St. Mary's Law Journal

Volume 8 | Number 3 Article 6

9-1-1976

Negligence as a Standard of Recovery in Libel Actions in Texas.

Suzie Barrows

NEGLIGENCE AS A STANDARD OF RECOVERY IN LIBEL ACTIONS IN TEXAS

SUZIE BARROWS

In 1974 the United States Supreme Court held in *Gertz v. Robert Welch, Inc.*[1] that states may decide for themselves the appropriate standard of liability to be applied to a publisher or broadcaster of a defamatory falsehood injurious to a private individual, so long as they do not impose strict liability.[2] The Court reasoned that this approach provided the most equitable balance between the states' interest in compensating private individuals for wrongful injury to reputation and the first amendment protection of the press.[3] By precluding the states from imposing liability without fault, the effect of the holding was to sanction a simple negligence standard in defamation actions brought by private individuals.[4]

In reshaping their laws to comply with the Court's mandate, those states which have considered the question have taken various approaches in interpreting the requirements and in resolving the issues left open by the *Gertz* decision. Texas has only recently attempted to define a standard of fault for publishers of falsehoods injuring the reputation of private individuals.[5] In addition to examining the present status of libel law in Texas, this comment will discuss the post-*Gertz* experience of other states as a means of anticipating the problems to be faced by Texas courts in applying a negligence standard to defamation actions.

DEVELOPMENT OF LIBEL LAW IN TEXAS

Texas has recognized the common law distinction between two varieties of defamatory language: that which is actionable per se and that which is not.[6] Libel per se occurs where, as a probable result of its publication, a statement causes injury to a person by fact or presumption of law.[7] The

1. 418 U.S. 323 (1974).
2. *Id.* at 347.
3. *Id.* at 347-48.
4. Although the majority opinion in *Gertz* does not specifically require that a negligence standard be applied in such cases, it was assumed by Justice Blackmun in his concurring opinion that the decision predicates libel actions upon a showing of negligence. *Id.* at 353 (Blackmun, J., concurring).
5. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819-20 (Tex. 1976).
6. Express Pub. Co. v. Wilkins, 218 S.W. 614, 616 (Tex. Civ. App.—San Antonio 1920, no writ); *accord*, Arant v. Jaffe, 436 S.W.2d 169, 176 (Tex. Civ. App.—Dallas 1968, no writ) (slander).
7. Rawlins v. McKee, 327 S.W.2d 633, 635 (Tex. Civ. App.—Texarkana 1959,

plaintiff must show only that the statement was communicated to a third person who understood its defamatory import.[8] Once this is shown, there is no need to prove malice on the part of the defendant.[9] Nor is there a need to show actual damage, for this is conclusively presumed by the court.[10] Thus, even if the plaintiff has sustained no actual injury, he may still receive nominal damages if the statement is libelous on its face.[11] In effect, the common law rules amount to strict liability against the publisher of a statement shown to be libelous per se.

In libel actions the burden of proof rests with the plaintiff to show defamation and prove damages.[12] He need not show, however, that the statement is false. There is a legal presumption of falsity, which the defendant may rebut by proving truth as a defense.[13] In addition to truth, the common law recognizes privilege as a defense to libel actions.[14] Statements which are absolutely privileged are not actionable even though false and published with malice.[15] Use of absolute privilege is largely confined to communications

---

writ ref'd n.r.e.); Morrison v. Dean, 104 S.W. 505, 506 (Tex. Civ. App. 1907, writ ref'd); *accord*, Providence-Washington Ins. Co. v. Owens, 207 S.W. 666, 671 (Tex. Civ. App.—Fort Worth 1918, no writ) (slander). The statutory definition of libel has somewhat supplanted the common law distinction by allowing actions to be brought on all defamation which falls within its description, regardless of whether the statement is libelous on its face. *See* TEX. REV. CIV. STAT. ANN. art. 5430 (1958). In effect, any language which comes within the statutory description is libelous per se. Fessinger v. El Paso Times, 154 S.W. 1171, 1174 (Tex. Civ. App.—El Paso 1913, writ ref'd).

8. Teague Brick & Tile Co. v. Snowden, 440 S.W.2d 419, 422 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ) (letter sent to plaintiff alone not libelous); *accord*, Burnaman v. J.C. Penney Co., 181 F. Supp. 633, 636-37 (S.D. Tex. 1960) (slander).

9. Mitchell v. Spradley, 56 S.W. 134, 136 (Tex. Civ. App. 1900, no writ); Forke v. Homann, 39 S.W. 210, 213 (Tex. Civ. App. 1896, writ ref'd). In addition to the common law rule, all libelous publications falling within the statutory definition of libel are actionable without proof of malice. Gibler v. Houston Post Co., 310 S.W.2d 377, 386 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.); State Medical Ass'n v. Committee for Chiropractic Educ., 236 S.W.2d 632, 634 (Tex. Civ. App.—Galveston 1951, no writ).

