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Washington and New York Respond to Gertz

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WASHINGTON AND NEW YORK RESPOND TO *Gertz*

INTRODUCTION

In recent years, courts have had difficulty reconciling the constitutional guarantees of freedom of speech and press[1] with the legitimate interest of the individual in protecting his reputation from defamatory falsehoods.[2] Since 1964 the United States Supreme Court has struggled to balance these two apparently contradictory values. After a long line of cases the Court determined that, in at least one area of defamation law, the development of a standard of liability should be left to the individual states. Thus, the Court's decision in *Gertz v. Robert Welch, Inc.*[3] left the states scrambling to promulgate constitutionally permissible standards for imposing liability upon publishers and broadcasters of defamatory falsehoods concerning private individuals involved in matters of public interest or general concern.

The *Gertz* decision presents inherent problems to the states. In effect, it requires that the courts of each state decide for state citizens the protection to be given their reputations. In balancing the interest of an individual in his reputation against the equally significant interest of the public in matters of interest to them, the states will undoubtedly adopt different standards.[4] Two recent state court decisions in New York and Washington are evidence of the widely disparate standards which are inevitable.

In *Taskett v. KING Broadcasting Co.*,[5] the Washington Supreme Court held that a publisher of a defamatory falsehood concerning a private individual involved in a matter of general or public interest is liable for actual damages if he fails to exercise

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[1] U.S. CONST. amend. I.

[2] This legitimate interest has been consistently recognized even while being limited by the United States Supreme Court. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).

[3] 418 U.S. 323 (1974).

[4] This lack of uniformity poses serious problems for the interstate publisher. To avoid liability publishers must be aware of the standards set by each state. Publishers are, in effect, bound by the states which impose the highest duty of due care on publishers. For discussions of this problem and of the possibility of media self-censorship as a result of this lack of uniformity, see Comment, *State Court Reactions to* Gertz v. Robert Welch, Inc.: *Inconsistent Results and Reasoning*, 29 VAND. L. REV. 1431, 1445-46 (1976); Note, *New Standards in Media Defamation Cases:* Gertz v. Robert Welch, Inc., 12 CALIF. W.L. REV. 172, 186-88 (1975).

[5] 86 Wash. 2d 439, 546 P.2d 81 (1976).

reasonable care.[6] The New York Court of Appeals, ruling on the same issue, held, in *Chapadeau v. Utica Observer-Dispatch, Inc.*,[7] that the relevant question in imposing liability in these cases is whether the publisher acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[8] This comment will analyze the two standards promulgated by the highest courts of Washington and New York and discuss which of these standards best serves the dual values of freedom of speech and press and protection of reputation.

I. CONSTITUTIONAL BACKGROUND

Because the common law tort of defamation results in the imposition of strict liability, it has long been a source of consternation to commentators.[9] Upon a finding that the statement of publication was false, defamatory, and communicated to a third party, damages were presumed. Thus, liability was imposed absent a finding of fault.[10] Historically, any contradictions between the twin torts of libel and slander and the constitutional guarantees of freedom of speech and press were dismissed with the blanket assertion that defamatory falsehoods were not protected under the first amendment.[11] Thus, the interest of the individual in his reputation was always superior to the public interest and "right to know." It was not until 1964 that the conflict was recognized.

A. New York Times, Inc. v. Sullivan[12] *through* Rosenbloom v. Metromedia, Inc.[13]

In *New York Times,* the United States Supreme Court first

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[6] *Id.* at 445, 546 P.2d at 85.

[7] 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

[8] *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

[9] *See, e.g.*, Harum, *Remolding of Common Law Defamation*, 49 A.B.A.J. 149 (1963); Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073 (1962).

Interestingly, even in Great Britain, known for its vigorous defamation law, some commentators feel that strict liability in defamation should be limited with respect to the news media. *Report of the Committee on Defamation*, 39 MOD. L. REV. 187 (1975).

[10] *See* W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971).

[11] *See* Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486-87 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

[12] 376 U.S. 254 (1964).

