; the seriousness of the charge required a thorough investigation; the affidavit of an unreliable source was not checked; the writer was not a football expert; and the magazine desired to publish a successful expose. Therefore, he held the publisher liable. In the case of Walker, a retired army general falsely charged with leading a campus protest, Justice Harlan determined that the publisher could not be held liable. In \textit{Walker} the news dispatch concerning Walker required immediate dissemination and the correspondent was at the scene and gave every indication of being trustworthy and competent. The dispatches on the whole were internally consistent, and Walker's prior publicized statements combined to give, in Justice Harlan's view, not "the slightest hint of a severe departure from accepted publishing standards." \textit{Id.} at 156-59.
by a third party as defamatory of the plaintiff. The Court, when faced with a case in which a publication's defamatory potential is not apparent, may require the plaintiff to prove that the defamer was negligent in failing to ascertain that the publication referred to the plaintiff, or that the defamer was negligent in failing to know of extrinsic facts which made the publication defamatory. If this view is correct, a publisher or broadcaster under Gertz can be held liable for a statement not defamatory on its face only when he knows or should have known of facts that either referred the statement to the plaintiff, or caused the statement to convey a defamatory meaning.

CRITICISM OF THE HOLDING

Since the Gertz holding is a compromise, it met with criticism from both sides. Justice Brennan criticizes the Court for not providing the media with enough protection. His objection to the Court's decision rests on three grounds. First, he fears that the imposition of a reasonable care standard will lead to self censorship in that under a reasonable care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy.

Secondly, he feels the burden of proof required under a reasonable care standard will be the preponderance of the evidence as opposed to the clear and convincing evidence required under the New York Times test. Finally, he feels that a reasonable care standard does not fully recognize or protect the potential defamer from the possibility of having to engage in protracted litigation.

Justice White criticizes the Court for cutting back longstanding remedies available to private citizens in defamation actions. He notes that previous defamation law, at least where the victim was a private citizen, had put the risk of a falsehood on the publisher. Justice White indicates that the Gertz holding would now require the victim to prove some fault and thus would shift this risk to the victim, even though he has done noth-

93. See generally Restatement (Second) of Torts § 564, and comments following.
94. 94 S. Ct. at 3020 (Brennan, J., dissenting).
95. Id. at 3020.
96. Id. at 3021.
97. Id. at 3032 (White, J., dissenting).
The *Gertz* standard, by infusing defamation with the concept of fault, balances the actor's conduct and the utility it has to society against the risk of injury that conduct creates to persons in society. And, as in any compromise, as the opinions of Justices White and Brennan illustrate, there will be competing views as to where that balance should be struck.

**The Public Figure After Gertz**

The Court still had to review the evidence in the *Gertz* case to answer respondent's contention that since Gertz was either a public official or public figure, respondent was entitled to invoke the *New York Times* privilege. Respondent argued that petitioner's appearance at the coroner's inquest rendered him a *de facto* public official. The Court answered that to accept this argument would be to declare all lawyers public officials on the grounds that they are officers of the court. The *Gertz* Court, consequently, rejected this approach.

However, whether petitioner was a public figure was a more complicated question. Here, the Court needed to define concretely the term public figure. The Court's approach was to recognize two types of public figures. In the first category was the individual who achieved "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." For an individual to be in this category, the Court would require clear evidence of general fame or notoriety and pervasive involvement in societal affairs.

The Court found the evidence insufficient to declare that petitioner was a public figure for all purposes. They recognized that Gertz was well-known in some circles, that he authored books and magazine articles, and that he was active in community and professional affairs. However, the fact that none of the prospective jurors at trial recognized Gertz's name seemed to sway the Court. Thus, in the Court's view, it seems that one's name must be readily recognizable by the average person to fall within the "all-purpose public figure" doctrine.

The second category of public figures includes those who voluntarily inject themselves or who are drawn into particular public controversies.

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98. *Id.*
99. *Id.* at 3012.
100. *Id.* at 3013.
101. *Id.*
102. *Id.*
and thereby become public figures for a limited range of issues. 