10. Hornby v. Hunter, 385 S.W.2d 473, 476 (Tex. Civ. App.—Corpus Christi 1964, no writ); Davila v. Caller Times Pub. Co., 311 S.W.2d 945, 947 (Tex. Civ. App.—San Antonio 1958, no writ); *accord*, Texas Plastics, Inc. v. Roto-Lith, Ltd., 250 F.2d 844, 852 (5th Cir. 1958) (slander).

11. Flournoy v. Story, 37 S.W.2d 272, 273 (Tex. Civ. App.—Fort Worth 1930, no writ); *accord*, Maass v. Sefcik, 138 S.W.2d 897, 899 (Tex. Civ. App.—Austin 1940, no writ) (slander); Anderson v. Alcus, 42 S.W.2d 294, 296 (Tex. Civ. App.—Beaumont 1931, no writ) (slander).

12. *See* Comment, *Defamation: The Texas Approach*, 13 S. TEX. L.J. 159, 168-72 (1971).

13. Coles v. Thompson, 27 S.W. 46, 47 (Tex. Civ. App. 1894, no writ); *accord*, Ledgerwood v. Elliott, 51 S.W. 872 (Tex. Civ. App. 1899, no writ) (slander).

14. Cobb v. Garlington, 193 S.W. 463, 466-67 (Tex. Civ. App.—Fort Worth 1917, no writ); *accord*, McDaniel v. King, 16 S.W.2d 931, 932 (Tex. Civ. App.—San Antonio 1929, no writ) (slander); Vacicek v. Trojack, 226 S.W. 505, 508 (Tex. Civ. App.—Galveston 1920, no writ) (slander).

15. Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 110, 166 S.W.2d 909, 912 (1942); Koehler v. Dubose, 200 S.W. 238, 242 (Tex. Civ. App.—San Antonio 1918,

made in the course of legislative, judicial, and executive affairs.[16] Conditional privilege, on the other hand, has a much broader scope: it applies to all communications made in good faith on any subject with reference to which the author has an interest or duty to perform, so long as the communication is made to another person having a similar duty or interest.[17] Where a communication is conditionally privileged, the privilege may be overcome only by proof of actual or express malice.[18] Texas further provides by statute that the conditional privilege defense applies to published accounts of judicial, legislative, and executive proceedings and public meetings if the account is "fair, true, and impartial."[19] The statutory defense of "fair comment" also allows comment and criticism of the conduct of persons involved in matters of public concern if "reasonable and fair."[20] This defense applies only to opinions published without falsity[21] so that, prior to 1964, Texas courts held that a misstatement of fact about public figures was not privileged.[22]

CONSTITUTIONAL LIMITATIONS ON RECOVERY IN LIBEL ACTIONS

The United States Supreme Court decision in *New York Times Co. v. Sullivan*[23] revolutionized libel law as it applies to public officials and launched a series of decisions expanding the constitutional limitations on recovery in

---

writ ref'd); Light Pub. Co. v. Huntress, 199 S.W. 1168, 1171 (Tex. Civ. App.—San Antonio 1918, no writ).

16. F. HARPER & F. JAMES, THE LAW OF TORTS § 5.23, at 427-30 (1956). *See generally* Runge v. Franklin, 72 Tex. 585, 589, 10 S.W. 721, 723 (1889); Taber v. Aransas Harbor Terminal Ry., 219 S.W. 860, 861 (Tex. Civ. App.—San Antonio 1920), *rev'd on other grounds*, 235 S.W. 841 (1921); Koehler v. Dubose, 200 S.W. 238, 242-43 (Tex. Civ. App.—San Antonio 1918, writ ref'd).

17. Browning v. Gomez, 332 S.W.2d 588, 592 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.); Buck v. Savage, 323 S.W.2d 363, 372 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); Cooksey v. McGuire, 146 S.W.2d 480, 482 (Tex. Civ. App.—Eastland 1940, no writ).

18. Fitzjarrald v. Panhandle Pub. Co., 149 Tex. 87, 96, 228 S.W.2d 499, 505 (1950); Cooksey v. McGuire, 146 S.W.2d 480, 483 (Tex. Civ. App.—Eastland 1940, no writ); Snider v. Leatherwood, 49 S.W.2d 1107, 1111 (Tex. Civ. App.—Eastland 1932, writ dism'd); *accord*, Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 515 (Tex. Civ. App.—Dallas 1970, writ dism'd) (slander).

19. TEX. REV. CIV. STAT. ANN. art. 5432, §§ 1-3 (1958); *see* Denton Pub. Co. v. Boyd, 460 S.W.2d 881, 883 (Tex. 1970); Walker v. Globe-News Pub. Co., 395 S.W.2d 686, 688 (Tex. Civ. App.—Amarillo 1965, writ ref'd n.r.e.); Nickson v. Avalanche Journal Pub. Co., 34 S.W.2d 749, 750 (Tex. Civ. App.—Amarillo 1961, no writ).

20. TEX. REV. CIV. STAT. ANN. art. 5432, § 4 (1958).

21. Fitzjarrald v. Panhandle Pub. Co., 149 Tex. 87, 94-95, 228 S.W.2d 499, 503 (1950); Houston Press Co. v. Smith, 3 S.W.2d 900, 906 (Tex. Civ. App.—Galveston 1928, writ dism'd).