[13] 403 U.S. 29 (1971).

confronted the question of whether the first amendment necessitated a limitation of state libel law in certain instances. One of three elected commissioners of the city of Montgomery, Alabama, brought suit against the New York Times for alleged defamatory falsehoods published in a paid advertisement deploring the ill-treatment of civil rights workers in the South. The Court held that, in cases involving the alleged defamation of a public official, recovery must be based upon a showing of "actual malice" defined as "knowledge that . . . [the statement] was false or . . . reckless disregard of whether it was false or not."[14]

Although limited to defamation involving public officials, *New York Times* was a radical departure from the "defamatory falsehoods are not protected free speech" theory. In rapid succession, the Court, in what is universally referred to as the "*Times* progeny," expanded the application of this "knowledge of falsity or reckess disregard of truth" standard to criminal libel,[15] supervisors of county-owned recreational facilities,[16] candidates for public office,[17] and police officers.[18] In addition, the rule was extended to cover such "public figures" as a college football coach accused of "fixing" a game[19] and a retired army general involved in a campus disturbance.[20] "Reckless disregard of truth" was defined, in yet another case, as "serious doubts as to the truth of . . . [the] publication."[21] However, the Court was soon to move away abruptly from its "*public* official" and "*public* figure" rationale in deciding defamation cases.

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[14] The Court noted that the case was to be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. The Court concluded:

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

Id. at 279-80.

[15] Garrison v. Louisiana, 379 U.S. 64 (1964).

[16] Rosenblatt v. Baer, 383 U.S. 75 (1966).

[17] Ocala Star-Banner v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).

[18] Time, Inc. v. Pape, 401 U.S. 279 (1971).

[19] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[20] Associated Press v. Walker, 388 U.S. 130 (1967).

[21] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

In *Rosenbloom v. Metromedia, Inc.*,[22] the Court decided the question of whether the first amendment limited the right of a *private* individual to recover damages for a defamatory falsehood involving a matter of public or general interest. Rosenbloom, a Philadelphia book dealer, complained that broadcasts by Metromedia, which referred to his books as "obscene" and stated that a pending federal suit was an attempt on his part to force the police to "lay off the smut racket," were defamatory.[23]

Justice Brennan, in his plurality opinion, joined by Chief Justice Burger and Justice Blackmun, stated that the relevant question in determining whether to require the *New York Times* standard of "knowledge of falsity or reckless disregard of truth" was not the status of the plaintiff as either public official, public figure, or private individual, but *the nature of the subject matter involved* in the alleged defamatory statement.[24] Thus, if the event reported was one of public or general interest, a private individual could recover damages for libel "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."[25] The effect was, therefore, to extend the standard to private individuals by changing the emphasis from the status of the defamed person to the character of the event reported.

The *Times* progeny, culminating in *Rosenbloom,* seemed to indicate a clear trend in the law of defamation as affected by the first amendment. In virtually all cases, the liability of a publisher or broadcaster of defamatory statements was to be based only upon a finding of actual knowledge of falsity or reckless disregard of truth since the "public interest" is implicit in nearly everything the media reports. Given the fact that "reckless disregard" required "serious doubt as to the truth of the publication,"[26] the

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[22] 403 U.S. 29 (1971).

[23] *Id.* at 36.

[24] The Court said:

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

Id. at 43.

[25] *Id.* at 52.

[26] 390 U.S. at 731.

obstacles in the way of recovery by a defamed individual seemed insurmountable.

B. Gertz v. Robert Welch, Inc.[27]

Rosenbloom, however, was a plurality opinion. Dissents by Justices Harlan and Marshall in that case indicated marked discontent with the application of the *New York Times* standard to defamation of private individuals. With *Gertz* the Court retreated from its position in *Rosenbloom* and placed upon the states the burden of determining what standard to adopt, so long as it was not strict liability, in allowing recovery from defamers of private individuals.

Much has been written of *Gertz* and its predicted effect upon state defamation law.[28] In that case, an attorney brought suit in libel against the publisher of the magazine *American Opinion.* In an article discussing a supposed communist conspiracy to discredit the police, Gertz was referred to as a "communist-fronter," and a "Leninist," and was accused of having a criminal record.[29] Framing the issue as whether publishers and broadcasters of defamatory falsehoods involving private individuals enjoy a constitutional privilege against liability, the Court returned to the traditional inquiry of the *New York Times* progeny. The Court again focused on the type of person defamed, not the event involved. Recognizing the conflicting values in the case, Justice Powell, writing for the majority, said: "Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[30] The Court, however, declined to shoulder the responsibility of drawing the line of demarcation between the two interests and instead left the ultimate decision to the individual states: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a

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[27] 418 U.S. 323 (1974).

