LIBEL, SLANDER, AND FREEDOM OF SPEECH

> *Good name in man and woman, dear my lord.*
> *Is the immediate jewel of their souls.*
> *Who steals my purse steals trash;*
> *`Tis something, nothing;*
> *`Twas mine, `tis his, and has been slave to thousands;*
> *But he that filches from me my good name*
> *Robs me of that which not enriches him,*
> *And makes me poor indeed.*

Shakespeare, *Othello*, Act III, scene 3.

INTRODUCTION: THE DEVELOPMENT OF DEFAMATION LAW

BEARING FALSE WITNESS

From earliest times, the concept of defamation, and its punishment, has been used to serve several distinct purposes. Slander as a "wrong" prohibited by society goes back at least as far as the Old Testament, and constitutes the Ninth Commandment against bearing false witness against one's neighbor. The prohibition no doubt predates the Old Testament, and is found in some form or another in almost every society. To originate or disseminate lies told about one's neighbor is fundamentally an *antisocial* act, since it strikes at the heart of the social compact by undermining trust and cooperation.

ENGLISH COMMON LAW HISTORY

In England, defamation consisted first of slander and later, libel as well as slander. The early Anglo-Saxon kings punished slander—speaking falsely against one's neighbor in local secular courts, not only to remedy the dishonor and personal insult it caused, but to preserve the peace by eliminating personal vendettas. Initially, an action in slander was limited to wrongs committed against the King or the nobles, and was linked to sedition. Persons who spread rumors or malicious gossip about the King or nobles were prosecuted in order that the originator of the falsehood might be found and punished even more severely. Out of this tradition grew the crime of "seditious libel." [see Chaps. I, III]

As the influence and power of the Church via-a-vis the King and feudal lords, grew, the courts were separated into "ecclesiastical" (that is, courts established by the Church to try and punish *moral* offenses), and *secular* (courts under the control of the King and Parliament established to try civil crimes and offenses against the King). After the Norman invasion and until the late sixteenth century, slander became the province of the ecclesiastical courts. Since the church courts relied on public knowledge of crimes and public accusations to maintain order, the perjurer and false accuser posed a threat to the fair and effective administration of ecclesiastical justice. Thus, slander was readily punished and the defamation suit soon became a popular vehicle for vindication and self-defense following most of the secular trials that ended in acquittal for the accused.

During the reign of Elizabeth I, the common law lawyers, aware of the popularity of the slander action in the ecclesiastical courts, began to pursue defamation actions in civil courts. By 1650, the popularity of the slander suit in civil, or common law courts was so great that judges imposed rules on interpretation and limitations, often quite arbitrarily, in an attempt to reduce the caseload and lighten the dockets.

The law of libel arose within a different institutional framework. The eruption of religious and constitutional controversy in the sixteenth and seventeenth centuries increased official concern over sedition, political dissent, and particularly the influential role of the press in promoting these ideas.

After Gutenberg invented the printing press, and literacy began to grow in the general population—beyond the few nobles and church-educated, the government soon realized that the damage caused by a malicious rumor in print was even more severe than one passed on by word of mouth. The damaging falsehood remained in a much more permanent form, allowing the harm to reoccur every time someone else read the passage. The civil wrong of *libel* thus became associated with more permanent forms of speech, whether a handwritten letter, a book, or pamphlet, whereas slander became limited to the spoken word. The distinction takes on additional importance when determining *damages*, the monetary compensation to be awarded to the plaintiff for the injury to his reputation.

To suppress the flow of harmful information, the charge of libel was more easily proven and covered a broader range of falsehoods than common law slander. Words never considered to be defamatory when spoken were libelous and criminal when published in the press. A libel defendant even lacked the safeguard against an unjust verdict assured by common law slander: truth, an absolute defense in slander, initially was not even admissible in an action for libel. Further, malicious intent was assumed in libel rather than an issue to be proved as in slander. Until 1800, the only issue for the jury in libel was the *fact* of publication.

THE NATURE OF DEFAMATION

We have discussed in previous chapters the historical notion of "seditious libel" and other forms of verbal attack on

the government and/or its leaders in other chapters. What we focus on in this chapter is the civil injury known as *defamation*, whether spoken, written, broadcast, or otherwise disseminated, and the natural tension between the right to speak, and the responsibility for speaking truthfully about other people.

When is one "defamed?"

The essence of a defamatory statement is that it is understood, or capable of being understood, as lowering the *reputation* of the person about whom the statement is made. Reputation, as it is used in this area of the law, means the estimation of a person's character or worth in the eyes of the community. If third persons tend to dissociate themselves from the person about whom the statement is made, then that person has been defamed. We find here very real tension between freedom of association, or assembly, and freedom of speech: one can actually impinge negatively on the other. For example, if neighbors refuse to associate or come into contact with Mr. Jones because it has been rumored that he was HIV positive, Mr. Jones' freedom of association has been infringed upon unless he can vindicate himself in some sort of forum. The law court, as the social institution designed to test and find the truth, is obviously the vehicle for such vindication.[1] The law has fashioned the civil action of defamation as a means of drawing the balancing line between the freedom to speak and the freedom to associate.

The injury can also be to a person's trade or business: thus if someone says that Dr. Punjab is a "quack," the natural meaning drawn from the statement would cause others not to consult with that physician.

If no additional information is needed in order to understand the meaning of a statement as defamatory, it is sometimes called *slander per se* that is, *on its face*, the statement impugns the character of the injured party. If we assert that Jones is a murderer or has committed murder, no additional information is necessary in order to understand that the meaning of the statement is to lower Jones' reputation in the eyes of others in the community.

However, sometimes innocent-sounding statements may, because of other known facts, cause the meaning to be defamatory. This is known as *defamation per quod*. The example often used is the newspaper story announcing (incorrectly) that Mrs. Jones just gave birth to twins. On its face, there is nothing defamatory; however, the statement, when coupled with other facts generally known in the community, for example, that Mr. and Mrs. Jones have only been married for one month, creates a defamatory meaning (that is, that they had been unchaste prior to marriage).[2] Of course, in certain social circles, having a child out of wedlock is not a badge of shame, but may even be an act worthy of admiration and respect. Thus, one must always look to the community and context in question to see if a statement has a defamatory meaning.

Who can be defamed?

Not all defamatory statements are actionable. Only *living persons* can be defamed, since once a person is dead, there can be no association with others in the community whatsoever. Thus, you can say just about anything about a dead person, so long as the statement does not include matter which would also defame a person still living. (Example: if Mrs. Busybody says that Mrs. Crocker, a deceased woman, had an illegitimate child, the child has been defamed, and may bring an action in its own right).

