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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.

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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.,* 94 S. Ct. 2997 (1974).

In 1968 a Chicago youth was shot to death by a policeman. The youth's family subsequently brought a civil action against the policeman through their attorney, Elmer Gertz. In this capacity, Mr. Gertz came under attack in *American Opinion,* the monthly periodical of the John Birch Society,[1] through an article which contained numerous false statements of fact.[2] Robert Welch, the magazine's editor, made no inquiry to determine the veracity of the charges against Gertz before he approved the article for publication. Instead, he attached an editorial introduction declaring that the author had done extensive research into the case.[3]

Gertz filed suit for libel against the magazine's publisher, Robert Welch, Inc., in the United States District Court for the Northern District of Illinois. After ruling that the article's accusations were libel per se under Illinois law,[4] the judge submitted the case to the jury for a determination of damages. The jury returned a verdict for $50,000 in presumed damages. However, the court granted defendant's motion for judgment notwithstanding the verdict, holding that since Gertz had failed to prove actual malice, the defendant was protected by a constitutional privilege because the article dealt with a matter of public interest.[5] The Seventh Circuit Court of Appeals affirmed[6] the lower court's ruling, citing the intervening Supreme Court decision of *Rosenbloom v. Metromedia, Inc.,*[7] wherein a plurality of the Court applied the "actual malice" standard to a private individual libeled in a report of general or public interest.

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[1]The society, through the *American Opinion* magazine and its other methods of communication, had been engaged in a campaign to inform the public of an alleged, nationwide, communist conspiracy aimed at discrediting local police as a prelude to the establishment of a national police force, which would then effectuate and sustain a communist dictatorship in the United States. As part of the continuing effort to alert the general citizenry to this danger, the managing editor of *American Opinion,* Robert Welch, commissioned the article on the murder trial of officer Nuccio which was subsequently published under the title "FRAME UP: Richard Nuccio and the War on Police." AMERICAN OPINION, April, 1969.

[2]The article labeled Gertz a "Leninist" and a "Communist-fronter" and implied that he had a criminal record. It further stated that he had been an official in the Marxist League for Industrial Democracy, described as a society which advocated the violent overthrow of the government. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3000-01 (1974). Gertz in fact had no criminal record, was not a communist, and never had been a member of the Marxist League for Industrial Democracy. *Id.* at 3000.

[3]94 S. Ct. at 3000-01.

[4]Gertz v. Robert Welch, Inc., 306 F. Supp. 310 (N.D. Ill. 1969).

[5]Gertz v. Robert Welch, Inc., 322 F. Supp. 997 (N.D. Ill. 1970).

[6]Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972).

[7]403 U.S. 29 (1971).

On appeal, the Supreme Court reversed, rejecting the *Rosenbloom* standard as unduly abridging the state's interest in compensating private individuals for harm occasioned by a libel. The Court remanded the case for further proceedings in accord with its holding that private individuals in libel actions against the media may recover, on a showing of negligence, damages for actual injuries that are proven by competent evidence; however, presumed and punitive damages are recoverable only if malice is shown.[8]

I. BACKGROUND

Defamation has been defined as that which tends to injure the reputation of an individual, to subject him to hatred or contempt, or to lower his esteem in the eyes of the community.[9] Historically, defamation was not divided into the categories of libel and slander.[10] The seignorial courts[11] of the Middle Ages originally dealt with problems occasioned by defamatory utterance.[12] However, with the decline of the seignorial courts, the ecclesiastical courts[13] took cognizance of defamation as a spiritual wrong.[14] Following the invention of the printing press and the advent of printed defamation, the Court of Star Chamber[15] took juris-

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[8]94 S. Ct. at 3011.

[9]Parmiter v. Coupland, 151 Eng. Rep. 340 (Ex. 1840). Dean Prosser suggests that *Parmiter* was the origin of the present definition of defamation. PROSSER, TORTS § 111 n.17 (4th ed. 1971) [hereinafter cited as PROSSER]. *See, e.g.*, Peabody v. Barham, 52 Cal. App. 2d 581, 126 P.2d 668 (Dist. Ct. App. 1942); Ajouelo v. Auto-Soler Co., 61 Ga. App. 2d 216, 6 S.E.2d 415 (1939); Cummins v. State, 89 Ind. App. 256, 166 N.E. 155 (1929).

[10]1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.9 (1956) [hereinafter cited as HARPER & JAMES]. *See also* Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 105; Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 547 (1903) [hereinafter cited as Veeder].