[28] *See, e.g.,* Note, *Constitutional Law-Damages for Libel—A New Standard for Recovery of Damages by Private Individuals Libeled in a Report of Public Interest—* Gertz v. Robert Welch, Inc., 1 B.Y.U. L. REV. 159 (1975); Note, 14 DUQ. L. REV. 89 (1975); Comment, *As Time Goes By:* Gertz v. Robert Welch, Inc. *and Its Effect On California Defamation Law,* 6 PAC. L.J. 565 (1975); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349 (1975); Note, *Freedom to Defame,* 11 WAKE FOREST L. REV. 166 (1975).

[29] 418 U.S. at 326.

[30] *Id.* at 342.

publisher or broadcaster of defamatory falsehood injurious to a private individual."[31] However, this license given to the states carried another limitation: "[T]he State may not permit recovery of presumed damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."[32] Therefore, provided they did not impose strict liability or grant presumed damages in the absence of *New York Times* "knowledge of falsity or reckless disregard of truth," the states were, and indeed are, at liberty to set their own standards of care in imposing liability upon defamers of private individuals.[33]

II. *Taskett v. KING Broadcasting Co.*[34]

In *Taskett,* the Supreme Court of the state of Washington took advantage of the *Gertz* invitation to promulgate a liability standard in the area of private defamation.

A. *The Background of the Decision*

On January 11, 1973, KING television broadcast a news story concerning the supposed disappearance of William Taskett, a Seattle advertising executive who owned ninety-five percent of an agency incorporated under the name Bill Taskett & Associates, Inc. During the previous month, the agency had lost one of its major accounts, and, threatened with lawsuits, Taskett filed for statutory dissolution of the corporation. Upon the appointment of a trustee and the notification of all creditors, including defendant KING Broadcasting, Taskett and his wife departed for a vacation in Mexico. The story broadcast by defendant asserted that "[s]everal Seattle businesses, including some television and

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[31] *Id.* at 347.

[32] *Id.* at 349.

[33] In a more recent case, Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court indirectly limited the definition of "public figure" by refusing to apply the label to the wife of the scion of a wealthy industrial family. The Court further declined to extend the "knowledge of falsity or reckless disregard of truth" test of *New York Times* to all media coverage of judicial proceedings. This would seem to confirm the Court's unwillingness to extend the *New York Times* doctrine on the basis of the nature of the event involved, in this case the divorce of two extremely wealthy people. The relevant inquiry is whether the person allegedly defamed is a public official, public figure, or a private individual, and in this context the Court will apply the "public figure" classification strictly.

[34] 86 Wash. 2d 439, 546 P.2d 81 (1976) (remanding to trial court). On remand, the trial court again granted summary judgment in favor of the defendant. No appeal was taken from that decision. Telephone interview with Evan L. Schwab, attorney for KING Broadcasting Co. (June 28, 1977).

radio stations, are looking for an advertising man. He's gone and he may have some of their money."[35] The story then went on to state that "no one knows where he is"; quoted the "receiver" as saying that the firm's debts might total one hundred thousand dollars while assets were a fraction of that amount; indicated the amounts several advertisers were alleged to have lost when Taskett left; noted that Taskett was last heard of in Mexico; and ended with the plea, "Bill Taskett, won't you please come home."[36]

The story was investigated for the defendant by a reporter who had spoken with the sublessee of Taskett's apartment, with various creditors, and with the trustee, and had consulted court files relating to suits pending against Taskett. Upon returning to Seattle, Taskett brought suit in libel against KING Broadcasting and James Harriot, the station's "anchorman."