However, the law recognizes entities other than natural human beings as "persons," and any corporation, partnership, limited liability company, unincorporated association or other *legally recognized entity* may be defamed and may sue for defamation. Accordingly, Burger King, Inc. may lawfully sue for defamation if one falsely states that it uses dog meat in its hamburgers. However, in more recent litigation, a Texas court upheld Oprah Winfrey's First Amendment right to tell her studio and television audience that she was no longer going to eat beef in light of the alleged danger of "mad cow" disease being passed on to humans.

Group Defamation

Although groups can be defamed, the group must be small enough so that the statement can reasonably be inferred as applying to each and every member of the group. Thus, the statement, "All politicians are on the take" is too broad; but an allegation that, "The Election Board is crooked," may be specific enough to lead to the conclusion that every member of the board is implicated.

Publication

Another essential element of the tort of defamation is proof that the defamatory statement was intentionally (or negligently) *published* to at least one other person by the defendant. By "published," we simply mean "communicated." The utterance need not be printed and circulated in mass media form. There are some exceptions: If the defendant sends a note to the plaintiff which includes defamatory statements about the plaintiff, the matter has not been published unless it could be reasonably foreseen that the plaintiff would show it to a third person (for example, was blind, illiterate, or a young child, and needed someone else to read the note to him). In some states, courts have ruled that where a defendant is notified that someone has written a defamation on his premises, but the defendant refuses to remove it or fails to do so within a reasonable period of time, he is held to be a publisher of the defamation. The classic example is the tavern keeper, who is notified that there is a scandalous and defamatory statement about the plaintiff in the restroom, but refuses to remove the graffiti.

Anyone who has any part in the publication of a defamatory statement is charged with, and can be liable for it. For example, where the defamation appears in a newspaper, the reporter who writes the story, the editor who reviews it and decides to include it, the printer, and the owner of the newspaper all could be liable. All that need be established is that the statement was published within the authorized scope of the newspaper's activities.

Republication and Dissemination

Every repetition of a defamatory statement is a "republication," and constitutes a separate *publication* under the law, even though the secondary source quotes the original source, or makes it clear that he or she (the secondary source) does not believe the truth of the matter stated. The rumor monger may cause far more damage to the plaintiff than the original utterer of the defamation, and society has a clear interest in curtailing the spread of rumor and untruths

that could lead to violent or other antisocial behavior. Moreover, if the original defamer intended or reasonably could have foreseen that his statement would be repeated, his liability is increased to the extent that greater harm was caused by such republication.

A *disseminator* is a type of republisher who circulates, sells, rents, or otherwise deals in the *physical embodiment* of defamatory matter contained in the material. For example, the distributor of books or newspapers, the news stand vendor or book dealer, even the newspaper delivery boy can be a disseminator, and, in certain cases, liable for the injury along with other republishers and the publishers. However, disseminators are held only to a standard of due care in their activities, and if they have no knowledge of the defamation contained in the material, and are not chargeable with knowledge concerning it (that is, they *should have known*, even though they did not, in fact know), then there is no liability. For example, if the bookseller and the newspaper boy had no reason to be aware of the contents of a particular book or article, they cannot be liable as disseminators. Similarly, the law would not deem couriers, UPS or FedEx delivery persons as disseminators, since the packages they deliver are sealed and usually considered confidential.

Electronic Media pose different problems. Different jurisdictions hold differently on the question of whether they are publishers or disseminators. If the Station's employees *originate* the programming, most courts agree that the station, like the newspaper, is a *publisher*. However, where the programming containing the defamatory matter originates elsewhere, either as a network feed or from a local source who purchased time on the station to broadcast the program, many courts treat the station in the same manner as the newspaper vendor and limit the station's liability to that of a disseminator.

Causation and Harm

The phrase, "No harm, no foul," currently in vogue, applies to a certain degree to the civil action of defamation. It is not enough, usually, for the plaintiff to seek a monetary award from the defendant on the basis that he has been defamed without some showing, however minimal, that the defamatory statement was the *cause*, directly or "proximately,"[3] of some measurable form of injury to reputation. Thus, if none of the individuals hearing the defamation interpret it as defamatory, the courts have held that the plaintiff has not proved his case. An admitted thief could hardly claim that his reputation had been damaged by the statement that he is a thief. However, if he were to be accused falsely of being a sex pervert, he may have a claim for damages. The adage, "there is honor among thieves" implies that a thief has a reputation the law will protect even if it is limited to his reputation among other thieves.

Damages for Injury to Reputation

It is in the area of damages that the old distinction between libel and slander makes a difference. Where the defamation takes the form of a libel, that is, a more permanent form of statement than the spoken word, the majority of courts *presume* nominal damages, and the plaintiff is relieved of the necessity of showing actual monetary harm. Where the defamation is an oral utterance only, that is, a *slander*, most courts hold that the plaintiff may not recover unless he proves "special damages," that is, injuries actually suffered by the plaintiff, such as loss of employment or business, failure of any firm expectancy including gifts, bequests, or the bestowing of favors.

The only exception to the rule that the plaintiff must prove special, or actual damages caused by a slander, is where the slander is deemed by the law to be so egregious as to amount to a presumption that the plaintiff has been injured by it. This is known as "*slander per se*," and is limited to the following types of utterances: (1) where the defendant has charged that the plaintiff has committed a serious, morally reprehensible crime, or that he has been incarcerated in a prison for such a crime; (2) where the defendant imputes a presently existing loathsome, communicable disease to the plaintiff (historically limited to venereal disease and leprosy, although it would clearly include AIDS today); (3) where the defendant has attributed to the plaintiff conduct, characteristics or associations incompatible with the plaintiff's business, trade, office or profession such that the natural and expected consequence of anyone who hears it and believes it true, would refuse to do business, or cease doing business with, the plaintiff;[4] and (4) where the defendant imputes unchastity to a woman.[5]

Defenses to the Defamation Action

Consent

It should go without saying that, if the plaintiff has, by word or deed, consented to the publication of the defamatory statement, he or she may not later seek to recover damages for its publication. Consent is seldom an issue in the legal context because few, if any people ever voluntarily expose themselves to statements designed to injure their reputations.