22. Fitzjarrald v. Panhandle Pub. Co., 149 Tex. 87, 94-95, 228 S.W.2d 499, 503-04 (1950); Bell Pub. Co. v. Garrett Eng'r Co., 141 Tex. 51, 61-64, 170 S.W.2d 197, 204 (1943); Hornby v. Hunter, 385 S.W.2d 473, 477 (Tex. Civ. App.—Corpus Christi 1964, no writ); Davila v. Caller Times Pub. Co., 311 S.W.2d 945, 947 (Tex. Civ. App. —San Antonio 1958, no writ).

23. 376 U.S. 254 (1964).

such actions. In *New York Times* the Court held that a public official could not recover for libelous references to his official conduct without proof that the reference was made with actual malice.[24] Actual malice was defined as knowledge that the statement was false or reckless disregard as to whether or not it was false.[25] In subsequent decisions this privilege was extended to cover situations involving criminal libel, public figures, and invasions of privacy.[26] Further, reckless disregard was defined in a later case to preclude liability unless it could be shown that the defendant had "serious doubts as to the truth of his statement."[27] In *Rosenbloom v. Metromedia, Inc.*[28] the Supreme Court concluded in a plurality opinion that the *New York Times* standard of liability applied in libel actions by private individuals against publishers of defamatory statements relating to matters of public or general concern.[29]

Gertz checked the momentum of prior decisions by rejecting the *Rosenbloom* approach and allowing the states to choose their own standard of liability in such cases.[30] The states may choose either the *New York Times* standard or a less stringent one, so long as strict liability is not imposed.[31] The *Gertz* decision was probably due in part to the widespread criticism which had greeted the *Rosenbloom* requirement that reported events must be of general or public interest to be privileged. The thrust of this criticism was that since the media itself decides what is newsworthy, the *Rosenbloom* decision makes it the arbiter of its own privilege and gives it unlimited protection.[32] *Gertz*, then, provided a better balance between freedom of expression and individual rights. Consistent adherence to the absolutist view in *Rosenbloom* that freedom of the press may never be restricted would have been difficult, and perhaps the Court viewed limitation as the best alternative.[33]

The Texas Response to Gertz

Texas examined the impact of *Gertz* on state libel law in the recent case of *Foster v. Laredo Newspapers, Inc.*[34] In that case, Foster, a licensed civil

24. *Id.* at 279-80.
25. *Id.* at 280.
26. Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967) (public figures); Time, Inc. v. Hill, 385 U.S. 374 (1967) (invasion of privacy); Garrison v. Louisiana, 379 U.S. 64 (1964) (criminal libel).
27. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
28. 403 U.S. 29 (1971).
29. *Id.* at 44.
30. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).
31. *Id.* at 347.
32. *See generally* Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 U.C.L.A. L. REV. 371, 379-81 (1970); Wright, *Defamation, Privacy and the Public's Right to Know: A National Problem and a New Approach*, 46 TEXAS L. REV. 630, 632 (1968).
33. *See* Note, 10 SUFFOLK U.L. REV. 126, 136 (1975).
34. 541 S.W.2d 809 (Tex. 1976). Garza v. San Antonio Light, 531 S.W.2d

engineer acting as a consultant to Webb County in a project investigating a flooding problem, brought a libel action against the *Laredo Times*. The *Times* printed an article erroneously stating the flooded area was platted by Foster, using language implying that he was guilty of unethical conduct in performing services for the county.[35] The San Antonio Court of Civil Appeals affirmed a summary judgment for the defendant on grounds that Foster fell within the definition of a public figure and had failed to prove that the article was published with malice.[36] On appeal the Texas Supreme Court held that no evidence existed establishing that Foster was either a public figure or public official and considered instead his right of recovery as a private individual.[37] Recognizing its options under the *Gertz* decision, the court declined to extend to private individuals the *New York Times* standard of recovery requiring proof of actual malice, and adopted the less strict negligence standard.[38] Therefore, under the rule articulated in *Foster*, if a private individual proves that a publisher or broadcaster knew or should have known that a defamatory statement was false, he may recover for actual injury caused by the publication of the statement.[39]

DEFINING A STANDARD OF FAULT IN LIBEL ACTIONS

Having opened the door to the implementation of a negligence standard in defamation actions brought by private individuals, Texas courts will now be faced with numerous questions concerning the application of the standard. As a result of the decision in *Foster*, the common law rules of strict liability that previously governed libel actions brought by private individuals will no longer be applicable in many situations.[40] Most notably, a private individual bringing suit against a publisher or broadcaster on a publication defamatory on its face may no longer rely on presumptions of malice and general dam-

926 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) was a libel action brought by private persons. Because the plaintiffs failed to show actual damage, however, the Court of Appeals was not given the opportunity to decide whether the *Rosenbloom* standard should be replaced by a fault standard. *Id.* at 930.

35. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976). The article stated that Foster "doubled" as a consultant engineer for the county. *Id.* at 811.

