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Tort Law-Constitutional Privilege Does Not Extend to Defamation Concerning a Private Individual on a Public Issue

Tort Law—CONSTITUTIONAL PRIVILEGE DOES NOT EXTEND TO DEFAMATION CONCERNING A PRIVATE INDIVIDUAL ON A PUBLIC ISSUE—*Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974).

In a libel action at common law,[1] proof of a defamatory publication[2] established liability unless either truth or privilege could be shown. Damage to the plaintiff's reputation was presumed, entitling him to general damages. In the United States, the punishment of libelous words did not raise a constitutional problem,[3] although the Constitution prevented restraint of publication.[4]

New York Times Co. v. Sullivan,[5] created a constitutional privilege against defamation actions brought by public officials without a showing of actual malice.[6] A plurality of the Supreme Court extended the *Sullivan*

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1. For a general survey of the historical development of the law of defamation, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 737-38 (4th ed. 1971); RESTATEMENT OF TORTS § 568 comment *b* at 159 (1938); Carr, *The English Law of Defamation*, 18 L.Q. REV. 255, 388 (1902); Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 40 L.Q. REV. 302, 397 (1924); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371 (1969); Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

2. A defamatory statement usually is regarded as " . . . one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 111, at 739 (4th ed. 1971). However, since this definition disregards those defamatory statements which arouse pity or sympathy, it is too narrow, and should include statements which " . . . injure 'reputation' in the popular sense." *Id.*

3. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

4. *See* Near v. Minnesota, 283 U.S. 697, 713-14 (1931); Patterson v. Colorado, 205 U.S. 454, 462 (1907); Commonwealth v. Blanding, 20 Mass. 304, 313, 3 Pick. 304, 313-14 (1825); Respublica v. Oswald, 1 L.Ed. 317, 323-25, 1 Dall. 319, 325 (Penn. 1788).

5. 376 U.S. 254 (1964). This constitutional privilege was eventually extended to public officials involved in criminal libel actions. Garrison v. Louisiana, 379 U.S. 64 (1964); all public employees, Rosenblatt v. Baer, 383 U.S. 75 (1966); public figures, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); and to false-light right of privacy actions, Time, Inc. v. Hill, 385 U.S. 374 (1967). A false-light right of privacy action exists where the defendant has invaded the plaintiff's right of privacy by publicity which places the plaintiff in a false-light in the public eye.

6. Actual malice is used here in the sense that there existed knowledge of falsity or reckless disregard for the truth. The decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), has been viewed as the elevation of the minority view of the fair comment doctrine. *See* Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A. L. REV. 371, 377 (1970); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 392 (1969). At common law there existed a qualified privilege in defamation suits to comment upon the credentials and conduct of public figures, public officials, or any matter of public interest. However, there existed disagreement over whether the fair comment doctrine should be limited to opinions and comment, or whether it should also encompass false statements of fact. The majority view, as expressed in the leading case

standard to a libel action brought by a private individual when the event was of public or general concern.[7]

In the recent case of *Gertz v. Robert Welch, Inc.*,[8] the Supreme Court was faced with the issue of whether or not to apply the *Sullivan* standard to any publication involving a matter of public interest without regard to the status of the person defamed. Gertz, the petitioner, represented the family of a young man who had been shot and killed by a Chicago policeman.[9] Respondent published an article about the policeman which contained several defamatory falsehoods concerning Gertz. The article claimed that the police officer was being framed as part of a nationwide conspiracy to discredit local police agencies[10] and labeled Gertz as a "communist-frontor" engineering the "frame-up."

The district court[11] held that "the subject matter of 'Frame-Up'[12] was

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of Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893), held that it was restricted to opinion and comment. Whereas, the minority view as best stated in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908), allowed the privilege to encompass facts relating to public officials and their public conduct, even though the facts were untrue. For additional explanation of the fair comment doctrine see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118 (4th ed. 1971); Note, *Fair Comment*, 62 HARV. L. REV. 1207 (1949).

7. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971). In *Rosenbloom* the Court was faced with an issue similar to that in the instant case: whether the *Sullivan* standard (knowledge-of-falsity-reckless-disregard-for-truth) should apply to a libel action brought by a private individual for a defamatory falsehood in an issue of public concern. Here, petitioner, a distributor of nudist magazines, was arrested during a police crack-down on violators of municipal obscenity statutes. Shortly thereafter, his home and a rented warehouse containing these magazines were subjected to a lawful search and seizure. Respondent's radio station aired news reports on these confiscations without styling the material "reportedly" or "allegedly" obscene. Petitioner, following an acquittal on criminal charges, filed a libel action against respondent. The jury in the district court awarded petitioner $25,000 in general damages and $750,000 in punitive damages (later reduced to $250,000 on remittitur). The court of appeals reversed, holding that the *Sullivan* standard applied.

The Supreme Court, in a plurality decision, affirmed, holding that in "a libel action . . . by a private individual . . . 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 reckless disregard of whether it was false or not." *Id.* at 52.

8. 94 S. Ct. 2997 (1974).