[11]Seignorial courts were the courts the lord of a manor held over the villein tenants attached thereto. These courts were in existence at the time of the Norman Conquest in 1066. William the Conqueror, through the feudal system, greatly expanded the use of such courts for all civil matters pertaining to the manor. *See* W. WALSH, A HISTORY OF ANGLO-AMERICAN LAW § 24 (2d ed. 1950) [hereinafter cited as WALSH]. A brief but excellent overview of such courts is given in F. KEMPIN, HISTORICAL INTRODUCTION TO ANGLO-AMERICAN LAW 25 (2d ed. 1973) [hereinafter cited as KEMPIN].

[12]*See generally* PROSSER § 111; Carr, *The English Law of Defamation*, 18 L.Q. REV. 255, 263 (1902) [hereinafter cited as Carr].

[13]Ecclesiastical courts were the courts of the church, presided over by church officers. They were of Roman origin and, with the rise of Christianity, grew to occupy an important position throughout all of Western Europe. 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 111-35 (2d ed. 1909) [hereinafter cited as POLLOCK & MAITLAND]. *See also* R. CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 12 n.28 (1973); Helmholz, *Canonical Defamation in Medieval England*, 15 AM. J. LEGAL HIST. 255, 256 (1971); Townsend, *Slander and Libel*, 6 AM. L. REV. 593, 599 (1872) [hereinafter cited as Townsend].

[14]*See generally* POLLOCK & MAITLAND ch. 5; P. WALKER, THE COURTS OF LAW, ch. 7 (1970).

[15]The Court of Star Chamber was created by an act introduced by Henry VII entitled *Pro Camera Stellata* in 1487, which gave the existing King's Council power to act as a court of

diction over printed defamatory material, deeming the printed wrong to be more serious than the spoken wrong.[16] As the ecclesiastical courts' influence declined, the common law courts first began to entertain writs for spoken defamation,[17] eventually termed slander, and then for written defamation, which became known as libel. When the two actions were fully within the jurisdiction of the common law courts, they became further distinguished[18] by the varying types of damages made available to plaintiffs for libel and slander.

As historically evolved, the law of defamation encompasses three elements of damage: general or presumed, special, and punitive. General or presumed damages compensate the libel victim for the presumed harm to his reputation.[19] The jury considers loss of reputation, impairment of community standing, and psychological or mental suffering,[20] without requiring specific proof. Proof of reputational injury is unnecessary because the damage is presumed to occur from publication of a libel.

Special damages compensate for temporal loss, generally of a pecuniary nature.[21] They are more important in the law of slander than in libel, since an action for slander cannot be maintained outside the per se categories without pleading and proving special damages.[22] Once special

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criminal equity. Because the King's Council met in a room with ceiling studded with stars, the name Star Chamber was given to the court. The court eventually fell into disrepute due to its use of torture to procure evidence and the infliction of such punishments as pillory, mutilation, branding, and imprisonment. KEMPIN 40-41; WALKER 181.

[16]De libellis Famosis, 77 Eng. Rep. 250 (K. B. 1609); WALSH 326; Carr 391; Veeder 555.

[17]*See generally* WALSH § 168 n.64 and accompanying text; Townsend 601-03; Veeder 555-60.

[18]The 1670 case of *King v. Lake* is cited as the first case distinguishing libel from slander. WALSH § 168 n.64.

[19]Because reputation is an ephemeral concept, no precise formula exists by which to measure the amount of damage inflicted upon an individual's reputation. Hence, to sustain an action for libel, it has traditionally not been necessary to prove general damages. They were presumed as a matter of law to accrue from the fact of publication. Levert v. Daily States Publishing Co., 123 La. 594, 49 So. 206 (1909); Mayo v. Goldman, 57 Tex. Civ. App. 475, 122 S.W. 449 (Ct. Civ. App. 1909); Wilson v. Sun Publishing Co., 85 Wash. 503, 148 P. 774 (1915); HARPER & JAMES § 5.30; RESTATEMENT (SECOND) OF TORTS § 569, comment *c* at 56 (Tent. Draft No. 20, 1974); RESTATEMENT OF TORTS § 621, comment *a* at 314 (1938).

[20]Hutchens v. Kuker 168 Neb. 451, 456, 96 N.W.2d 228, 231-32 (1959); Farrar v. Tribune Publishing Co., 57 Wash. 2d 549, 553, 358 P.2d 792, 795 (1961); Lamanna v. Scott Publishing Co., 48 Wash. 2d 683, 692, 296 P.2d 321, 327 (1956).

[21]Williams v. Rutherford Freight Lines, Inc., 10 N.C. App. 384, 179 S.E.2d 319 (Ct. App. 1971); J. GATLEY, LIBEL AND SLANDER §§ 202-06 (7th ed. 1974).