Before placing an individual in this category, the Court would examine "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." The Court found that Gertz was not within the second category of public figures. In making this determination the Court considered: that Gertz's role at the coroner's inquest was an act undertaken only in furtherance of his private client's interest; that Gertz took no part in the criminal prosecution of Nuccio, the subject out of which the defamation arose; that Gertz never discussed the criminal or civil litigation with the press and was never quoted as having done so; and, that Gertz did not thrust himself into the vortex of the particular issue and did not engage the public's attention in an attempt to influence its outcome. Thus, the Court determined that Gertz was not a public figure, and in the process, the Court clarified the public figure concept.

DAMAGES

The final aspect of the Gertz decision concerns the awarding of damages in defamation actions. The Gertz holding substantially altered the common law rules governing the type of damages recoverable in defamation actions. At common law, if a defamation is found to be actionable per se, the defendant is liable for the harm caused to the reputation of the person defamed, or in the absence of proof of such harm, for the harm which normally results from such a defamation. This is the doctrine of general damages. One court has stated:

General damages are those which the law presumes must actually, proximately and necessarily result from publication of the defamatory matter. They arise by inference of law and are not required to be proved by evidence and are allowable whenever the immediate tendency of the words is to impair the plaintiff's reputation, although no actual pecuniary loss has, in fact resulted.

Therefore, the awarding of general damages is based on the conclusive legal presumption, which may have no basis in fact, that the plaintiff has sustained an injury to reputation for which he is entitled to recover.

103. Id.
104. Id.
105. Id.
106. See generally RESTATEMENT OF TORTS § 621 (1938).
107. Van Norman v. Peoria Journal-Star, Inc., 31 Ill. App. 2d 314, 329, 175 N.E.2d 805, 811-12 (1961). General damages differ from special damages in that special damages are required to be shown in cases of defamations not actionable per se in order for the plaintiff to maintain an action.
The rationale behind the awarding of general damages is that proof of actual damages will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.\(^{108}\)

The presumption of general damage that results from a defamation actionable \textit{per se} affords little control over the jury in assessing damages. This rule is generally stated as follows:

There is no standard by which such damage can be measured but among the elements and circumstances to be considered by the jury are the wide publicity given the defamatory publication, plaintiff's prominence in the community where he lives, his reputation, his injured feelings and mental suffering and anguish.\(^{109}\)

Therefore, the doctrine of presumed damages allows the jury to convert damage to reputation into an exact monetary amount in the absence of specific guidelines.

The \textit{Gertz} holding recognized that the uncontrolled discretion of juries to award damages without proof of loss, or even in the absence of loss, could seriously endanger the exercise of first amendment freedoms.\(^{110}\) Furthermore, the Court indicated that within the rubric of general damages the jury could punish unpopular ideas or opinions under the guise of compensating plaintiffs for injury to reputation.\(^{111}\)

Thus, the Court held

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.\(^{112}\)

This holding is based on the Court's belief that the states have no substantial interest in compensating for anything less than actual injury.

Regarding actual injury, the Court stated:

We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is \textit{not limited to out-of-pocket loss}. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and stand-

\(^{108}\) W. Prosser, \textit{Law of Torts} 765 (4th ed. 1971) [hereinafter cited as \textit{Prosser}]. In many cases the effect of defamatory statements is so subtle and indirect that it is impossible to trace directly the effects thereof to the person defamed. \textit{Restatement of Torts} § 621, comment a.


\(^{110}\) 94 S. Ct. at 3011-12.

\(^{111}\) \textit{Id}.

\(^{112}\) \textit{Id}. at 3011.
ing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.\footnote{113}

Thus, where the \textit{Gertz} holding applies, absent proof of \textit{New York Times} malice, the common law presumption of general damages in cases of defamation actionable \textit{per se} is unacceptable. As a result, plaintiffs are allowed to recover only such actual damages as are necessary to compensate plaintiffs for actual injury. Furthermore, these actual damages must be proved by competent evidence.