9. In his capacity as a lawyer, Gertz had attended the coroner's inquest into the death of Nelson, the decedent, and had instituted the various civil actions against Nuccio, the police officer.

10. The purported goal of this conspiracy was the creation of a national police force capable of introducing a communist regime.

11. 322 F. Supp. 997 (N.D. Ill. 1970). The district court had initially ruled that Gertz was neither a "public official" nor a "public figure," therefore, the constitutional privilege as

clearly one of public interest protected by the first and fourteenth amendments."[13] The court of appeals[14] affirmed, holding that the subject matter was of significant public interest[15] and that the petitioner had failed to establish actual malice[16] demanded by the constitutional standard.

Reversing the court of appeals, Justice Powell writing for the Court[17] recognized that the underlying concern in the case was the struggle "to define the proper accommodation between the law of defamation and the freedoms of speech and press . . . ."[18] The Supreme Court reaffirmed the reconciliation of these two societal values in relation to public officials[19] and to public figures,[20] but refused to extend the *Sullivan* rule to protect publishers in defamation actions brought by private individuals solely where the matter is of public interest, without regard to the individual's public status. This eliminates the difficulty of determining whether an issue amounted to one of "general or public interest."[21]

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enunciated in *Sullivan* was inapplicable. It also ruled that the article was libelous per se, thus leaving the jury with only the issue of damages. The jury returned a $25,000 award for the petitioner, but the court in an apparent afterthought granted the respondent's motion for judgement notwithstanding the verdict, on the basis that the constitutional privilege was raised due to the fact that the subject matter was of "public concern."

12. This is the title of the article in which the defamatory falsehoods concerning Gertz were published.

13. 322 F. Supp. at 1000 (N.D. Ill. 1970).

14. 471 F.2d 801 (7th Cir. 1972).

15. *Id.* at 805.

16. *Id.* at 807. Actual malice is used here in the sense of the knowledge of falsity or reckless disregard for truth. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

17. Justice Powell's opinion was joined by Justices Marshall, Rehnquist, and Stewart. Justice Blackmun concurred in the opinion. Chief Justice Burger filed a separate dissent, as did Justices Brennan, Douglas, and White.

18. 94 S. Ct. at 3000. Although this struggle can be seen in the divergent opinions filed in both Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), and in Gertz v. Robert Welch, Inc., 94 S.Ct. 2997 (1974), both Douglas and Black have historically considered the struggle to be hopeless. Justice Douglas reasons that the first amendment protection is absolute, therefore it cannot be accomodated with the law of defamation. *Id.* at 3015 (dissenting opinion). *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 170-72 (1967) (Black, J., concurring); Garrison v. Louisiana, 379 U.S. 64, 80 (1964) (Douglas, J., concurring); and New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring) [collected in Justice Powell's opinion in Gertz v. Robert Welch, Inc. 94 S. Ct. at 3007-08].

19. 94 S. Ct. at 3008.

20. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

21. 94 S. Ct. at 3010. Justice Brennan's dissent rejected the view that the *Rosenbloom* extension would require a tedious judicial determination of whether an issue was one of "general or public interest." The basis of Justice Brennan's argument is that the courts in making this determination would only be fulfilling their traditional role of arbitrating "all

This holding recognized that avoidance of self-censorship by the media, must be balanced with the state's legitimate interest in compensating injury inflicted by defamatory falsehoods.[22] This state interest is greater in protecting private individuals than public individuals, because self-help is the first step in minimizing the injury to reputation done by a defamatory falsehood.[23] Private individuals however, are hampered in this effort because they lack access to communicative channels to rebut false allegations, and thus are more vulnerable than public persons.[24] Furthermore, private persons are more deserving of recovery because they have not voluntarily thrust themselves into the public arena,[25] whereas, the public person has assumed or consented "to increased risk of injury from defamatory falsehoods."[26]

Consonant with the Court's avowed intention to reconcile the law of defamation with the values of the first amendment, it restricted the liability imposed by the states to compensation for actual injury.[27] This limita-

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disputes concerning clashes of constitutional values." *Id.* at 3021. Furthermore, this job has been reduced due to the body of law interpreting what is a public concern, both before and after *Rosenbloom*. *Id.*

22. *Id.* at 3007-09. Justice Powell cited Justice Stewart's opinion in Rosenblatt v. Baer, 383 U.S. 75, 92-93 (1963), in noting that the protection of the personal dignity of each individual is primarily left to the states.

23. 94 S. Ct. at 3009.

24. *Id.* Justice Brennan in his dissent strongly disagreed with this rationale. *Id.* at 3018-19. The basis of his disagreement, which he referred to, was expressed in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) where the Court said:

> While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. *Id.* at 46.

Justice Brennan suggested that the states should ensure a citizen the right to respond, instead of "stifling public discussion of matters of public concern." *Id.* at 47. For a general discussion of the argument in favor of retraction and right-of-reply statutes see Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L.Q. 581, 605-08 (1964); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

25. 94 S. Ct. at 3010. Justice Brennan, again, failed to see the logic of this argument. *Id.* at 3019. Referring back to his opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971), Justice Brennan argued that due to the interaction of today's society, "[v]oluntarily or not we all are 'public' men to some degree."