[22]Fort v. Holt, 508 P.2d 792 (Colo. App. 1973); McMullen v. Corkum, 143 Me. 47, 54 A.2d 753 (1947); Olston v. Hallock, 55 Wis. 2d 687, 201 N.W.2d 35 (1972); J. CLERK & W. LINDSELL, TORTS § 1681 at 1829 (13th ed. 1969); Veeder 571. Generally in pleading slander, a plaintiff will allege a specific loss for special damages. In cases where such a loss would be difficult to measure, the degree of specificity required in the supporting evidence may be somewhat decreased. *Cf.* Walter v. Bender, 22 N.J. Misc. 44, 35 A.2d 435 (S. Ct. 1943). *But cf.* HARPER & JAMES § 5.14. *See generally* MCCORMICK, LAW OF DAMAGES § 115 (1945) [hereinafter cited as MCCORMICK]. However, if the defamatory words are termed slander per se, (*e.g.*, imputing a criminal offense, a venereal or other loathsome communicable disease, unchastity of a woman, or misconduct of an individual's business or means of obtaining a living) there need be no

damages are proven in such an action, general damages to reputation may be presumed and compensated for by the jury.[23]

Punitive damages are awarded to a plaintiff in either a libel or a slander action where the defendant has acted with malice.[24] Malice, in this sense, connotes a feeling of ill will.[25] The jury has considerable discretion in affixing the monetary amount of punitive damages, subject only to the constraint that damages must not be excessive.[26]

The law of libel in the United States has recently undergone modification by the Supreme Court, beginning with the 1964 landmark case of *New York Times Co. v. Sullivan*.[27] That case presented the issue of whether a public official, libeled in his official capacity, could recover damages under state law that permitted injury to his reputation to be presumed merely from the publication of a defamatory falsehood. It was held that to adequately protect the constitutional guarantee of freedom of the press as contained in the first and fourteenth amendments, a public official must prove malice on the part of the press before a recovery for injury can be allowed.[28] The Court defined malice as a knowledge of the falsity of a statement or a reckless disregard as to its truthfulness.[29] If malice were shown, the plaintiff could recover presumed and punitive damages.[30] *Curtis Publishing Co. v. Butts*[31] extended the rule of *New*

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proof of special damages for the action to lie and general damages to reputation will be presumed. Hutchins v. Kuker, 168 Neb. 451, 96 N.W.2d 228 (1959); Mayo v. Goldman, 57 Tex. Civ. App. 475, 122 S.W. 449 (Ct. Civ. App. 1909); Wilson v. Sun Publishing Co., 85 Wash. 503, 148 P. 774 (1915); PROSSER § 112.

[23]PROSSER § 112; RESTATEMENT OF TORTS § 575 comment *a* at 185 (1938); J. SALMOND, TORTS § 120 n.17 (13th ed. 1961).

[24]Kahermanes v. Marchese, 361 F. Supp. 168 (E.D. Pa. 1973); Ag-Chem. Equipment Co. v. Hahn, Inc., 350 F. Supp. 1044 (D. Minn. 1972); Big Wheel Restaurants, Inc. v. Bronstein, 302 N.E.2d 876 (Ind. Ct. App. 1973); McCORMICK § 118.

[25]Malice may also connote more than ill will. It may imply evil motive, intent to injure, spite, envy, hatred, desire to degrade, knowledge of falsity, wanton disregard for another's rights, etc. *See* Fairbanks Publishing Co. v. Francisco, 390 P.2d 784 (Alas. 1964); Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 302 N.E.2d 88 (1973); Polzin v. Helmbrecht, 54 Wis. 2d 578, 196 N.W.2d 685 (1972). *Cf.* Malice as used in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[26]*See* Hammersten v. Reiling, 262 Minn. 200, 115 N.W.2d 259 (1962) *cert. denied*, 371 U.S. 862 (1962); Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958); McCORMICK § 120 n.105; RESTATEMENT OF TORTS § 908 comment *a* at 556 (1938). A caveat should be added. Present day libel law varies from state to state. To ascertain deviations from the historical development discussed herein, one should check local statutes and case law.

[27]376 U.S. 254 (1964).

[28]*Id.* at 283.

[29]*Id.* at 280.

[30]As a result of *Gertz*, punitive damages may be disallowed in future libel actions except under the most egregious of circumstances. Maheu v. Hughes Tool Co., Inc., 43 U.S.L.W. 2197 (D. Cal. Oct. 18, 1974).