Washington had been one of the first states to respond to *Rosenbloom*. In *Miller v. Argus Publishing Co.*,[37] the state supreme court, citing *Rosenbloom* with approval, and noting the "tension" between the individual's interest in his reputation and first amendment guarantees, determined that a private individual involved in a matter of public interest must prove "knowing or reckless falsity" with clear and convincing proof to recover in libel.[38] Relying on *Miller,* the trial court in *Taskett* granted summary judgment in favor of KING. The court noted that *Gertz* appeared to allow more "flexibility" than *Rosenbloom* in imposing liability but said that any change would have to be initiated in the state supreme court.[39] Taskett appealed, and the Washington Court of Appeals certified the case to the Washington Supreme Court.

Although the state supreme court had not addressed the issues raised in *Gertz* before the *Taskett* case, the state's judiciary was aware of *Gertz* and its potential impact upon *Miller*. The

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[35] Quotes are as reported in the court's opinion. 86 Wash. 2d at 451, 546 P.2d at 88.

[36] Quotes are as reported in the court's opinion. *Id.* at 452, 546 P.2d at 88-89.

[37] 79 Wash. 2d 816, 490 P.2d 101 (1971).

[38] *Id.* at 827, 490 P.2d at 109.

[39] Brief for Appellant at 6 (quoting from trial court's oral opinion). Brief for Respondents at 23 indicates that plaintiff did not mention the *Gertz* decision in his brief opposing summary judgment. He did not ask the trial court to read or apply any rule under *Gertz*, nor did he respond to the court's offer to defer final decision until it had read the *Gertz* opinion in full.

Washington Court of Appeals, in *Exner v. AMA*,[40] a case involving an alleged defamation of a self-proclaimed public figure with respect to the limited issue of fluoridation of water, observed, in dicta: "[p]rivate individuals who have not become public figures may now protect their reputations in state courts by legal remedy without proof of malice and . . . the mandate of *Miller v. Argus Publishing* is likewise modified."[41]

Against the background of *Gertz* (which allowed greater leeway in imposing liability upon defamers of private individuals), *Miller* (which was still the law of the state requiring "knowledge of falsity or reckless disregard of truth" for recovery), and the incorrect conclusion made in *Exner* (that *Gertz required* a modification of the strict standard in *Miller*), the court proceeded to clarify the law of defamation in Washington.

B. *The Holding*

Recognizing the problem of reconciling first amendment guarantees and defamation law, as discusssed in earlier Washington cases,[42] the Washington court agreed with the reasoning in *Gertz*. Hence, to require "knowledge of falsity or reckless disregard of truth" as a prerequisite to recovery in libel by a private individual imposed an unacceptable burden resulting in near-absolute immunity for the media. The court further reasoned that the argument that a lesser standard than the *New York Times* test might result in "self-censorship" was "without merit."[43] Thus, the underlying rationale of both *Rosenbloom* and *Miller* was undercut. Although the day of strict liability for defamatory falsehoods had passed, the pendulum had seemingly swung too far in favor of the media. Balancing the competing interests, the court arrived at the following conclusion:

> [W]e hold that *a private individual, who is neither a public figure nor official, may recover actual damages for a defamatory falsehood, concerning a subject of general or public interest, where the substance makes substantial dangers to reputation apparent, on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the state-*

[40] 12 Wash. App. 215, 529 P.2d 863 (1974).

[41] *Id.* at 223, 529 P.2d at 869.

[42] *See, e.g.*, Tilton v. Cowles Publishing Co., 79 Wash. 2d 707, 459 P.2d 8 (1969); Grayson v. Curtis Publishing Co., 72 Wash. 2d 999, 436 P.2d 756 (1967).

[43] 86 Wash. 2d at 446, 546 P.2d at 86.

> *ment was false, or would create a false impression in some material respect.*[44]

The court then specifically overruled *Miller v. Argus Publishing Co.* and reversed and remanded to the trial court for further proceedings consistent with its opinion.[45]

III. *Chapadeau v. Utica Observer-Dispatch, Inc.*[46]

Chapadeau offered the state of New York its opportunity to respond to *Gertz*. The New York judiciary had adopted, as had Washington, the *New York Times-Rosenbloom* standard and had frequently applied it.[47] Also, as had Washington, a lower New York court had indicated in dicta that, in light of *Gertz*, a standard different from that adopted in accordance with *Rosenbloom* might better serve to balance the conflicting public and private interests in defamation law.[48]

A. *The Background of the Decision*

On June 10, 1971, Joseph L. Chapadeau, a public school teacher, was arrested and charged with criminal possession of heroin and criminal possession of a hypodermic instrument. These charges were subsequently dropped. In reporting the event, the defendant, a local newspaper in Utica, New York, grouped the story of Chapadeau's arrest with a report concerning the arrests of two other men on charges of criminal possession of marijuana.