Truth

Equally logical is the defense of truth. That is, if the statements made about the plaintiff are true, the fact that they were injurious will not matter, since society has an interest in protecting and encouraging truthful speech. The majority of courts hold that if the defendant proves that his statements were true, it does not matter if his purpose was to hurt the plaintiff, or even that he did not personally believe his statements to be true at the time he made them.[6] In such a case, however, there may be liability for other personal injury, such as *intentional infliction of emotional distress*, or wrongful invasion of privacy.

The question, "what is the truth?" is pertinent here. Is it necessary that the defendant prove that every single aspect of the statement is absolutely true in every detail? Most courts have held that the defendant must present and prove facts having the basic "sting" of the original charge, but not necessarily the literal truth of every phrase of the original charge. Thus, if the original charge stated that the plaintiff bilked "hundreds of people out of their life's savings through a fraudulent investment scheme," most courts would hold that proof of the existence of eighty-five such individuals, would be sufficient to sustain the defense of truth. At the same time, proof of the commission of a completely different, though morally reprehensible act, for example, that the plaintiff robbed a liquor store and shot the owner, will not excuse the defamation if it is untrue. As we noted above, even thieves have some reputation that

the law will protect.

Privileges to Defame

The law recognizes that there can sometimes be a tradeoff between the interest the state has in protecting a person's reputation in the community, and other social objectives, such as ensuring that the processes of government and the courts work effectively and preserve domestic accord. Accordingly, there are certain privileges, both absolute and conditional, that protect defamatory speech. Much of the litigation over defamation revolves around whether the defendant had a privilege to utter the defamatory words in question, or if he had a privilege, whether it was lost by previous or subsequent actions. We will deal first with those privileges recognized at common law.

Absolute Privileges

Privileges at common law were divided into two sorts: absolute and conditional. An "Absolute" privilege is one that cannot be lost due to the improper motives of the speaker. The usual reason cited for an absolute privilege is that some greater public policy is being served that outweighed the relative merits of such a defense in any particular case.

Participation in the processes of government

For example, almost all courts recognize an absolute privilege to defame by any participant in a judicial proceeding, so long as there is some reasonable relationship between the statement and the subject matter of the legal proceeding. This privilege covers utterances not only by the litigants, but their counsel, witnesses giving testimony, the judge and the jury. The statement, of course, must be made inside the courtroom during a judicial proceeding. Statements made "on the courthouse steps" are *not* privileged and may be actionable.

The rationale for the absolute privilege is the belief that justice may not be served if parties or witnesses are afraid to come forward to testify or file claims if they think they could be immediately sued, and be required to defend against a claim of defamation for having done so. Since the statements that are privileged are subject to judicial scrutiny and review, as well as testing by the opposition through cross-examination, it is believed that adequate protections against fraud are available.

Absolute privileges also exist in other branches of government. The courts have recognized an absolute privilege exists for statements made by federal and state legislators *while on the floor* of their legislatures or in committee sessions of that legislature. The most notorious example of the abuse of this privilege was the Army-McCarthy Hearings in 1954 when Senator Joseph McCarthy used his power as a United States Senator to damage the reputation of many men in public service as well as the entertainment industry by labeling them communists or communist sympathizers. The "naming of names" always took place in a committee meeting or on the floor of the Senate, where the absolute privilege against defamation was available. Unlike the judicial privilege, however, the legislative privilege does not require the statements uttered to be germane or relevant to any other matter.

The legislative privilege is limited to statements made on the floor of the legislative body. When Senator William Proxmire announced his "Golden Fleece" Award[7] at a press conference off the Senate floor, his defamation of a federal grant recipient was not protected, and Senator Proxmire had to defend against the suit.

There is also an absolute privilege afforded to top rank, "cabinet" or department head level, or other top-level policy-making officials in the executive branches of government, both federal and state. The privilege can be lost, however, if, as in the courts, the statements have no reasonable relevancy to the public official's duties or the scope of his office.

A related absolute privilege, created by the U.S. Supreme Court protects radio and television stations and other electronic mass media subject to Section 315 of the Communications Act.[8] Because broadcasters and cablecasters were compelled by law to provide equal opportunities to all opposing candidates for the same public office as was initially provided to the first candidate, the Supreme Court held that the stations could not be held liable for defamatory utterances made by such opposing candidates, even if made with absolute malice.

Spousal Privilege

At common law, a spouse had an absolute privilege to utter a defamation of a third person to the other spouse. The reason for the privilege is the same as that given for the privilege, at common law, of one spouse from being compelled to testify against the other spouse: the state has an interest in preserving the marital relationship, and the compulsion to disclose statements made in confidence by one spouse to the other could disrupt that relationship. As a practical matter, the spousal testimony immunity effectively precludes proving a case of defamation of a third party made by one spouse to the other.

Conditional Privileges

Conditional privileges are those which, while serving some important governmental interest, can be asserted only when uttered or published for *proper motives*, and where such publication was not *excessive*. Either an improper motive or unnecessarily wide dissemination of the defamatory statement can defeat the privilege.

Wide dissemination or excessive publication can defeat a conditional privilege where the defendant does not exercise care to publish the defamatory statement only to those who are privileged to hear it. For example, speaking in a loud voice, or addressing a letter to the editor of a newspaper concerning a person who is not a public figure, when it should have been addressed to a much smaller audience could defeat the conditional privilege. And while statements made by managers to their secretaries in dictation of a letter to a third party are privileged by necessity, speaking in a loud voice so that others overhear the defamation loses the privilege.

The courts have not always been in agreement as to what constitutes an "improper motive." Clearly, however, where the party knows the factual statement to be false, or does not care whether it is true or false, one would conclude that the motive in making such a statement is improper. We shall reexamine this element below when Constitutional defenses to defamation are examined.

At common law, the courts recognized a number of conditional privileges. Among these was the fair reporting of proceedings, statements made by local governmental officials, statements made for the purpose of protecting either the public or a private interest, and fair comment and criticism.

Fair and accurate reporting of proceedings

The courts recognize a conditional privilege to report what takes place in proceedings of governmental bodies and other meetings or conventions in which there is sufficient public interest (such as political conventions, and large gatherings of other organized groups such as trade associations, medical societies, national religious organizations).[9] Typically, the mass media reports on such proceedings and quotes statements made there. If the reports are fair and substantially accurate, the media are privileged to report them. Thus, Senator McCarthy's statements made on the Senate floor, which were absolutely privileged, were also conditionally privileged when *republished* the next day in the *New York Times*.[10]

Local Legislative Bodies and Administrative Bodies

Unlike their counterparts in state and federal legislatures and cabinet level departments, public officials in local legislative and administrative bodies have only a conditional privilege to utter defamations, where made in the course of their functions, and with proper motives.