[31]388 U.S. 130 (1967).

York Times from public officials to public figures.[32] In *Rosenbloom v. Metromedia, Inc.*,[33] the predecessor of *Gertz,* a plurality of the Court further advanced the constitutional privilege enjoyed by the press by establishing the "public issue" category.[34] Under this extension, anyone libeled by the press in its discussion of a topic of public concern or general interest must meet the malice test set forth in *New York Times*.[35]

II. INSTANT CASE

In *Gertz v. Robert Welch, Inc.*,[36] the Court again faced the problem of balancing the competing interests of freedom of the press with the state's interest in compensating private individuals for injury flowing from libel.

The Court concluded that freedom of the press was being chilled under the majority of state libel laws, notwithstanding the protection afforded by *New York Times* and *Curtis*. The chilling effect resulted from four common characteristics of libel suits brought by private individuals. First, under the doctrine of strict liability, any publication of a libel, whether committed mistakenly or intentionally, subjected the publisher to liability. Second, the doctrine of presumed damages permitted the jury to award damages for injury to reputation without any showing of proof. Third, the jury's broad discretion in assessing damages often resulted in inflated awards which bore no relationship to the degree of in-

[32]*Id.* at 155. Three separate opinions were written in *Curtis*. Although Mr. Justice Harlan announced the opinion for the Court, his characterization of the test as proof of "[h]ighly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers . . ." was supported only by a plurality of the Court. *Id.* Justices Brennan and White concurred with Chief Justice Warren in extending the *New York Times* test and not an adulterated standard to media criticism of public officials and figures. *Id.* at 172. Justices Black and Douglas, in a separate opinion, concurred with the Chief Justice, but did so only to create a majority for the extension of the test. *Id.* at 170. Their view was that publishers have absolute immunity from defamation suits.

[33]403 U.S. 29 (1971).

[34]*Id.* at 43.

[35]It should be noted, however, that there was no clear majority opinion in *Rosenbloom*. Justices Brennan, Blackmun, and Chief Justice Burger opted for a test based not on the status of the individual involved but upon whether an issue of public concern or general interest was involved. *Id.* at 30. Justice Black, who concurred with the result, viewed the first amendment as giving absolute protection to the press from actions against them for defamation. *Id.* at 57. Justice White concurred, but stated he would hold that the *New York Times* test should apply only to those private individuals libeled in a report concerning the official acts of public officers. *Id.* at 57. Justice Harlan dissented, voicing opposition to requiring private individuals to meet the same standards as public officials and public figures, arguing that a change from strict liability for libel to a different basis of liability would be the most appropriate direction for the law to move. *Id.* at 62. Justice Marshall dissented, voicing concern over the possible consequences of making the courts determine what information is and is not necessary for self-government. *Id.* at 78. Justice Stewart, in his dissent, voiced the same fearful possiblity as did Justice Marshall. *Id.* at 80. Justice Douglas took no part in the decision.

[36]94 S. Ct. 2997 (1974).

jury suffered. Fourth, juries could assess punitive damages, where a plaintiff proved malice, in amounts that bore no relationship to the injury incurred and which tended to punish the defendant who espoused an unpopular point of view. These four considerations prompted the Court in *Rosenbloom* to extend the actual malice test to private individuals libeled in reports of public interest.

Reevaluating its former stance, the Court agreed with Gertz that the public issue category as established in *Rosenbloom* unduly abridged the state's interest in compensating injury to reputation in two respects. First, private individuals have less access than public officials or public figures to the media and are therefore generally unable to vindicate their reputation by a public response. Second, private individuals are more deserving of recovery because, unlike public officials and public figures, they have not voluntarily entered the public forum and assumed the risks attendant thereto. Therefore, the *Gertz* Court attempted to remedy the chilling effect that large awards for libel have on the freedom of the press without unduly limiting the right of an individual to be recompensed for injury suffered as the victim of a libel by establishing the following standards: first, states may determine for themselves the basis of liability to be applied, so long as it is not strict liability; second, presumed and punitive damages are abolished unless the plaintiff can show malice on the part of the media defendant per *New York Times;* third, if malice is not shown, the plaintiff is to be compensated only for the actual injury he suffers, *i.e.,* that injury which is proved by competent evidence. Those injuries which may be proved are not limited to purely economic loss, but also include reputational damage, pain, suffering, and emotional distress.