The alleged libel involved one paragraph of the article which

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[44] *Id.* at 445, 546 P.2d at 85. Childress v. Hearst Corp., 86 Wash. 2d 486, 546 P.2d 108 (1976), decided the same day on similar facts, cited the *Taskett* rule as controlling.

[45] *See* note 34 *supra*. One justice, concurring with the new rule, nevertheless, dissented on the ground that the rule should not be applied retroactively. Another justice lodged a vigorous dissent opposing the new rule and defending *Miller*.

[46] 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

[47] *See* Trails West, Inc. v. Wolff, 32 N.Y.2d 207, 298 N.E.2d 52, 344 N.Y.S.2d 863 (1973); Twenty-Five E. 40th Restaurant Corp. v. Forbes, Inc., 30 N.Y.2d 595, 282 N.E.2d 118, 331 N.Y.S.2d 29 (1972); Kent v. City of Buffalo, 29 N.Y.2d 818, 277 N.E.2d 669, 327 N.Y.S.2d 653 (1971); Frank v. McEldowney, 29 N.Y.2d 720, 275 N.E.2d 337, 325 N.Y.S.2d 755 (1971).

[48] In Safarets, Inc. v. Gannet Co., 80 Misc. 2d 814, 361 N.Y.S.2d 276 (Sup. Ct. 1974), the court stated:

> Were it for us to decide, we would espouse some lesser standard as permitted in *Gertz* where private persons are defamed. However, we cannot anticipate whether the Court of Appeals will abandon the *Rosenbloom* doctrine or, if it should, what standard of care it might adopt. Therefore, we are bound to adhere to the *Rosenbloom* rule as adopted by the Court of Appeals.

80 Misc. 2d at 818, 361 N.Y.S.2d at 280.

stated that "the *trio* was part of a group at a party in Brookwood Park when they were arrested. Drugs and beer were found at the party, police charge."[49] Chapadeau brought suit in libel claiming that the article defamed him because it indicated that he was at a party at which beer and illegal drugs were found. He further alleged that his reputation as a high school teacher was thereby injured.[51]

At trial, the supreme court (New York's court of general jurisdiction) refused to grant the defendant newspaper's motion for summary judgment. Under the New York procedure which allows immediate review of such orders,[51] the defendant appealed to the appellate division of the supreme court. That court reversed, granting the *Observer-Dispatch's* motion for summary judgment. Chapadeau's appeal to the court of appeals followed.

B. *The Holding*

In an opinion which was surprisingly short, given its potential impact, the court of appeals first surveyed the relevant cases in the area, including the *New York Times* progeny, its own cases applying *Rosenbloom,* and finally *Gertz.* The court then promulgated a new rule stating:

> We now hold that within the limits imposed by the [United States] Supreme Court where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover: however, to warrant such recovery he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.[52]

Applying this new rule to the case, the court determined that the facts were insufficient to support any finding of "grossly irresponsible" conduct. Therefore, the granting of summary judgment in favor of the *Observer-Dispatch* was affirmed.

IV. Analysis of the Two Decisions

On similar facts, the highest courts of Washington and New

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[49] 38 N.Y.2d at 197, 341 N.E.2d at 570, 379 N.Y.S.2d at 62 (emphasis added).

[50] Brief of Appellant at 2.

[51] N.Y. Civ. Prac. Law & R. § 5701 (McKinney 1963).

[52] 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

York have created two widely-differing standards for imposing liability upon media defamers of private individuals involved in matters of public concern. Since the *Gertz* opinion authorizes any standard so long as fault is an element, both standards are constitutionally permissible. The question becomes, therefore, which standard best serves the competing values of free speech and untarnished reputation.