Protection of the public interest

The law recognizes that citizens may mean well but sometimes be mistaken in their belief of certain facts that form the basis of a defamation. Accordingly, where the defendant has acted to protect the public interest by stating facts about a third person that turn out to be false, he or she is nevertheless privileged to utter the defamation if he or she *honestly* believes the truth of the matter stated. For example, if Mr. Adams saw a person whom he honestly believed to be Mr. Baker, commit a crime, his reporting of that crime to the police and naming the perpetrator as Mr. Baker are privileged if it later turns out that the guilty party was not Mr. Baker, but rather Mr. Carlson.

Protection of a private interest

There is a conditional privilege to defame where the defendant has a reasonable belief that some important interest in person or property is threatened (it need not be his own), and if the statement is reasonably related to this interest, and the defendant reasonably believe that the person to whom the defamation was published was in a position to protect or assist in the lawful protection of that interest.

Generally, the courts require that there be some sort of relationship between the defendant and the person to whom the defamation is published. This can be a family relationship, a business or employment relationship. The existence of such a relationship tends to demonstrate the *bona fides* of the defendant's beliefs.[11] A statement made by a mother to her daughter, "Don't get involved with John Doe; I've heard that he was jailed for beating his ex-wife" would be conditionally privileged (assuming no improper motive by the mother) because of the family relationship between them and the likely concern the mother has to protect her daughter's interests. Similarly, if an employee tells his employer that the plaintiff is stealing from the employer, the relationship has been established and the person to whom the defamation is published is in a position to protect the interest.

The courts have held that, where there is no such relationship, there may still exist a conditional privilege to defame, if the defamation is made in response to a request for information made by the person to whom the defamation is published. Thus, when a prospective employer contacts a former employer, asking for information about a job applicant, statements made by that former employer about the job applicant are privileged if related to the information requested, and are not made with malice (in this case, knowingly false and from a desire solely to injure the plaintiff). In some jurisdictions, a former employer may *volunteer* such information, rather than responding to a request, and still not lose the privilege.

Fair Comment and Criticism

Perhaps one of the most significant privileges, usually available only to the media is the privilege of "fair comment and criticism." The privilege generally extends only to opinions expressed about matters of public interest. What is a matter of public interest has been held to be fairly broad: public officials and candidates for public office, public institutions, public or private schools and their faculties, objects of art and science, and persons espousing theories about art and science, entertainers and other "public figures."[12] So long as the matter discussed is of legitimate public interest, and the comment expressed by the defendant is his or her *honest opinion*, the defendant is privileged, even though the opinion expressed is cruel or disparaging. Thus, a movie critic's scathing review of the motion picture, "Titanic," is normally protected even if it includes harsh opinions of the acting ability of Leonardo DiCaprio or the directing ability of James Cameron.

Opinions expressed about the personal characteristics, affairs or motives of a public figure may cause the "fair comment" privilege to be lost unless the opinion or observation expressed is a *reasonable one*. In addition, the courts have held that the morals and motives of *public officials* and high profile *public figures* are matters of public interest. Clearly, the much-published affair of President Clinton and Monica Lewinsky was a matter of public interest, and formed the basis for an investigation by special prosecutor Kenneth Starr into whether the President abused his office in attempting to suppress the facts surrounding his affair from being known. Practically *any* opinion about the President's moral character would have been held to be conditionally, if not absolutely privileged, given the unceasing public interest in the matter.

In other situations not involving public officials or public figures, an opinion based on false facts might not be privileged unless the opinion expressed is a *reasonable* one, and the defendant *honestly* believes the facts on which the opinion is based to be true.

Fact vs. Opinion The Milkovich Case

Reasonableness is also a factor when a determination must be made whether a statement is to be deemed one of fact or one of opinion. In *Milkovich v. Lorain Journal Co.*,[13] the Supreme Court held that, while statements that cannot reasonably be interpreted as stating or implying actual facts about an individual are protected,[14] those statements which imply facts which are susceptible of being proved true or false do not enjoy either Constitutional or common law protection merely because they are couched in the *language* of opinion. For example, the Court reasoned:

> *If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."*[15]

Accordingly, while statements of opinion, reasonably based on true facts or which are incapable of being proven true or false, are normally protected under the "fair comment" privilege. But as the *Milkovich* case demonstrates, there are situations where someone is not entitled to his or her own opinion at least not free to express it without heeding the consequences that may result if they harm a person's reputation.

Defamation Law and the First Amendment

We have learned, in previous chapters, that, despite the unequivocal language of the First Amendment, "Congress shall make *no* law—," certain restrictions are placed on freedom of expression where such expression is likely to cause significant *harm*, to *society* in general, to a specific *group* in society who require greater protection, such as minors, or, in the case of defamation, to *individuals* and their relationships with others. The ultimate interpreter of what the Constitution protects and what it does not protect is the United States Supreme Court.

Constitutional Rationale

The Supreme Court has carved out certain exceptions to the freedoms guaranteed by the First Amendment where the needs of society outweigh the restrictions on individual liberty. While various theories have been advanced, from time to time, concerning the "preferred position" of the First Amendment, the rationale for giving greater protection to *political speech* is clear: In a society based upon the principle of self-governance, an informed populace is much more important than in autocratic or totalitarian societies; without information, the members of the society cannot make informed choices, which is the hallmark of democracy. Any law, rule, or mechanism that stifles the free flow of information, inevitably stifles self-rule, and helps those in power stay in power.

Such was the rationale of the U.S. Supreme Court in its 1964 landmark decision in *New York Times v. Sullivan*.[16] In that case, the *New York Times* newspaper was sued by L.B. Sullivan, a Montgomery County, Alabama Commissioner, for the publication of a full page advertisement purchased by civil rights workers, claiming that unnamed officials had violated federal law in denying Blacks their civil rights. The ad contained minor factual errors. The Alabama jury awarded Sullivan $500,000 in damages, and Alabama Supreme Court affirmed, holding that the ad was libelous *per se*, thus excusing Sullivan from having to prove specific monetary damages; and despite the fact that no official was named in the ad, the Alabama Court held that the statements could be understood as being about the plaintiff. Since Alabama law did not recognize any applicable common law privilege, truth was the only defense, unavailing to the Times because of the minor factual inaccuracies contained in the ad.[17]

Under traditional common law, the verdict was, on its face, a perfectly reasonable one, and totally consistent with common law principles. However, the U.S. Supreme Court overturned the verdict, and announced that the First Amendment demanded that the common law of defamation be modified in a number of ways. First, the common law *presumption* that a defamatory statement was *false*, and that the burden of proof was on the *defendant* to prove its truth, was held to be unconstitutional, at least with respect to statements made about *government officials*. In such cases, the Constitution requires that truth be a complete defense, and that a public official plaintiff must persuade the trier or fact [18] that the statement was false.