III. Analysis

A. The Evidentiary Problem

In *Gertz,* the Court uprooted the doctrine of presumed damages and discarded it in favor of a standard that requires all damages, except in cases where malice is shown, to be supported by competent proof. However, because the Court failed to articulate the quality of proof that is competent to establish harm to reputation, *Gertz* strikes at best a tenuous balance between the competing interests of free press and protection of personal reputation. Establishing this balance was in fact left to trial judges who must decide what is competent evidence as a matter of law.

Traditionally, presumed damages have been equated with general damages for reputational injury. There was no requirement that this type of harm be actually proven. However, because *Gertz* now requires that reputational injury be shown by competent evidence, a primary question for determination is what type of proof is competent to establish harm to reputation. If general evidence will satisfy the competent proof standard, the chilling effect on freedom of the press in the form of media

self-censorship will not be eliminated. For example, would it be sufficient to have one witness testify in broad and general terms that, based upon the prevailing community opinion, the victim's reputation has been harmed? Such a minimal evidentiary requirement does not differ significantly from the traditional rule presuming damage to a libel victim's reputation. It is, therefore, doubtful whether one witness would be sufficient to affirmatively establish injury. Juries would still be free to award substantial sums for reputational harm, once its existence was established by general evidence. If one witness is inadequate to establish injury to reputation by general testimony, are two, three, or even four sufficient? Conceivably, the defense could counter with its own witnesses, stating in general terms that no injury had been done. The trial could then quickly degenerate into a mere race to accumulate more witnesses than the opposing party, a method reminiscent of trial by oath-helpers.[37] In any event, because proving or disproving reputational harm through general testimony of a witness departs insignificantly from the traditional rule of presuming damages to one's reputation, a rule requiring that reputational injury be supported by general evidence will not alleviate the chilling effect of large libel awards upon the freedom of the press.

On the other hand, if the Court intended to require specific evidence to prove reputational injury,[38] the right of the libel victim to recover is severely abridged.[39] In the past, specific evidence has been necessary to show special damages, *e.g.*, whether a plaintiff has suffered an out-of-pocket loss. Specific evidence is inappropriate, however, to prove injury to reputation because reputation is an ephemeral concept, not subject to specific physical definition.[40] For this reason it was traditionally believed

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[37]Oath-helpers were individuals that took an oath, swearing to the veracity of a defendant's oath that he was not guilty of the offense charged. This ancient form of trial eventually evolved into the present-day jury system. WALSH 79; *see* E. JENKS, A SHORT HISTORY OF ENGLISH LAW 46 (2d ed. 1922); KEMPIN 54.

[38]Requiring specific proof is suggested by the Court's lumping into the category of "actual injury" those injuries that were previously compensated by both general and special damages. The implication is that if one type of evidence is to be required to prove all injuries, harm to reputation must now be shown by the same quality of proof traditionally employed to establish special damages.

[39]In his dissent, Justice White asserts that the rule announced in *Gertz* regarding general damages will eliminate recovery for presumed damages in analogous cases of slander, not actionable per se. Apparently, Justice White would interpret the majority opinion to mean that general evidence will be inadequate to show damage to reputation.

[40]An exception to the hearsay rule has traditionally permitted general evidence of reputation to be admitted. The rationale behind the exception lay in the difficulty of proving the matter in question by other forms of evidence. The testimony offered was not the individual assertion of the witness, nor did it deal with specific acts. The requirement was firmly established that the testimony must relate only to matters of common community knowledge. V WIGMORE, EVIDENCE §§ 1580, 1584-86 (3d ed. 1940).

In defamation cases, the reputation evidence represented a composite of the esteem in which the community held the defamed party. Again, witness testimony was confined to the

that harm to one's reputation could not be specifically proved and therefore was appropriately presumed.[41] Where damage to one's reputation is required to be proved by specific evidence, there may well be an elimination of most, if not all, future awards for injury to reputation.[42] There is no doubt that through the imposition of a standard of proof so stringent that injury to reputation becomes nearly impossible to prove, the number of large awards for damage to reputation will be drastically curtailed. This approach might indeed solve the problem of excessive awards which faced the *Gertz* Court, but only at the expense of the second objective, preserving to the state the right to compensate its private citizens for harm occasioned by libel. Thus, a determination that specific evidence is to be required in future libel suits is to interpret *Gertz* as a judicial declaration that harm to reputation in most libel cases is nonexistent, a premise antithetical to defamation law. However, even with this rigid application of the competent evidence standard limiting the number of cases where damages might be awarded, the dollar amount for libel damages that a jury may affix in any one case is still unimpaired. Once the court determines that the evidence of actual injury is competent, the jury may still ascertain, according to its discretion, the amount of damages to be awarded. Hence, the specific evidence approach does little to provide an equitable balance of freedom of the press with the state right to compensate its citizens for reputational injuries occasioned by libel.