36. Foster v. Laredo Newspapers, Inc., 530 S.W.2d 611 (Tex. Civ. App.—San Antonio 1975), *rev'd*, 541 S.W.2d 809 (Tex. 1976).

37. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 817-18 (Tex. 1976).

38. *Id.* at 819-20.

39. *Id.* at 819-20.

40. Inapplicability of the old rules of strict liability in libel actions brought by private individuals has already been recognized by several state courts adopting a negligence standard pursuant to *Gertz*. *See, e.g.*, Gobin v. Globe Pub. Co., 531 P.2d 76, 83 (Kan. 1975); Wilson v. Capital City Press, 315 So. 2d 393, 397 (La. Ct. App. 1975); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 334 N.E.2d 494, 498 (Ohio Ct. App. 1974), *cert. denied*, 423 U.S. 883 (1975).

ages.[41] *Gertz* expressly precludes recovery of presumed damages in such actions where malice is not proved.[42] If a plaintiff cannot show actual injury, therefore, he is no longer able to vindicate his name by receiving presumed nominal damages and a judgment in his favor.[43] A prima facie case of libel may no longer be made by merely showing the defendant communicated a false defamatory statement concerning the plaintiff. A plaintiff must now prove the statement was false, that it actually injured him, and some degree of fault on the part of the defendant amounting at least to simple negligence.[44]

Since *Foster* limits the application of the negligence standard to actions brought by private individuals against publishers and broadcasters, it seems likely that the common law rules of strict liability will continue to be used in actions against nonmedia defendants.[45] As a result, libel law in Texas will consist of one standard for public officials and public figures (the *New York Times* rule), a negligence standard for private plaintiffs against media defendants, and yet another standard based on common law principles for purely private defamation.[46]

Determining the Status of the Plaintiff

Because use of a negligence standard is limited to actions brought by private individuals, the precise scope of the public figure classification

41. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221, 1235-36 (1976); Comment, *Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment*, 69 NW. U.L. REV. 960, 975-77 (1975); Note, 48 TEMP. L.Q. 450, 466 (1975).

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

43. *See* Comment, *Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment*, 69 NW. U.L. REV. 960, 975-77 (1975). The Court's definition of "actual injury," however, includes such inherently subjective factors as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering," as well as out-of-pocket loss. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

44. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 423 (1975); Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221, 1235 (1976).

45. The weight of comment favors the view that the standard of liability proposed in *Gertz* was meant to apply only to defamation by the media. *See* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 792-93 (1975); Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 648-50 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 215-17 (1976); Comment, *As Times Goes By: Gertz v. Robert Welch, Inc. and Its Effect on California Defamation Law*, 6 PAC. L.J. 565, 578-80 (1975).

46. *Cf.* Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. Ct. App. 1976). The court in that case sought to avoid such complexity in state libel law by holding its negligence standard applicable to all defendants in actions brought by private individuals. *Id.* at 696.

becomes crucial. The Court in *Gertz* made significant changes in this area by rejecting the *Rosenbloom* rule that one who is involved in an event of public or general concern is a public figure.[47] Under that theory, the media had almost unlimited freedom to defame, for an individual became a public figure whenever a comment about him involved a subject of general interest.[48] *Gertz* narrowed the class of public figures by placing them in two general categories: those who achieve such general notoriety that they become public figures for all purposes, and those who voluntarily thrust themselves into a particular controversy and become public figures with respect to that issue.[49] This second category will most often concern the courts since *Gertz* offers no indication as to the extent an individual may participate in a controversy without becoming a public figure. The Supreme Court, however, has held that the term "public controversy" as used in *Gertz* does not encompass "all controversies of interest to the public."[50] Divorce proceedings of very wealthy individuals, for example, do not qualify as a public controversy.[51]

The greater part of the Texas Supreme Court's opinion in *Foster* dealt with the threshold problem of identifying public figures. The court observed that Foster did not assume a special prominence in the resolution of the flooding controversy, but remained strictly within his role as consultant. Further, he did not attempt to influence the outcome of the dispute through exposure of his personal opinions to the public.[52] Because Foster's participation in the controversy was minimal, the court held that he had not thrust himself into the controversy in such a manner as to incur public figure status.[53] A significant number of other post-*Gertz* cases, in conferring public figure status, have emphasized the plaintiff's attempts to promote his views in connection with a public controversy.[54] As reasoning for its decision, the *Gertz* court argued

47. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

48. *See* Beytagh, *Privacy and a Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453, 467-68 (1975); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 478 (1975); Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 206 (1976); Note, 48 TEMP. L.Q. 450, 460 (1975).

49. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). Persons who fall into the first category are generally those whose names have become household words. *See, e.g.*, Buckley v. Littrell, 539 F.2d 882, 885-86 (2d Cir. 1976) (William F. Buckley, Jr. held to be a public figure for all purposes); Meeropol v. Nizer, 381 F. Supp. 29, 34 (S.D.N.Y.), *aff'd*, 505 F.2d 232 (2d Cir. 1974) (children of convicted treason-conspirators Julius and Ethel Rosenberg given public figure status).