Second, the Court held that the First Amendment will protect false statements made about public officials unless the plaintiff can show that the statement was made with "actual malice" (as opposed to the presumption of malice under common law). But *actual malice* did not necessarily mean an ill motive, said the Court; rather, the term meant that the plaintiff either *knew* the statement was false or, lacking direct knowledge, made the statement in *reckless disregard* of its truth or falsity.

The imposition of this Constitutional standard, said the Court, was necessary to give adequate "breathing space" to the political process.[19] The Court observed that the Founders lived in an era where political debate and criticism of public officials in the newspapers of the day were often vitriolic in the extreme. In order to ensure that debate is "uninhibited, robust, and wide open," said the Court, a little falsehood must be tolerated so that citizens will not engage in self-censorship[20] for fear of criminal prosecution or a ruinous civil suit.[21]

As noted above, the development of Constitutional limitations on common law defamation arose over the concern for protecting the political process. If those in power can silence any public criticism by means of a defamation suit, they could perpetuate and increase their power. One could easily imagine a situation where the misconduct of President Nixon, with respect to the 1972 Watergate break-in and subsequent coverup, or the morally questionable conduct of President Clinton and Monica Lewinsky would never have come to the public's attention, if the media engaged in self-censorship for fear of huge damage awards in a defamation suit. Documented facts in both cases of attempts to suppress evidence of wrongdoing or in blaming such stories upon a "vast, right-wing conspiracy" demonstrate that if those officials had greater power to suppress speech, they would use it to stay in power.

Public Officials, Public Figures, and Private Persons

The *New York Times* case limited its holding to defamatory statements made about *public officials*. While the term clearly covered the acts of a County Commissioner who had significant control over the mechanics of voting in his

jurisdiction, the Court did not attempt to say how far down the chain of responsibility one could go before the *Times* case did not apply. Certainly, not every public employee could be considered a "public official."[22]

Definition of "Public Official"

Subsequent decisions following *New York Times* have held that a determination of who is and who is not a public official does not turn on either their title or whether or not they were elected or appointed. Rather, as the Court stated in a subsequent case, public officials are those persons engaged in government service "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[23]

The "actual or apparent" test has sometimes been criticized because of its subjective element: if the public perceives you to have such influence, you are a "public official" for purposes of Constitutional protection. However, Justice William J. Brennan, Jr., who wrote for the Court in *Rosenblatt*, cautioned that mere general public interest in the qualifications and performance of all government employees would not be sufficient to confer "public official" status to an individual under *New York Times*. His or her job must be one of "such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it."[24] But the *Rosenblatt* case makes it clear that a government employee need not have a high ranking job in order to be considered a "public official" under *New York Times*,[25] and that government employee plaintiffs face a high hurdle in arguing that they are not subject to the rule.

Public Figures

It soon became evident that, at least in the United States, not all persons who are in a position to wield power affecting the lives of ordinary citizens hold public office. Rather, there are individuals in the private sector who, either because of their backgrounds or activities, become involved in public controversies. Two cases, following three years after *New York Times*, extended the *Times* rule to what became known as "public figures."

In *Curtis Publishing Co. v. Butts*[26] former University of Georgia football coach Wally Butts, who at the time was employed by the Georgia Athletic Association, brought suit against Curtis for publishing a story in the *Saturday Evening Post* that accused Butts of conspiring with University of Alabama Coach "Bear" Bryant to fix the 1962 Georgia-Alabama game. While a majority of the Justices agreed on the result that Butts could not avail himself of the traditional "strict liability" nature of defamation law, but must prove some measure of "fault" on the part of the defendant because he was a "public figure" they did not all agree on what the standard should be.

Two theories were advanced: the first, advanced by Chief Justice Earl Warren, argued that many governmental functions, particularly the resolution of public questions affecting large segments of the public, are performed by private entities. Increasingly, he contended, the distinctions between governmental and private sectors are blurred, and as a result, many "private" individuals are intimately involved in the resolution of important public questions. Others, by reason of their fame, shape events in areas of concern to society at large. Moreover, public figures, like public officials, have considerable access to the mass media, both to influence policy and to counter criticism. Thus, he reasoned, public figures have less need than purely private individuals to avail themselves of the defamation suit to correct the record. Accordingly, the Chief Justice concluded that *New York Times* applied equally to public figures, and that such plaintiffs must prove "actual malice," that is, knowledge of falsity or reckless disregard thereof.

A second rationale, advanced by Justice John Marshall Harlan, focused more on the activities of the plaintiff to determine whether he had a legitimate call on the court for protection in light of his or her prior activities and means of self-defense. In light of the values inherent in the First Amendment, it is always preferable to meet erroneous speech with "more speech," countering the first. In examining Coach Butts' background and continuing involvement in college athletics and coaching, Justice Harlan concluded that Butts "commanded sufficient continuing public interest and had sufficient access to the means of counter argument to be able to 'expose through discussion the falsehood and fallacies' of the defamatory statements."[27]

In a companion case, *Associated Press v. Walker*,[28] decided concurrently with *Butts*, the plaintiff, a retired army general, was a private citizen. He claimed that the AP had defamed him in a news dispatch stating that he had taken command of a violent crowd on the University of Mississippi campus during a riot occasioned by the efforts of the federal government to enforce the enrollment of James Meredith, an African-American.

Unlike Coach Butts, Walker held no *position*, public or private that gave him public figure status. Rather, according to Justice Harlan, he became a public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy."[29]With this assessment, a majority of the Court agreed. However, Justice Harlan believed that public figure plaintiffs should not be required to prove "actual malice" as part of their case. He would, instead, use a standard of fault most closely resembling "gross negligence," that is, that the defendant engaged in "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[30]

Distinguishing Between Public Figures and Private Persons

While a majority of the Supreme Court had agreed that the *New York Times* case extended to public figures, the individual Justices could not agree on a rationale. It was not until 1974, in *Gertz v. Robert Welch, Inc.*[31] that a majority opinion could be obtained on the definition of public figures and the rationale for lessening their rights under the common law of defamation.