Presumably, courts will now begin to fashion compromise approaches to the problems presented in establishing injury to reputation through either general or specific evidence. One solution might be to require a combination of specific and general proof. For example, a plaintiff would be allowed to prove harm to his reputation through general testimony, but only after he had established some special damage or economic detriment by specific proof. Failing this, no award for reputational harm based upon general proof would be allowed. This approach is analogous to the present-day practice in slander actions. Unless there is slander per se, an award for presumed damages is permitted only if the plaintiff first establishes special injury by specific proof. Such a com-

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expressions of the general community attitude toward the plaintiff and not to specific instances or occurrences. McCORMICK, EVIDENCE § 249 at 595 (2d ed. 1972).

A relaxation of this past standard can be seen in the recently enacted Federal Rules of Evidence wherein reputation may be established by opinion evidence, i.e., the witness speaking for himself and not for the community. However, he may *not* relate specific instances upon which he bases his opinion except on cross-examination or when a character trait, such as honesty, is placed in issue. Federal Rules of Evidence, Pub. L. No. 93-595 §§ 405(a), (b) Jan. 2, 1975.

[41]Cases and authorities cited note 19 *supra*.

[42]Justice White, in his dissent, foresaw this consequence when, speaking of competent proof of actual injury, he stated "[i]t will be exceedingly difficult, perhaps impossible, for him [the plaintiff] to vindicate his reputation interest by securing a judgment for nominal damages . . . ." 94 S. Ct. at 3025.

promise, however, may be overly restrictive. The class of plaintiffs able to show special damages is, as a practical matter, narrowed to those having business enterprises. Because special injury connotes an economic or material detriment, specific quantification and proof of such injury is most readily available where a specific business enterprise has suffered due to a libel. Therefore, the self-employed businessman can more easily posit an economic detriment than those who are not self-employed. Even if a plaintiff is a businessman, however, he would still have to show a causal connection between the libel and the injury. If it is difficult for a businessman to prove that a decrease in his profits was caused by a libel,[43] it would seem equally if not more difficult for a nonbusinessman, such as a construction foreman, to establish a decrease in earnings as the proximate result of a defamatory publication as a predicate to recovery for reputation.[44] Clearly, courts face a difficult task in fashioning a compromise approach to proof of reputational injury.

Due to the broad discretion now permitted by the Supreme Court's failure to define competent evidence required for proof of reputational injury, the evidentiary standard applied in future libel cases will reflect the lower courts' conclusions regarding the weight to be given freedom of the press as opposed to the state's right to compensate libel victims. Some courts may favor recovery and will adopt the general evidence approach to proving reputational harm. Others may favor the press and will choose the more restrictive specific evidence or a combination approach.[45] In any event, the degree of uncertainty in this new standard

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[43]An interesting analogy to the problem of proving causation in a libel suit can be found in the Uniform Commercial Code section 4-402 which provides that "[a] payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake, liability is limited to actual damages proved." UNIFORM COMMERCIAL CODE § 4-402. In American Fletcher Nat'l Bank & Trust Co. v. Flick, 146 Ind. App. 112, 252 N.E.2d 839 (1969), the court held that even though Flick had proved a decline in and the subsequent demise of his used car business, he had failed to show that the bank's wrongful dishonor of certain of his checks and a wrongful setoff against his account by the bank, which resulted in doubt being cast upon his business solvency, proximately caused his injury. Although Flick did not sue for libel of his credit reputation, the difficulty of proving causation is analogous because of similar consequences flowing from the effect of the wrongful dishonor of checks. If it is difficult to prove that a decline in one's business was caused by an impaired credit reputation, then it will be even more difficult to prove that libel of one's general reputation is the proximate cause of some special injury.

[44]However, if subsequent to the libel there exists *no* visible economic detriment, such as loss of one's job, upon which to fasten a causal connection, the defamed individual may be effectively excluded from *any* recovery for damages to reputation, although the defamation be of such an egregious nature that "[s]ubstantial danger to reputation is apparent." 94 S. Ct. at 3011.