50. Time, Inc. v. Firestone, — U.S. —, —, 96 S. Ct. 958, 965, 47 L. Ed. 2d 154, 163 (1976) (resort to judicial proceedings in order to obtain a divorce decree not voluntary involvement in a controversy).

51. *Id.* at —, 96 S. Ct. at 965, 47 L. Ed. 2d at 163.

52. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 817 (Tex. 1976).

53. *Id.* at 817.

54. *See, e.g.*, Vandenburg v. Newsweek, Inc., 507 F.2d 1024, 1026 (5th Cir. 1975) (college track coach projected himself into racial controversy); Guitar v. Westinghouse

that those who avoid publicity should be given different treatment than those who seek it.[55] Thus, it appears that although a plaintiff may find himself in a position involving a possibility of media exposure, he should not be considered a public figure as long as he does not deliberately attract such exposure.[56]

Moreover, once a plaintiff has been given public figure or public official status, in order for the more strict *New York Times* standard to apply, a defamatory statement must relate to his status as such.[57] This rule was given support in *Foster*, where it was held that even though the plaintiff might be considered a public official by reason of his position as county surveyor, the *New York Times* rule would be inapplicable unless the allegedly libelous article referred to either his official conduct or fitness for that office.[58] Similarly, there is no requirement of malice where a defamatory statement concerning a public figure does not refer to his involvement in a matter of public interest.[59]

Some post-*Gertz* courts have held that a negligence standard applies only to actions brought by private plaintiffs involved in a matter of public interest.[60] *Foster*, however, seems to apply to all private plantiffs in suits against publishers or broadcasters, "whether engaged in matters of public concern or not . . . ."[61] This approach will eliminate any difficulties which might

---

Electric Corp., 396 F. Supp. 1042, 1054 (S.D.N.Y. 1975) (plaintiff was author of controversial book); Carey v. Hume, 390 F. Supp. 1026, 1028 (D.D.C. 1975) (plaintiff was general counsel to United Mine Workers of America in a controversy concerning illegal removal of files from union office); Kapiloff v. Dunn, 343 A.2d 251, 258 (Md. Ct. Spec. App. 1975) (plaintiff's controversial school policies earned him community notoriety); Exner v. American Medical Ass'n, 529 P.2d 863, 868-70 (Wash. Ct. App. 1974) (plaintiff vigorously involved in fluoridation controversies).

55. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974).

56. *See* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 224 (1976). It has been suggested that *Gertz* requires a two-pronged determination before a person can be deemed a public figure in a controversy: it must first be determined whether the person's involvement was voluntary, and then the extent of his impact on the controversy must be assessed. *See* Note, 48 TEMP. L.Q. 450, 461 (1975).

57. Even in *Rosenbloom* the Court admitted that some aspects of the lives of the most public persons fall outside the scope of matters of public concern. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971).

58. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 814-15 (Tex. 1976).

59. *See* Douglas v. Janis, 118 Cal. Rptr. 280, 287 (1974) (slander).

60. *See, e.g.*, Chapadeau v. Utica Observer-Dispatch, Inc., 379 N.Y.S.2d 61, 64 (1975); Taskett v. King Broadcasting Co., 546 P.2d 81, 85 (Wash. 1976). *See also* RESTATEMENT (SECOND) OF TORTS § 580B, Comment e, at 30 (Tent. Draft No. 21, 1975) (drafters of Restatement feel there is a possibility the United States Supreme Court will limit requirement of fault to statements involving matters of public or general interest).

61. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976). Two post-*Gertz* courts, passing directly on the issue, have held that a negligence standard should not be restricted to the defamation of private persons involved in a matter

arise where a plaintiff is only a remote participant in an event of public interest or where an article devoted generally to a subject of public concern contains a defamatory statement not germane to the item of interest.[62]

Standard of Care

The negligence standard adopted in *Foster* requires that the plaintiff show the defendant knew or had reason to know of the statement's defamatory potential.[63] This approach attempts to fashion a "reasonably prudent editor" standard similar to the traditional standard used in tort actions based on negligence.[64] A negligence standard in libel actions, however, must be more specifically defined than the common law concepts applied to physical torts because it involves first amendment protections of the press.[65] Where injury to reputation is apparent from the face of the statement or where one had reason to know of extrinsic facts giving the statement a definite defamatory potential, that person's failure to inquire into the facts and ascertain their truth is clearly unreasonable. Where the danger to reputation is not apparent, however, it has been argued that it is not enough for a plaintiff to show a defendant was negligent in failing to discover the falsity of the statement. It must also be proved that the defendant was negligent in failing to understand that the statement referred to the plaintiff and posed a threat to his reputation.[66] If neither a defendant's knowledge of the facts nor the nature of the language used would put a reasonable person under similar circumstances on notice of the need for inquiry, there should be no liability under a negligence standard.[67] The common law principles of foreseeability are not consistent with the *Gertz* goal of protecting the press so long as reasonable

---

of public interest. Troman v. Wood, 340 N.E.2d 292, 297 (Ill. 1975) (libel); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 690-94 (Md. Ct. App. 1976) (slander).