The definitions and justifications offered up in the *Butts-Walker* opinions were blended in Justice Lewis Powell's majority opinion in *Gertz*. Public figures, said the majority opinion, are those who are especially prominent in society, and thereby "invite attention and comment."[32]Public figure status may be accorded to:

1. Those persons who by
    a. occupying positions of "persuasive power and influence"[33]

b. their "pervasive involvement in the affairs of society,"[34] or

c. the "notoriety of their achievements" have acquired such fame or notoriety in the community that they are deemed public figures for all purposes and in all contexts;[35] or

2. More commonly, public figure status may be accorded to those persons who "have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved."[36] Such individuals thereby become public figures "for a limited range of issues."[37]

The Powell majority also clarified the First Amendment values supporting the extension of the *Times* standard to public figures. Chief Justice Warren's "power" rationale was stressed in articulating the role of the public person in society. [38]The *voluntary nature* of the individual's activities was also stressed, implying that public figures, for the most part, *assume the risk* of adverse publicity by "thrusting" themselves into the vortex. Access to the media, while recognized as usually more available to public officials and public figures, was downplayed in *Gertz* as a constitutional justification for the application of the *Times* rule.[39]

The dichotomy established in *Gertz* between public figures and private individuals was reinforced two years later in a 1976 decision, *Time, Inc. v. Firestone*.[40] There, a majority of the Court ruled that Mary Alice Firestone, former wife of the scion of one of America's wealthier industrial families, was not a public figure under the Gertz formulation because she (1) did not voluntarily become involved in a public controversy, (2) did not choose to publicize questions concerning the propriety of her marriage, (3) was not prominent in the resolution of public questions, and (4) did not use her access to the media to influence the outcome of the divorce proceedings, nor "as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution. [41]

Media vs. Non-Media Speakers

A third area of traditional defamation law which the Supreme Court has modified, is the notion that the "press," that is, the mass media, is entitled to greater First Amendment protection than private speakers who become defendants in defamation actions.

Media Liability for Defamation of Public Figures

Although not expressly stated in the *Gertz* case, there is considerable evidence that the Supreme Court intended to limit the application of the "public figure/private individual" rules announced in *Gertz* and followed in *Firestone*, to media defendants. In *Gertz*, the Court consistently refers to [newspaper] "publishers" and "broadcasters,"[42] media liability,[43] the news media,[44] and "media."[45] The Court reinforced this assumption by reiterating the language in the *Firestone* case.[46] Presumably, a public figure who is defamed by a private, or non-media speaker would not have to prove "actual malice," as that term was defined in *New York Times v. Sullivan*, or even simple negligence. The fact that the statement was intentionally uttered by the non-media defendant would be enough if the other elements of a defamation action were present, and the speaker could not avail himself of any of the absolute or conditional privileges at common law.

Media Liability for Defamation of Private Individuals

Apart from reaffirming the plurality decisions of Butts and Walker, that public figures come under the New York Times standard and must prove "actual malice," *Gertz v. Robert Welch, Inc*. is significant because it completely restructured the standard of proof in common law defamation suits by private individuals against media defendants. A majority of the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or a broadcaster of defamatory falsehoods injurious to a private individual" as opposed to a public official or public figure."[47]

No attempt was made by the Court to define what level of fault should apply in private individual suits against media defendants. Anglo-American law recognizes several degrees to fault, ranging from strict liability (that is, no proof of fault is required), to intentional misconduct (that is, "knowing and willful," almost always applicable in misdemeanor and felony criminal cases). Between these two extremes are several shades of "fault."

Negligence is the standard of fault most often applied in civil cases. The plaintiff in a personal injury case, for example, has the burden of persuading the jury that the defendant acted *negligently*, that is, breached his or her duty, as a reasonable citizen, to exercise due care with regard to other members of society. Usually, the question of negligence centers around whether or not the defendant should have foreseen that his or her actions would likely cause injury to another. Foreseeability and probability are both operative in assessing negligence. In the context of a defamation case, a plaintiff would be required to prove that the publisher or broadcaster acted reasonably in gathering the information for the news story, reviewing and checking its accuracy, and in reporting it. If, for example, a newspaper defendant neglected to check the accuracy of a reported story which had defamatory overtones, when its standard policy was to seek further verification or collaboration (or where the media industry as a whole routinely engaged in such fact-checking) it could be concluded that the newspaper was negligent, and thus at fault.

Some jurisdictions distinguish between *ordinary negligence* and *gross negligence*. Gross negligence denotes a more significant departure from the standard of care to which society holds all of its adult citizens, and, while there is no way it can be quantified, one can imagine that it posits a situation where the harm to another (in this case, harm to one's reputation) is so foreseeable that to fail to exercise care in ensuring that statements made about the defendant are, in fact, accurate, would be universally regarded as a dereliction of the duty of care.[48]

Some states regard "gross negligence" as equivalent to *recklessness*, the minimum standard of fault that a public official or public figure plaintiff must prove in order to recover damages in a defamation suit. Other states have held that *recklessness* is a more serious dereliction of duty, since the defendant is charged with some level of awareness that the facts forming the basis of the defamation, could be untrue, but *not caring*, one way or the other, whether those facts were false.

Finally, the law recognizes *intentionality* as the highest level of fault. Analyzed within the context of a defamation action, "intentional fault" means that the defendant *knows* the facts uttered to be untrue, yet disseminates them anyway. The motive for doing so (what courts have referred to as "malice"), is not actually an element of proof, but may be used to prove intent to injure: If the defendant had something to gain by spreading falsehoods about the plaintiff, proof of that motive could help establish that the defendant knowingly defamed the plaintiff. And, as noted above, proof of intent to injure can justify an award of *punitive* damages.

While it might seem clear from the *Gertz* case, that the traditional common law presumption that defamatory statements are false (thus placing the burden on the defendant to prove the truth of the matter stated), it was not until 1986 that the Court specifically held that, with respect to alleged defamations of private individuals by media defendants, the burden was on the *plaintiff*, that is, the private individual, and not the media defendant, to prove the *falsity* of the facts on which the defamatory statement was based.