\textbf{Actual Damage as Distinguished from Special Damage}

The \textit{Gertz} Court substituted actual injury to reputation for the common law doctrine that presumed general damages in the case of a defamation actionable \textit{per se}. However, actual injury is not equivalent to what the common law recognizes as special damage. At common law, if a defamation is not actionable \textit{per se}, the plaintiff must plead and prove special damages to maintain a cause of action. Special damage is special in the sense that it must be supported by specific proof of actual material or pecuniary loss.\footnote{114}

The \textit{Gertz} decision clearly distinguishes between special and actual damage. The Court stated that in proving actual injury to reputation the plaintiff need not adduce evidence that assigns a specific dollar value to his injury in order to recover.\footnote{115} Therefore, under \textit{Gertz} the plaintiff need not prove that he suffered a specific pecuniary loss. However, if a defamation is not actionable \textit{per se}, whether proof of special damage as opposed to actual damage will still be necessary to establish a cause of action, was not decided by the \textit{Gertz} Court.\footnote{116}

Furthermore, the \textit{Gertz} Court's holding which requires proof of actual injury to reputation will affect other common law defamation rules. At common law, once a cause of action for defamation is established, either by the character of the defamation itself (\textit{per se} defamations), or by proof of pecuniary loss (special damages), the bars are lowered

\footnote{113. Id. at 3012 (emphasis added).}
\footnote{114. See note 85 supra.}
\footnote{115. 94 S. Ct. at 3012.}
\footnote{116. This also would be an argument for extending the \textit{Gertz} holding to all defamation actions that would be actionable without proof of special damage at common law, since the Court did not address itself to the type of damages needed to sustain an action for a defamation not actionable \textit{per se}.}
and the plaintiff may recover general damages irrespective of whether the defamation is actionable *per se*. General damage may include injury to the plaintiff's reputation, his wounded feelings and humiliation, consequential physical illness and pain as well as estimated future damages.

These damages do not qualify as special damage, in the sense of specific pecuniary loss, but once some special damage is shown and a defamation becomes actionable, general damages are recoverable as parasitic to the special damage claim. However, the *Gertz* Court swept away the doctrine of general damages. Under the *Gertz* decision, damages may no longer be presumed. Thus, as Justice White recognized, the *Gertz* decision will eliminate the prevailing common law rule that allowed the recovery of general damages for injury to reputation in cases of defamation not actionable *per se* if some form of material or pecuniary loss is proved.

**Emotional Damages**

At common law the gravamen of a defamation action is not the hurt feelings of the plaintiff but the degradation of his reputation. Therefore, the plaintiff can recover damages for emotional distress and resultant bodily harm only when a defamation is *per se*, or only after special damages have been established. Since the hurt feelings of the plaintiff do not comprise the gist of the tort of defamation, the plaintiff can recover damages for his hurt feelings only under the rubric of general damages. Emotional damage is presumed to flow from the impact of a defamation on the plaintiff's reputation once the cause of action has been otherwise established.

The *Gertz* Court, by allowing recovery for emotional damage as actual injury if supported by competent evidence, has apparently altered the character of the tort of defamation which had previously been compensation for damage to reputation. The Court has explicitly recog-

117. *See* note 85 supra.
119. 94 S. Ct. at 3025 (White, J., dissenting).
120. *See* Tom Olesker Exciting World of Fashion, Inc. v. Dun and Bradstreet Inc., 16 Ill. App. 3d 709, 712, 306 N.E.2d 549, 552 (1973). In *Olesker*, the court stated that since damage to reputation is the gist of a defamation action, the one year statute of limitations does not begin to run until the libelous material is disseminated to a third party.
121. *Restatement of Torts* § 575, comment b.
122. *See generally* 94 S. Ct. at 3033 n.29 (White, J., dissenting).
123. In Time, Inc. v. Hill, 385 U.S. 374, 384 n.9 (1966), Justice Brennan states that the difference between a libel action and a right of privacy action is that the former action compensates for injury to reputation, while the latter action provides redress for the mental distress the plaintiff suffered as a result of being exposed to the public view.
nized something akin to pain and suffering as grounds for recovery in a defamation action. Damages for pain and suffering compensate for injury to the plaintiff's feelings. Therefore, by allowing compensation for injury to a plaintiff's feelings if found to result from the publication of a defamatory falsehood, the *Gertz* Court is breaking new ground in the defamation area. The Court is recognizing that not only may a defamation invade a plaintiff's interest in his reputation, but a defamation may also invade a plaintiff's interest in freedom from mental distress. Thus, the tort of defamation, in the Court's view, encompasses not only protection of reputation, but also protection from mental distress.