62. *See* Troman v. Wood, 340 N.E.2d 292, 298 (Ill. 1975).

63. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976). This test has also been adopted in several other states. *See, e.g.*, Troman v. Wood, 340 N.E.2d 292, 298 (Ill. 1975); Taskett v. King Broadcasting Co., 546 P.2d 81, 85 (Wash. 1975). The *Restatement (Second) of Torts* has suggested a standard subjecting a publisher to liability if he knows a statement is false and defames another, and he acts negligently or with reckless disregard of these matters. RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975).

64. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 149-54 (4th ed. 1971).

65. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 460-61 (1975).

66. *See id.* at 461-63; Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 244-45 (1976); Note, 6 LOY. CHI. L.J. 256, 272-74 (1975).

67. *See* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 505-06 (1975); RESTATEMENT (SECOND) OF TORTS § 580B, Comment c, at 28-29 (Tent. Draft no. 21, 1975).

care is exercised.[68] A defendant should not be given a duty to avoid unforeseen consequences or to ascertain the truth of all statements. To impose such a duty would approach the strict liability standard specifically rejected by *Gertz*.[69] Lack of apparent danger to reputation will thus have a bearing on the determination of whether a defendant exercised reasonable care under the circumstances.

The law in negligence cases is constructed for the particular case at hand, with precedent doing little more than marking the outer boundaries of liability. There is a paucity of case law in jurisdictions outside Texas utilizing a negligence standard in libel actions, and the boundaries of liability are as yet undefined. One post-*Gertz* court has found negligence where the defendant "carelessly distorted the information and magnified the wrong in order to sensationalize the story; or negligently misinterpreted the information . . . or negligently used inaccurate language to describe the true facts."[70] Journalistic negligence was also found in *Firestone v. Time, Inc.*,[71] in which a libel action was brought against a magazine that had printed an article sensationalizing a divorce case by erroneously stating that one of the grounds was adultery. The Florida Supreme Court held that the defendant should have been aware that there was no finding of adultery since the plaintiff was awarded alimony in the divorce decree and state law prohibited alimony where adultery was proved.[72] On the other hand, a Louisiana court has refused to find negligence where the defendant relied on information given him by the state police without verifying it against local records.[73] Under such circumstances, it was held the defendant had no reason to doubt the authenticity of the information and was under no duty to verify it.[74] Further guidance on the question of media negligence in Texas may be obtained from earlier decisions dealing with the degree of fault necessary to defeat a claim of conditional privilege.[75] Once standards of conduct are determined for a

68. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 464-65 (1975).

69. *See id.* at 464-65.

70. Lawlor v. Gallagher Presidents' Report, Inc., 394 F. Supp. 721, 733 (S.D.N.Y. 1975).

71. 305 So. 2d 172 (Fla. 1974), *rev'd*, — U.S. —, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976).

72. *Id.* at 178. The case was reversed and remanded for retrial by the United States Supreme Court because the quoted finding of negligence appeared to have been made in the first instance by the state supreme court rather than at the trial level. Time, Inc. v. Firestone, — U.S. —, —, 96 S. Ct. 958, 969-70, 47 L. Ed. 2d 154, 168 (1976).

73. Wilson v. Capital City Press, 315 So. 2d 393, 398 (La. Ct. App. 1975).

74. *Id.* at 398.

75. *See, e.g.*, Express Pub. Co. v. Gonzalez, 326 S.W.2d 544, 547 (Tex. Civ. App.—San Antonio 1959, writ dism'd) (newspaper's report that judgment had been entered against two persons when in reality a nonsuit had been taken against one of them was unfair statement of facts and sufficient to defeat claim of conditional privilege);

variety of concrete fact situations, they may be extended to other fact situations, thereby allowing an overall standard to emerge.[76]

Currently, few courts have defined a negligence standard based on the conduct of the responsible publisher or broadcaster in the community.[77] A "responsible publisher" standard might favor the more conventional journals which concentrate on persons who have already attracted press attention and discriminate against innovative media focusing on private aspects of society, such as trends, conditions, mores, and lifestyles.[78] The adoption of any negligence standard, whether based on the conduct of the reasonably prudent man or the responsible publisher, ought to be particularized. A defendant's conduct should be measured against that of publishers or broadcasters under similar circumstances and pressures, and with similar resources, philosophies, and goals.[79]

Limitations imposed by *Gertz* upon the state courts' discretion to compensate private individuals for injury to reputation represent a minimum standard that the courts are required to adopt.[80] The states remain free, however, to adopt stricter standards. Two courts, fearing a simple negligence standard would have an adverse effect on freedom of the press, have adhered to the *Rosenbloom* rule requiring a showing of malice toward private individuals where the event is of public concern.[81] New York has adopted an intermediate standard of gross negligence under which a plaintiff must establish that a defendant acted in a "grossly irresponsible" manner without consideration of the standards ordinarily followed by responsible publishers.[82] A standard

---

Davila v. Caller Times Pub. Co., 311 S.W.2d 945, 947 (Tex. Civ. App.—San Antonio 1958, no writ) (confusion by newspaper of criminal's identity is sufficient lack of care to overcome claim of conditional privilege); Belo & Co. v. Lacy, 111 S.W. 215, 217-18 (Tex. Civ. App. 1908, writ ref'd) (in absence of notice that they are erroneous, newspaper reporter is not required to verify official entries on clerk's file docket before publication).