[45]In Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 43 U.S.L.W. 2300 (Ind. Ct. App. Dec. 30, 1974) the court went one step further and chose to retain the *New York Times* test as applied in *Rosenbloom,* reasoning that under *Gertz,* the state could define for itself a stricter standard than the one enunciated therein. The court felt that the distinction between the large majority of public officials and private citizens with respect to their ability to respond to a libel was meaningless, especially when the libel occurs in a discussion of public interest.

serves neither the press nor the individual.[46]

Courts in general have had and continue to have, apart from the competent evidence standard now espoused in *Gertz*, a discretionary method of control over the amount of damages awarded by juries. If a court determines that a jury award is unjustified or excessive, it can in its discretion order a remittitur[47] or, in the alternative, a new trial on the damage issue.[48] By concluding that large damage awards threaten freedom of the press, it would seem that the Court apparently believes application of this discretionary principle has failed.[49] If courts have not properly employed their discretion to use the remittitur device, it is questionable whether the availability of the discretionary standard of competent evidence will cure the problem of large damage awards in libel cases.

The Court's holding poses another definitional problem for the lower courts. The *Gertz* standard applies when "[t]he substance of the defamatory statement 'makes substantial danger to reputation apparent.' "[50] Thus, courts, of necessity, are forced to decide which words or combination of words, set against present-day standards and social values, are of such potent defamatory meaning that substantial danger to reputation becomes apparent. At first blush, it appears that this duty is but a restatement of the past function of courts in defamation actions. Courts have always been faced with a threshold determination of whether the alleged defamation might have a *tendency* to injure the party at whom it

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[46]In his dissent, Justice Brennan states "the probable result of today's decision will . . . lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication." 94 S. Ct. at 3020. Although Justice Brennan's remarks were generally directed to the standard of care *Gertz* requires of publishers, it implies that as the factors affecting the possible outcome of a suit against the media increase, so will self-censorship. Hence, failing to define adequately the competent evidence standard may lead to increased media self-censorship.

[47]A remittitur is a procedural device whereby the court suggests that the plaintiff accept a reduction in the damage award. If the plaintiff agrees, a reduction is ordered. If not, the judge may order a new trial on the issue of damages. The judge may do this because in theory he has the discretion to grant a new trial. Hence, the remittitur is simply an exercise of his discretion. The plaintiff may not complain because he acquiesces in the reduction while the defendant may not complain because the jury has already fixed his liability, which could be sustained if the judge did not exercise his discretion. F. JAMES, CIVIL PROCEDURE § 7.21 at 322 (1965).

[48]*See generally* Comment, *Correction of Damage Verdicts by Remittitur and Additur*, 44 YALE L.J. 318 (1934).

[49]For a general collection of cases dealing with remittitur, see Annot., 95 A.L.R. 1163, 1166-68 (1935); Annot., 53 A.L.R. 779, 783-92 (1928).

[50]94 S. Ct. at 3011. The Court said this phrase places the *Gertz* guidelines in perspective. One possible interpretation of this language, consistent with the Court's objectives of balancing freedom of the press with the right to be recompensed for libel, would be that courts now have the responsibility to determine if a publication is defamatory and injurious on its face. The Court intimates that when a statement does not warn a publisher of its defamatory potential, an individual's right to compensation may be restricted by a much higher standard than that announced in *Gertz*. *Cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967).

was directed.[51] Once the court decided that such a tendency could exist, the question of whether in fact it did exist and was understood as being defamatory was submitted to the jury.[52] If this factual question was answered in the affirmative and no valid defense was raised, the jury assessed damages. However, the new standard seems to raise the threshold determination of a "tendency to injure" to a level which abrogates, by implication, the jury function of determining whether the allegations were understood as defamatory and damage was incurred. This is so because when courts decide that substantial danger to reputation is present, they have implicitly determined that the defamatory material did have a tendency to injure, that it was in fact so understood, and was, for all practical purposes, injurious.

However, because defamation affects an individual within the context of his community reputation, it must be viewed against a backdrop formed by the social mores, norms, and general societal attitudes of the community.[53] Courts have had difficulty using this backdrop in defining obscenity.[54] Indeed, the problem has plagued them for over a decade.[55] Not having been able to define what is obscene, using as a guide community norms and attitudes, it may be questioned whether by using the same guide courts will be able to define what is a defamatory statement making "substantial danger to reputation apparent."

B. A Proposed Alternative

A viable solution to the problem of excessive damage awards would be to declare that damages for reputational injury may be presumed, but

[51]Initially, the judge could rule as a matter of law that the allegations were either defamatory or could reasonably be so construed. MacRae v. Afro-American Co., 172 F. Supp. 184, 186 (E.D. Pa. 1959), *aff'd*, 274 F.2d 287 (3d Cir. 1960); HARPER & JAMES § 5.1 at 350. *See also* Clark v. Pearson, 248 F. Supp. 188, 192 (D.D.C. 1965).