In *Philadelphia Newspapers, Inc. v. Hepps*,[49] a majority of the Supreme Court held that a private individual was required to prove that statements published in the *Philadelphia Inquirer* linking the plaintiff with organized crime, were false. In that case, the trial court ruled that *Gertz* required that the plaintiff must prove malice or negligence, but reserved ruling on the issue of whether *Gertz* also required the plaintiff to prove the statements false. At the end of the trial the court ruled that the *Inquirer* was not required to prove the truth of the stories.[50]The Pennsylvania Supreme Court reversed, holding that the trial judged erred in shifting the common law burden of proof of truth/falsity, from the defendant to the plaintiff. The U.S. Supreme Court reversed, stating:

> *[T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result.... Because such a "chilling" effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could "only result in a deterrence of speech which the Constitution makes free."*[51]

Non-Media Liability for Defamation of Public Officials

Whether the *Gertz* Court intended the Media/Non-Media distinction to apply in public official cases, is not so clear. While the *New York Times* case obviously involved a media defendant, the rationale offered by the Court would seem to provide protection to non-media speakers who defame public officials but who do not do so knowingly or with reckless disregard of truth or falsity. Uninhibited, wide open and robust political debate often occurs outside of the mass media. Untelevised debates between candidates for public office (none of whom are presently public officials), statements made by members of the audience at such debates, mass mailings of political literature that contains defamatory statements about public officials, and even the lone speaker passing out leaflets to pedestrians on a busy street are a few examples of situations where the potential defendant is not a member of the organized mass media.[52] Few would argue, however, that the thrust of *New York Times* would extend to them as well as newspaper publishers and broadcasters.

Proof of Fault

In the *Hepps* case referred to above,[53] the lower court permitted the defendant newspaper to refuse to disclose its sources, pursuant to a state *shield law*. This raises the question of whether it is fair to impose the burden of proving both falsity and fault in a defamation case, and yet be denied access to information that might tend to show that the defendant media was negligent or reckless in relying on such undisclosed "sources." The issue was not addressed in *Hepps*. However, in an earlier case, *Herbert V. Lando*,[54] a majority of the Supreme Court had ruled that a media defendant's news-gathering methods, thought processes, and editorial judgments, including copies of prior drafts of a news story, the reporter's notes, and comments from an editor, all were subject to "discovery:"[55]

> *Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances. The President, for example, does not have an absolute privilege against disclosure of materials subpoenaed for a judicial proceeding.* United States v. Nixon, *418 U.S. 683 (1974). In so holding, we found that although the President has a powerful interest in confidentiality of communications between himself and his advisers, that interest must yield to a demonstrated specific need for evidence. As we stated, in referring to existing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." Id., at 710.*

Justice Brennan dissented in part, saying that the actual *editorial process* should be exempt from discovery unless the plaintiff first established, to the judge's satisfaction, a *prima facie* case of the falsity of the statements published by the media defendant.[56] This "Editorial Privilege," he argued, would be treated similarly to the concept of "Executive Privilege:"

> *The same rationale [as was used by the Court in* United States v. Nixon *in recognizing the existence of Executive Privilege] applies to respondents' proposed editorial privilege. Just as the possible political consequences of disclosure might undermine predecisional communication within the Executive Branch, see* NLRB v. Sears, Roebuck & Co., *421 U.S. 132, 151 (1975), so the possibility of future libel judgments might well dampen full and candid discussion among editors of proposed publications. Just as impaired communication "clearly" affects "the quality" of executive decisionmaking, ibid., so too muted discussion during the editorial process will affect the quality of resulting publications. Those editors who have doubts might remain silent; those who would prefer to follow other investigative leads might be restrained; those who would otherwise counsel caution might hold their tongues. In short, in the absence of such an editorial privilege the accuracy, thoroughness, and profundity of consequent publications might well be diminished.*[57]

The majority of the Justices, however, believed that the creation of an "editorial privilege" that would shield the newsroom from all inquiry would shift the balance between freedom of the expression and the social values served by the defamation action too much in favor of freedom without accountability:

> *But if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what* New York Times *and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no constitutional value in false statements of fact."* Gertz v. Robert Welch, Inc., *supra, at 340.*

Conclusion

Absolute freedom to do and say as one pleases cannot exist in society. Sooner or later, society exerts pressure on individuals to curtail their freedoms for the good of all. Indeed, one can say that civilization, particularly western civilization, with its holding the individual in high value, is a study in how individual freedoms are balanced against the needs of the group. The tradeoffs protecting the individual as much as possible from harm by others either intentionally or unintentionally, but negligently committed, obviously requires the individual to refrain from engaging in behavior that causes harm to others. Words, in addition to sticks and stones, can hurt you, particularly where you are dependent upon others for so much in society. Unless one elects to become a hermit and reject all of the benefits of society, one must necessarily surrender some freedom, and assume *responsibility* for one's actions. The common law of defamation, tempered by the First Amendment, is an on-going process of balancing the rights of the individual, on the one hand, with the needs of society, on the other. As with other areas of the law, the law of defamation will continue to evolve and adjust to changing social and technological realities.

Endnotes

[1]. Even if Mr. Jones had his blood tested and went around telling people he was not HIV positive, he would likely continue to be disbelieved, since he would be regarded as having a motive to lie.

[2]. This is sometimes called *defamation per quod*. The Plaintiff has the burden of proving the additional facts which would give the statement a defamatory meaning.

[3]. "Proximate Cause" is a judicial doctrine invented by the courts to limit responsibility for injuries to those actions which foreseeably could have led to the actual result in question. Thus, a person struck by an automobile that had defective brakes might recover not only from the driver, but also from the manufacturer who designed and installed the brakes, since it is foreseeable that an automobile with defective brakes will more likely cause an accident resulting in injury than an automobile with good brakes.

[4]. A statement that falsely suggests that a restaurant uses dog meat in its stew, or that it has been cited repeatedly by the Health Department for violations so clearly damages the reputation of the establishment that no proof of nominal damages is necessary. It is *slander per se*. However, monetary recovery may still be limited unless the plaintiff can show that the defendant made statement knowing it was false thus justifying an award of *punitive damages*, or that the plaintiff's business dropped off to a substantial degree *actual damages*.

[5]. A few states hold that imputation of unchastity to either sex is actionable. This is clearly the minority view. Historically, a woman's virginity was considered a far more precious commodity than a man's. In modern American society, one could argue that the ideal of feminine chastity has lost much of its significance or value, perhaps even signifying something negative, and that this last exception should be eliminated.

[6]. A minority of courts requires a justifiable motive. However, in cases involving public officials, public figures and media defendants, the Constitution requires that truth be an absolute defense.