76. *See* Note, 48 TEMP. L.Q. 450, 464-65 (1975).

77. *See* Gobin v. Globe Pub. Co., 531 P.2d 76, 84 (Kan. 1975); Chapadeau v. Utica Observer-Dispatch, Inc., 379 N.Y.S.2d 61, 64 (1975). A "responsible publisher" standard has been specifically rejected by at least one post-*Gertz* court because it would make prevailing practices controlling and cause a steady decline in the overall standard of care observed by the media. Troman v. Wood, 340 N.E.2d 292, 298-99 (Ill. 1975).

78. *See* Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422, 453-54 (1975).

79. *See id.* at 456; Note, TEMP. L.Q. 450, 465 (1975); RESTATEMENT (SECOND) OF TORTS § 580B, Comment f, at 32 (Tent. Draft No. 21, 1975).

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

81. Walker v. Colorado Springs Sun, Inc., 538 P.2d 450, 457 (Colo. 1975), *cert. denied*, 423 U.S. 1025 (1976); Aafco Heating & Air Cond. Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 585 (Ind. Ct. App. 1974), *cert. denied*, 96 S. Ct. 1112 (1976). The *Walker* case modified the *Rosenbloom* rule to the extent that "reckless disregard" in cases concerning private individuals involved in events of public concern does not require a finding that the defendant had serious doubts about the validity of the statement. 538 P.2d 450, 457 (Colo. 1975), *cert. denied*, 423 U.S. 1025 (1976).

82. Chapadeau v. Utica Observer-Dispatch, Inc., 379 N.Y.S.2d 61, 64 (1975).

of fault based on gross negligence, however, has not been popular with the courts. Texas specifically rejected it in *Foster*, arguing that the difference between ordinary negligence and gross negligence is not clear and that use of the latter as a standard of fault would not provide demonstrably greater protection to the media from self-censorship.[83]

Defenses

The adoption of a negligence standard in Texas libel actions will have the effect of eliminating the common law rule that a defendant must raise the defense of truth and bear the burden of proving it.[84] There is no longer a presumption of falsity; since a plaintiff must show a defendant knew or should have known that a statement was false, he will necessarily have to prove falsity as well.[85] Absence of a presumption of falsity may prove to be more effective than the common law rule since a plaintiff usually has better access to the information necessary to prove truth or falsity.[86] Although truth is still a complete defense to libel actions,[87] the burden of proving it will be shifted to the plaintiff where a negligence standard is employed.

The *Foster* decision may revitalize the Texas statutory privilege of fair comment. Because of the broad applicability of the United States Supreme Court decisions protecting freedom of the press in libel actions, those decisions have had the effect of supplanting many common law conditional privileges.[88] The *Foster* decision, however, complies with *Gertz* by restricting the constitutional protection of the press so that it no longer applies to defamation by the media of a private individual.[89] The fair comment privilege, which protects any reasonable and fair expression of opinion by the media related to matters of public concern, may be revived as a defense in actions brought against the media by private individuals involved in public events.[90]

---

83. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976); *see* Troman v. Wood, 340 N.E.2d 292, 298 (Ill. 1975) (rejecting a gross negligence standard on grounds that there is little need for distinguishing between degrees of fault).

84. *See* General Motors Corp. v. Piskor, 352 A.2d 810, 815 (Md. 1976) (slander).

85. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221, 1235-37 (1976); RESTATEMENT (SECOND) OF TORTS § 580B, Comment i, at 33 (Tent. Draft No. 21, 1975).

86. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221, 1236 (1976); Comment, *As Time Goes By: Gertz v. Robert Welch, Inc. and its Effect on California Defamation Law*, 6 PAC. L.J. 565, 588 (1975).

87. The United States Supreme Court, in a recent case involving invasion of privacy, affirmed the principle that proof of an article's truth will preclude a finding that the publisher is at fault. Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 498-500 (1975).

88. *See* Comment, *As Time Goes By: Gertz v. Robert Welch, Inc. and Its Effect on California Defamation Law*, 6 PAC. L.J. 565, 585 (1975).

89. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976).

90. A distinction has been drawn between deductive opinions, which are false assertions of fact deduced from true information, and evaluative opinions, which express a

It is unlikely, however, that similar results will be experienced with respect to other conditional privileges. Under Texas law, conditional privileges can be lost by a showing of malice,[91] which need be no more than "gross indifference to the rights of others"[92] or a "lack of good faith."[93] Proof of fault under a negligence standard, such as proof that a statement was published without grounds for believing it true, may amount to the equivalent of an abuse of privilege and eventually absorb the use of conditional privileges altogether.[94]

Should this occur, two problem areas caused by the use of conditional privileges in Texas may be cleared up. Presently, communications between employers concerning employees and credit reports are protected by a qualified privilege.[95] Although a defamatory statement may be responsible for an individual's inability to find proper employment or obtain credit, he does not have a cause of action against the persons responsible unless he shows that the statement was made with malice.[96] Neither failure to investigate falsity nor failure to act with reasonable care has been considered sufficient to show an abuse of this privilege,[97] although either might constitute grounds for a finding of negligence under the *Foster* rule. It is uncertain, though, whether the holding in *Foster* was meant to apply to commercial speech, so the applicability of a negligence standard in cases involving credit reports or

---

value judgment based on true information. Deductive opinions alone are actionable, where fault by the publisher is shown. *See* Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221, 1250-54 (1976).