26. 94 S. Ct. at 3010.

27. *Id.* at 3011-12. This holding represents, as does most of Justice Powell's opinion, the adoption of the Marshall-Stewart dissent in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971). The basic rationale for limiting recovery to compensation for actual injury is that punitive and presumed damages act not only as "windfalls" to the plaintiff, but also, can

tion is in line with the Court's feeling that a strict liability standard for the media would create an unacceptable degree of self-censorship.[28] The Court did indicate, however, that if the plaintiff desires recovery of presumed and punitive damages, this can be accomplished by meeting the more rigorous standard of knowledge of falsity or reckless disregard for truth[29] enunciated in *Sullivan*.[30]

Gertz represents the adoption of a compromise between the law of defamation and the competing values protected by the first amendment.[31] Basically, the defendant-publisher is denied the protection of a constitutional privilege and the plaintiff is restricted to recovery of compensation for actual injuries, thus effectively defining the outer reaches of the *Sullivan* constitutional privilege, and changing the common law doctrine relating to damages.[32]

As a compromise decision, *Gertz* offers the advantage of being a definitive ruling clarifying the uncertainty previously existing in this area of the law.[33] From the media's perspective this decision relieves it from the threat

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cause self-censorship of the press. *Id.* at 84. *See* Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630, 648 (1968).

Justice White attacked this holding, in his dissent, by noting that the self-censorship argument is not viable because an occasional damage award does not intimidate the media industry. 94 S. Ct. at 3032. Furthermore, although Justice Powell included a rather open-ended definition of "actual injuries," proof of damage to reputation is exceedingly difficult to establish. *Id.* at 3033. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.30 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 765 (4th ed. 1971).

28. 94 S. Ct. at 3011.

29. *Id.*

30. 376 U.S. 254 (1964).

31. 94 S. Ct. at 3000.

32. The changes in the area of damages, implemented by *Gertz*, were strongly criticized in Justice White's scholarly dissent. White noted that "the 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 50 States." 94 S. Ct. at 3022. Justice White charged the majority with "judicial overkill" and characterized its opinion as follows:

> [Y]ielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices. *Id.* at 3027.

33. A number of jurisdictions applied the *Rosenbloom* extension to a variety of situations deemed of "general or public interest." *See, e.g.*, New Jersey State Lottery Comm'n v. United States, 491 F.2d 219 (3d Cir. 1974) (winning numbers in New Jersey lottery); Berry v. National Broadcasting Co., Inc., 480 F.2d 428 (8th Cir. 1973) (murder); Porter v. Guam Publications, Inc., 475 F.2d 744 (9th Cir. 1973) (theft); Firestone v. Time, Inc., 460 F.2d 712 (5th Cir. 1972) (electronic eavesdropping); Gospel Spreading Church v. Johnson Publishing Co.,

of large and often unwarranted presumed and punitive damages.[34] Nevertheless, there still remains an opportunity for the plaintiff to recover compensation for actual injuries.

Unfortunately the effect of this decision makes recovery for the private individual difficult. Although Justice Powell noted that a dollar and cents value need not be assigned to the actual injuries, all awards must be supported by competent evidence.[35] It is submitted that the damage done to one's reputation rarely is susceptible of concrete proof and, therefore, *Gertz* will either discourage the bringing of defamation actions of this nature, or negate those brought due to the difficulty of establishing actual injuries by competent evidence.[36] Attempting to mitigate this effect, Justice Powell observed that actual injury includes numerous types of damages such as mental anguish, humiliation, and injury done to one's standing and reputation in the community.[37] However, these concepts are elusive and difficult to prove. Therefore, *Gertz* will heavily favor the media, unless the courts are willing to broadly interpret the meaning of competent evidence.

L.T.S.

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454 F.2d 1050 (D.C. Cir. 1971) (established church's activities in real estate). *Contra*, Hood v. Dunn & Bradstreet, Inc., 486 F.2d 25 (5th Cir. 1973) (credit report held not to be a matter of general or public interest).

34. Justice White was not persuaded by this argument and observed the following:

> Not content with escalating the threshold requirements of establishing liability, the Court abolishes the ordinary damages rule, undisturbed by *New York Times* and later cases, that, as to libels or slanders defamatory on their face, injury to reputation is presumed and general damages may be awarded along with whatever special damages may be sought. Apparently because the Court feels that in some unspecified and unknown number of cases, plaintiffs recover where they have suffered no injury or recover more than they deserve, it dismisses this rule as an "oddity of tort law." 94 S. Ct. at 3033.

35. *Id.* at 3012.

36. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.30, at 468 (1956).

> Actual damage to reputation may be suffered although the plaintiff may be unable to prove it. By the very nature of the harm resulting from defamatory publications, it is frequently not susceptible of objective proof. Libel and slander work their evil in ways that are invidious and subtle. The door of opportunity may be closed to the victim without his knowledge, his business or professional career limited by the operation of forces which he cannot identify but which, nonetheless, were set in motion by the defamatory statements. *Id.*

37. 94 S. Ct. at 3012.