[7]. The Award was an attempt, by Proxmire, to focus public attention on the waste and mismanagement of government funds by federal contract and grant recipients.

[8]. 47 U.S.C. §315. The so-called "equal time" legislation requires broadcasters and cablecasters who afford one candidate for public office time on their facilities, to give *equal opportunities* to any opposing candidate for the same office. See Chapter VIII.

[9]. This privilege has also been called the privilege of "record libel."

[10]. In 1987, Senator Edward Kennedy, from the floor of the U.S. Senate, accused the Freedom of Expression Foundation of being a "front" for media mogul Rupert Murdoch. The Foundation's president was incensed when the *New York Times* and other national newspapers printed Kennedy's remarks. Knowing that Kennedy's remarks on the floor and that the *Times* repeating of them were both privileged, the Foundation president challenged the Senator to repeat the accusations off the Senate Floor. Senator Kennedy declined, apparently realizing that he would lose the protection afforded by the privilege.

[11]. That is, the degree that the defendant holds the beliefs in *good faith*.

[12]. The U.S. Supreme Court has created a legal definition of "public figure" that is discussed below.

[13]. 497 U.S. 1 (1990).

[14]. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); see also, *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6 (1970) (an accurately reported statement that real estate developer was "using blackmail" to get city council to give him zoning variances held to be not actionable because could not reasonably be interpreted to mean that the plaintiff was actually being accused of the crime of blackmail).

[15]. 497 U.S. 1, at 19-20.

[16]. 376 U.S. 254 (1964).

[17]. For the same reason, the privilege of *fair comment* was not available, since fair comment must be based on true facts to be privileged.

[18]. The "trier of fact" is usually the jury. However, in civil trials where there is no jury, the judge is the trier of fact as well as of the law.

[19]. 376 U.S. at 271-72.

[20]. The Court has utilized the concept of "chilling effect," that is, the tendency of a law to discourage not only unlawful behavior but lawful behavior as well, due to the fear of being wrong in interpreting where the line has been drawn. See Chapters III and VIII.

[21]. In *Garrison v. Louisiana*, 379 U.S. 64 (1965) decided the following year, the Court revisited this principle, noting that the common law of libel had a tendency to discourage the dissemination of truth, which in the realm of public affairs was a fatal defect barred by the First Amendment.

[22]. *Hutchinson v. Proxmire*, 443 U.S. 111, 119, n.8 (1979).

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

[24]. Id., 383 U.S. at 86.

[25]. Frank P. Baer, the plaintiff in the *Rosenblatt* case, was a supervisor of a county recreational skiing center. The Supreme Court considered his status to be questionable enough to remand the case back to the lower court for an initial determination of that point.

[26]. 388 U.S. 130 (1967).

[27]. 388 U.S. 130, 155 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (dissenting opinion of Brandeis, J.)

[28]. 388 U.S. 130 (1967).

[29]. 388 U.S. at 155.

[30]. 388 U.S. at 155.

[31]. 418 U.S. 323 (1974).

[32]. 418 U.S. at 345.

[33]. Id..

[34]. Id. at 352.

[35]. Id. at 351-52.

[36]. Id. at 345.

[37]. Id. at 351. The Court ruled that *Gertz*, a Chicago attorney, was not a public figure, since he played a minimal role in the public controversy surrounding the prosecution of a police officer for manslaughter, had never discussed this issue in any context with the press, and was never quoted as having done so, and while operating as a civil advocate, did not engage the public's attention in an attempt to influence the resolution of the "police brutality" issue surrounding the prosecution. Id. at 352.

[38]. Id., at 345, 352.

[39]. This was probably due, in part, to the fact that the Court had decided the same day *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In that case, the Court struck down Florida's *right of access* statute which gave political candidates the right to respond to newspaper editorials attacking their candidacy or endorsing their opponents as a constitutionally impermissible infringement on the freedom of the press. It could easily be argued that the *Miami Herald* decision prohibiting government-enforced access, and a constitutional theory underlying the extension of the *Times* case to public figures because they have greater access to the press, are contradictory.

[40]. 424 U.S. 448 (1976).

[41]. Id., at 453-55.

[42]. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

[43]. Id., at 353 (Blackmun, J., concurring).

[44]. Id., at 355 (Burger, C.J., dissenting).

[45]. Id., at 362 (Brennan, J., dissenting).

[46]. *Time, Inc. v. Firestone*, 424 U.S. 449 (1976). The Court referred to "an uninhibited press," id. at 456; to "publisher," "publisher or broadcaster," and "press and broadcast media," id. at 458, 464-65.

[47]. 418 U.S. at 347.

[48]. In some courts, the establishment of a *prima facie* case of gross negligence, together with the complete failure of the defendant to rebut that showing, could result in a *directed verdict*, that is, the judge directing the jury to return a verdict in favor of the plaintiff.

[49]. 475 U.S. 767 (1986).

[50]. During the trial, the *Inquirer* took advantage of Pennsylvania's "shield law" on a number of occasions,

and refused to disclose the *sources* of some of the facts included in the stories. The trial judge refused to give the jury instructions that they could draw a negative inference as to the truth of the stories by the defendant's resort to shield law protection, but also refused to instruct the jury that they could not do so.

[51]. 475 U.S. at 779. Justice Sandra Day O'Connor, writing for the majority, observed that, "As a practical matter..., evidence offered by plaintiffs on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted." Id.

[52]. A more modern example is the individual publisher of a website on the Internet that contains matter defamatory of one or more public officials. Although it could be argued that the Internet, itself, is a form of mass media, it is unlike The *New York Times* or NBC in that there is no single owner, editor, or publisher who has control over the content of what appears on the Internet. Indeed, as the "www" of the Internet aptly reminds us, the sources of content on the Internet are world wide, and under the jurisdiction of no single nation or state.

[53]. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)

[54]. 441 U.S. 153 (1979).

[55]. "Discovery" refers to the pre-trial process whereby the litigants may ascertain the basis for their opponent's case, American courts, both Federal and State, generally afford parties wide latitude in the discovery process, and will usually grant motions to compel, if production of documents or answers by party/witnesses are not readily forthcoming. The rationale usually given for permitting broad pre-trial discovery is to eliminate unfair surprise and thus unnecessary and costly delay at trial. Discovery can also lead to a sharpening of the issues, or an out-of-court settlement again leading to the saving of valuable judicial time.

[56]. *Herbert v. Lando*, 441 U.S. 153, 197-98.

[57]. Id., at 194.

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