91. Cooksey v. McGuire, 146 S.W.2d 480, 483 (Tex. Civ. App.—Eastland 1940, no writ); Houston Chronicle Pub. Co. v. Martin, 5 S.W.2d 170, 174 (Tex. Civ. App.—El Paso 1928, writ dism'd); *accord*, Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 514-15 (Tex. Civ. App.—Dallas 1970, writ dism'd) (slander).

92. Buck v. Savage, 323 S.W.2d 363, 373 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); World Oil Co. v. Hicks, 46 S.W.2d 394, 398 (Tex. Civ. App.—Texarkana 1932, writ ref'd); Houston Chronicle Pub. Co. v. McDavid, 157 S.W. 224, 226 (Tex. Civ. App.—Austin 1913, no writ).

93. Cobb v. Garlington, 193 S.W. 463, 467 (Tex. Civ. App.—Fort Worth 1917, no writ); *accord*, Caruth v. Dallas Gas Co., 282 S.W. 334, 339 (Tex. Civ. App.—Dallas 1926, no writ) (slander).

94. *See* RESTATEMENT (SECOND) OF TORTS § 580B, Comment k, at 34-35 (Tent. Draft No. 21, 1975). *But see* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 496-98 (1975) (suggesting criteria for the application of a conditional privilege after *Gertz*).

95. *See* Comment, *Defamation: The Texas Approach*, 13 S. TEX. L.J. 159, 184-92 (1971).

96. *See id.* at 185. The Fair Credit Reporting Act, 15 U.S.C. § 1681 (1970), has helped to raise the standard of care imposed upon credit reporting agencies.

97. Dun & Bradstreet, Inc. v. O'Neill, 456 S.W.2d 896, 900-01 (Tex. 1970); Butler v. Central Bank & Trust Co., 458 S.W.2d 510, 515-16 (Tex. Civ. App.—Dallas 1970, writ dism'd). *See* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471, 492 (arguing that Texas adheres to strict view of degree of culpability necessary to overcome conditional privilege in credit reporting).

communications between employers will depend on the position taken by Texas courts regarding the liability of nonmedia defendants.[98]

CONCLUSION

The greatest danger in applying a negligence standard to libel actions lies in its flexibility, for it vests great discretion in the jury in deciding whether or not a defendant is at fault. Much concern has been expressed that emotional issues may cause a jury to abandon its discretion and render excessive verdicts against defendants exhibiting unpopular views, resulting in self-censorship by the media and an avoidance of controversial issues.[99] Such fears seem to be without a substantial empirical basis.[100] Nothing in the resolution of the *Foster* decision, or other decisions adopting a negligence standard, should intimidate responsible publishers and broadcasters. Restrictions now placed on the earlier protections of the press are minimal. Although private plaintiffs are afforded a less stringent standard of recovery, they are infrequently the subject of media attention. Furthermore, the negligence standard of recovery is accompanied by measures designed to eliminate the dangers of excessive verdicts against unpopular defendants: There can be no presumed or punitive damages where malice is not shown, and recovery is restricted to actual injury proved by competent evidence.[101]

It is undeniable, however, that a threat of self-censorship still exists. Yet some self-censorship is good where it suppresses material of dubious informational value or material which appeals solely to prurient curiosity. If negligence standards are properly applied, publishers and broadcasters will not be held liable for mistakes that could not have been avoided by the exercise of reasonable care. Discussion may even be stimulated since the fear that liability will result from good faith mistakes might be reduced. A fault standard should serve to prevent the kind of negligence which ought to be avoided. If self-censorship results, then, it will be a self-censorship which society can well afford.

---

98. California has held that credit reports fall outside the first amendment protections set out in *Gertz*. Roemer v. Retail Credit Co., 119 Cal. Rptr. 82, 86 (Ct. App. 1975).

99. *See* Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEXAS L. REV. 271, 274-76 (1976); Note, 51 CHI.-KENT L. REV. 612, 631-32 (1974); Note, 10 SUFFOLK U.L. REV. 126, 139 (1975); Note, 48 TEMP. L.Q. 450, 465 (1975). Anxiety over increased self-censorship was a central part of one of the *Gertz* dissents. Gertz v. Robert Welch, Inc., 418 U.S. 323, 366-68 (1974) (Brennan, J., dissenting).

100. *See* Comment, *Defamation Law in the Wake of Gertz v. Robert Welch, Inc.: The Impact on State Law and the First Amendment*, 69 NW. U.L. REV. 960, 980 (1975).

101. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974).