Clearly, pragmatic concerns must be taken into account in formulating an answer. The standard must be easily understood by the publishers and broadcasters who will be called upon to comply with it and the members of the bar who must advise them. In addition, it must be intelligible to the courts which will adjudicate the disputes which will inevitably arise.

A. *The* Taskett *Negligence Standard*

Although the Supreme Court did not mandate any particular standard in *Gertz,* the decision makes the Court's preference abundantly clear. Justice Powell's majority opinion, in dicta, broadly hints that a negligence test is the preferred "lesser standard."[53]

The reasons for adopting a negligence standard in determining media liability in such cases are extremely persuasive. The tort law concept of negligence is well understood. Courts and lawyers are familiar with the "reasonably prudent man" test and its applications. Thus, publishers and broadcasters can be advised, with considerable certainty, as to what will be expected of them if they are to avoid liability. The disadvantage, as in all negligence law, is that application of the standard is subject to the vagaries of the jury system. Uncertainty always exists as to how a jury will apply this reasonable man test to the facts of a given case. Due to this uncertainty, danger of media self-censorship is unavoidably present. However, this is true of virtually any standard, including the "knowledge of falsity or reckless disregard of truth" test. In addition, the safeguards of the appellate process, which will prevent findings of liability based on the expression of unpopular but constitutionally protected views, are equally available under any legal standard. Thus, the danger of self-censorship is attributable to the necessary uncer-

[53] 418 U.S. at 348, 350.

tainties of a jury system, not to the use of any particular standard.

In addition, the reasonable man test provides the necessary protection for constitutional freedoms of speech and press while allowing recovery for actual damages to reputation. In the absence of a constitutionally required standard which balances these interests, it seems reasonable to impose liability on publishers for negligent defamation of private individuals while allowing for good faith mistakes. It is unlikely that requiring publishers to act as reasonably prudent members of their profession will restrain their exercise of fundamental rights to any significant degree.

The *Taskett* decision, relying partially on the reasons outlined above, also gave great weight to the inability of a private individual to respond successfully to a defamatory falsehood.[54] Quoting extensively from *Gertz*,[55] the court noted that a public official or figure has greater access to the sources of communication and thus enjoys a greater opportunity to refute defamatory statements than does a private individual. This, too, is a valid reason for selecting the negligence standard. The relative defenselessness of the private citizen adds weight to the state's interest in providing a means of redress for injuries to his reputation, thus, tipping the scale in the balancing process towards a standard which requires less fault on the part of the publisher for recovery by the defamed individual.

The majority of states passing on the problem since *Gertz* have found this reasoning persuasive.[56] Although a trend is diffi-

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[54] 86 Wash. 2d at 445, 546 P.2d at 85.

[55] *Id.* at 445-47, 546 P.2d at 84-85.

[56] *See* Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Troman v. Wood, 62 Ill. App. 184, 340 N.E.2d 292 (1975); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1975).

Other states, while not specifically adopting a negligence standard, seem to suggest that a negligence standard should in fact be applied. *See* Helton v. United Press Int'l. 303 So. 2d 650 (Fla. 1974) (private individuals no longer required to prove actual malice to recover); Tendler v. Dun & Bradstreet, Inc., 43 Cal. App. 3d 788, 118 Cal. Rptr. 274 (1974) (dicta stating that absent overriding consitutional considerations negligence standard applies); Corbett v. Register Publishing Co., 38 Conn. Supp. 4, 356 A.2d 472 (1975) (denying summary judgment against plaintiffs who are private individuals since affidavits would not preclude some finding of fault).

cult to discern at present, it is significant that the *Restatement (Second) of Torts* has tentatively adopted the negligence standard.[57] The impact this will have upon the states which have not yet responded to *Gertz* is unclear. It should be remembered that several states,[58] including Colorado,[59] have chosen to retain the *Rosenbloom* standard, maintaining that freedom of speech and press requires the protection of the stricter "knowledge of falsity or reckless disregard of truth" test. Thus, uniformity in this area of the law does not seem imminent.