**Nominal, Future and Punitive Damages**

If at common law a defendant is found liable for a defamation actionable *per se*, the plaintiff is entitled to recover at least nominal damages. This enabled a plaintiff to vindicate his character by obtaining a jury verdict which would establish the falsity of defamatory material. If a plaintiff under *Gertz* establishes the liability of the defamer, but fails to prove actual damages, will the cause of action fail because he has shown no injury? It seems that the *Gertz* Court will answer the question affirmatively, and thereby prevent a plaintiff from obtaining a judicial declaration that the publication at issue was false and defamatory. This conclusion follows by analogy from the general tort rule that in negligence actions, proof of damage is an element of the plaintiff's case. This is based on the rationale that negligent conduct in itself is not considered to be such "an interference with the interests of the world at large that there is any right to complain of it, or be free from it, except in the case of some individual whose interests have suffered." Therefore, unlike under the common law doctrine of general damages, a plaintiff under *Gertz* will not be allowed to recover nominal damages since he is limited to recovery for actual injury.

*Gertz* also raises questions concerning the award of damages for future harm in a defamation action. This damage is recoverable at common law under general damage theory, but is held to be inadequate to establish special damage. By requiring proof of actual injury, the *Gertz* Court abrogated the doctrine of general damages. However, it

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124. "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include . . . personal humiliation, and mental anguish and suffering." 94 S. Ct. at 3012.
125. *Restatement of Torts* § 620, comments a and b.
seems the Gertz decision will allow a recovery of damages for future harm which the plaintiff might sustain as a result of a defamatory falsehood since these damages are recoverable under general tort principles and like actual injuries can be supported by competent evidence.

Finally, the Gertz Court held that the states are prohibited from awarding punitive damages in any case where the plaintiff establishes the defendant’s liability under a less demanding standard than that stated by New York Times.\textsuperscript{127} Therefore, where the Gertz standard applies, punitive damages may not be awarded on the common law grounds of actual malice. At common law, actual malice in this sense means ill will, lack of honest belief or intent to injure.\textsuperscript{128} Under Gertz, a plaintiff must establish knowing-falsity or reckless disregard of the truth on the part of the defendant before punitive damages can be recovered.\textsuperscript{129}

\textbf{CONCLUSION}

"The (Supreme) Court added, subtracted and came up with a whole other animal that no one had ever seen before," said Don H. Reuben, a noted Chicago libel lawyer. "What this animal is, only time will tell. It’s like buying a mongrel dog pup. You don’t know what it’s going to be like until it grows up. And if there ever was a mongrel, this decision is it."\textsuperscript{130}

The law of defamation is the product of an uneven historical development. Defamation law is riddled with inconsistencies and contradictions that exist only because they have always existed. Perhaps by introducing the concept of fault into defamation and by substantially modifying the damage remedy, the Court’s decision in Gertz will force the state courts and legislatures to reexamine the fundamental assumptions that support the law of libel and slander.

\textbf{STEVEN MICHAEL LEVIN}

\textsuperscript{127} 94 S. Ct. at 3012.


\textsuperscript{129} The Gertz Court based this holding on the ground that like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but unlike the former rule, punitive damages are wholly irrelevant to the state interest (compensation for injury) that justifies a negligence standard for private defamation. 94 S. Ct. at 3012.

\textsuperscript{130} Chicago Sun-Times, July 7, 1974, Sec. 1-A at 18.