What should ultimately determine which standard the remaining states adopt is how well, in practice, each standard protects the two interests at stake. It is too early to tell how well the negligence standard will, in practice, protect constitutional freedoms of speech and press. Nevertheless, a large number of states have, in rejecting the *Rosenbloom* test in favor of the negligence standard, theoretically determined that *Rosenbloom* offers insufficient protection to the individual's interest in his reputation. The choice is, therefore, between a standard that *might* offer insufficient protection to constitutional guarantees and the *Rosenbloom* standard that, according to the majority of states ruling on the question, *does not* give adequate protection to the value of one's reputation. This failure of the *Rosenbloom* "knowledge of falsity or reckless disregard of truth" standard is,

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[57] RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975).

> One who publishes a false and defamatory communication concerning a private person, or concerning a public official or a public figure in relation to a private matter, is subject to liability, if, but only if, he
> (a) Knows that the statement is false and that it defames the other,
> (b) acts in reckless disregard of these matters, or
> (c) acts negligently in failing to ascertain them.

[58] *See* AAFCO Heating and Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. 1974) (2-to-1 decision), *cert. denied*, 424 U.S. 913 (1976); Le Boeuf v. Times Picayune Publishing Corp., 327 So. 2d 430 (La. 1976); Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 547 P.2d 1074 (1976).

[59] Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975) (two justices dissenting).

For a discussion of the case, see Comment, *Constitutional Law—Libel Action—Private Plaintiff versus Member News Media—An Application of* Gertz v. Robert Welch, Inc.—Walker v. Colorado Springs Sun, Inc., 36 OHIO ST. L.J. 911 (1975).

In the recent case of Rowe v. Metz, 564 P.2d 425 (Colo. App. 1977), *cert. granted*, No. C-1230 (Colo. May 23, 1977), the Colorado Court of Appeals held that the "reckless disregard" standard of fault was applicable to defamation actions between *private* individuals.

perhaps, the most persuasive argument in favor of the negligence standard adopted by *Taskett.*

B. *The* Chapadeau *"Grossly Irresponsible" Standard*

Unlike the negligence standard set out in *Taskett,* the requirement that a private individual must prove by a preponderance of the evidence that the publisher acted in a "grossly irresponsible manner" is not a standard familiar to the law.[60] The court attempted to define the new standard by describing "grossly irresponsible" as "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[61] However, this qualification results in only further uncertainty in ascertaining what the standard means. While the term "grossly irresponsible" has the flavor of recklessness, "without due consideration" and "ordinarily followed" are akin to the standards of conduct imposed on professionals in ordinary negligence. Thus, the initial inquiry must be to determine where, on the spectrum of standards of care, gross irresponsibility lies. This is no easy task.

The language employed in *Chapadeau* seems to rely heavily upon Justice Harlan's opinion in *Curtis Publishing Co. v. Butts.*[62] The libel action in *Butts* was brought by a college football coach accused of "fixing" a game. The Court, characterizing the plaintiff as a "public figure," held: "[A] 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly *unreasonable conduct consituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*"[63] Significantly, Justice Harlan's test was never applied, and Chief Justice Warren's concurring opinion applying the *New York Times* test to defamation of "public figures" became the law.[64]

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[60] No listing for "grossly irresponsible" is found in either BLACK'S LAW DICTIONARY (4th ed. 1968), or WORDS AND PHRASES (1958). "Irresponsible" is defined only with reference to mental incompetency or insolvency. 22A WORDS AND PHRASES 506 (1958).

[61] 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

[62] 388 U.S. 130 (1967).

[63] *Id.* at 155 (emphasis added).

[64] Associated Press v. Walker, 388 U.S. 130 (1967), joined with *Butts* for argument, was remanded to the Texas Court of Civil Appeals for further proceedings not inconsistent with the Warren opinion.

The Chief Justice's opinion was highly critical of the above standard:

> Mr. Justice Harlan's opinion departs from the standard of *New York Times* and substitutes in cases involving "public figures" a standard that is based on "highly unreasonable conduct" and is phrased in terms of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.[65]

Chief Justice Warren's skepticism is equally applicable to the *Chapadeau* standard.

The New York Court of Appeal's choice of this "grossly irresponsible" language is mystifying. Presumably, the court wished to arrive at a standard stricter than negligence but not as strict as reckless disregard of truth. The result of this compromise, however, is an unmanageable standard likely to cause confusion when applied.[66]

It must be assumed that the court refused to adopt a negligence standard because it felt that such a standard would give first amendment freedoms inadequate protection. However, in its apparent concern over these rights, the court has fostered greater uncertainty as to where constitutional protection ends and liability for defamation begins. The result is nothing short of judicial abdication of responsibility. Not only is such a standard unfathomable to a jury of laymen but, more significantly, the publishers and broadcasters who must abide by the standard will be equally unsure as to what is expected of them.

This is the major failing of the *Chapadeau* standard. Clarity is imperative in this area of the law, as Justice Blackmun recognized in *Gertz*.[67] Uncertainty is likely to result in self-censorship. Lowering the standard at the cost of introducing uncertainty benefits neither potential plaintiffs nor defendants. To avoid this

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[65] 388 U.S. at 163.

[66] *But see* the following cases where the *Chapadeau* rule was cited as controlling: Bolam v. McGraw-Hill, Inc., 52 App. Div. 2d 762, 382 N.Y.S.2d 772 (1976); Tobler v. Newsday, Inc., 51 App. Div. 2d 986, 381 N.Y.S.2d 113 (1976); and Commercial Programming Unlimited v. CBS, Inc., 50 App. Div. 2d 351, 378 N.Y.S.2d 69 (1975).

[67] Justice Brennan concurred in order to have a "clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity." 418 U.S. at 354.

self-censorship, the publishers and broadcasters must have at least a working understanding of what conduct is prohibited and what conduct is protected. The *Chapadeau* standard does neither for the reason that the term "grossly irresponsible" is not a legally defined standard of conduct. Publishers are likely to avoid reporting borderline stories for fear of incurring liability under what appears to be a standard, the content of which is left largely to the discretion of courts and juries in application.

The blame does not rest solely with the New York Court of Appeals. The *Chapadeau* standard clearly falls within the mandate of *Gertz* as laid down by the Supreme Court. *Chapadeau* imposes liability only upon a finding of fault, albeit the degree of fault required remains unclear. The Supreme Court might have done better simply to give the states a choice between negligence and the "knowledge of falsity or reckless disregard of truth" standards, both of which are thoroughly familiar to bar and bench. The Court opted to give the states greater leeway, however, opening the way to compromise standards such as *Chapadeau.*

In spite of its weakness, the *Chapadeau* standard is not unsalvageable. A good solid line of cases interpreting the rather amorphous language of the rule *might* give it the clarity needed in this area. It should be remembered that the *New York Times* "knowledge of falsity or reckless disregard of truth" test suffered from the same lack of legal meaning until the words were given significance through interpretation.[68] Unfortunately, while the standard remains unexplained, New York courts, lawyers, plaintiffs, and publishers must suffer with its inadequacies.

CONCLUSION

Given the *Gertz* decision, wherein the Supreme Court refused to promulgate a standard by which liability in defamation law could be measured, some confusion is to be expected as each state attempts to strike a balance between the Constitution and the individual's right to protection from defamatory falsehoods. The inevitable outcome is that different standards will be adopted in different jurisdictions. It therefore seems an inopportune time for the courts to add further confusion by creating unmanageable standards.

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[68] *See, e.g.*, St. Amant v. Thompson, 390 U.S. 727 (1968).

Virtually any clear legal standard is preferable to one so ambiguous as to be no standard at all. The failure to promulgate a workable and understandable test by which to impose liability upon defamers of private individuals involved in matters of public interest is the near-fatal defect of *Chapadeau v. Utica Observer-Dispatch, Inc.*

The remaining question is which, among the workable standards in this area, is the best. The negligence standard adopted in *Taskett v. KING Broadcasting, Inc.* strikes an admirable balance between the interest in constitutionally protected free speech and press, and the interest in protection of the reputations of private individuals. The standard adequately protects both interests by limiting media liability to occasions when the publisher or broadcaster has failed to act reasonably and, at the same time, allows the private individual to recover actual damages, without the almost insurmountable burden of proof required by *Rosenbloom.* It seems likely that, given these advantages, the states which have yet to set a standard in this area should opt for the negligence standard as did the court in *Taskett.*

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