[52]Curtis Publishing Co. v. Vaughan, 278 F.2d 23, 26 (D.C. Cir.) *cert. denied*, 364 U.S. 822 (1960); Weider v. Hoffman, 238 F. Supp. 437, 441 (M.D. Pa. 1965); MacRae v. Afro-American Co., 172 F. Supp. 184, 185 (E.D. Pa. 1959), *aff'd*, 274 F.2d 287 (3d Cir. 1960).

[53]Spanel v. Pegler, 160 F.2d 619, 622 (7th Cir. 1947); HARPER & JAMES § 5.4; 22 N.Y.U.L. REV. 513, 515 (1947); Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 420 (1969).

[54]Obscenity is similar to defamation in that its definition depends upon social customs, mores, and attitudes; it involves constitutional protection of the press; and it has an alleged injurious effect upon society. However, unlike obscenity, injuries caused by defamation may be quantified. Nevertheless, the analogy does merit consideration. *Cf.* Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 420 (1969).

[55]*See* Hamling v. United States, 94 S. Ct. 2887 (1974); Miller v. California, 413 U.S. 15 (1973); Redrup v. New York, 386 U.S. 767 (1967); A Book Named *John Cleland's Memoirs of a Woman of Pleasure* v. Attorney General, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

In *Miller*, the Court determined that obscenity is a question for the trier of fact, to be determined by applying "contemporary community standards." 413 U.S. at 24. In *Hamling*, the Court added that "juror [s] [are] entitled to draw on [their] own knowledge of the views of the average person in the community . . . ." 94 S. Ct. at 2901.

only in nominal amounts.[56] In receiving an award of nominal damages, a plaintiff is able to vindicate his reputation symbolically[57] by proving the falsity of the defamatory charge. To merit more than a nominal damage award for injury to reputation, a plaintiff would be required to substantiate his claim by either (1) proving some special injury, coupled with general evidence of reputational harm, or (2) by proving beyond a reasonable doubt that serious injury accrued to his reputation, using either general or specific evidence.

Admittedly, such a system will restrict recovery of reputational damages, in many cases, to those individuals best suited to prove special injury, *e.g.,* businessmen. However, the restriction will not operate to deprive *all* injured parties from *any* recovery for harm to reputation. Individuals who suffer severe injury to reputation are given a chance to prove their case and be recompensed, provided they meet the burden of showing such injury by proof beyond a reasonable doubt. Courts are generally familiar with the beyond a reasonable doubt standard and can appropriately instruct juries regarding its application. In this manner, recovery for injury to reputation would be limited to those individuals recognized by the jury as being most deserving.

Courts and juries would continue to perform the same functions they presently do in libel cases. The court would make the initial determination of whether the publication might have a tendency to injure the victim's reputation. The jury would then decide if in fact it was injured. If the reputation of the victim was found by the jury to have suffered, nominal damages would be presumed and awarded. Further evidence of special damages, or severe reputational injury, would be submitted to the jury for its determination. In this manner, the problem of judicially defining what words make substantial danger to reputation apparent is avoided. The jury and not the court is the barometer measuring defamation and the consequent injury against the rise and fall of societal norms, standards, and mores.

Finally, courts would retain their discretionary powers of new trial and remittitur where damages are deemed excessive, as well as their traditional powers of directed verdict and judgment *n.o.v.* where damages are not sufficiently shown. In short, the media would not be as subject to the

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[56]Although "nominal damages" will not be rigidly defined, a suggested approach would allow an award of attorney fees and court costs as well as some daily compensation for time a plaintiff spends away from his job in court.

Historically, a plaintiff was entitled to nominal damages even if the jury believed that no harm had been done to his reputation. RESTATEMENT OF TORTS § 620 (1938); MCCORMICK § 22; HARPER & JAMES § 5.30 at 468.

[57]A minimal damage award, however, may reflect adversely upon the character of the victorious plaintiff. The inference is that the jury considered his reputation to be of such little value that even though an egregious libel occurred, scant harm was done to the victim's already poor reputation. Such was the case in *Q.B. VII* where Dr. Kelno was awarded damages of one half-penny, the lowest coin of the realm. L. URIS, Q.B. VII (1970).

chilling effect of unjustified damage awards, yet the injured plaintiff would be afforded the opportunity to vindicate his good name and to be compensated for his injured business and reputational interests. The result of this approach would be a more equitable balance between the competing interests of freedom of the press and the right of an individual to recover for harm to his reputation.[58]

IV. Conclusion

The Court in *Gertz* set about to clarify the constitutional ramifications of libel that have arisen from *New York Times* and its progeny. This objective may not have been achieved as *Gertz* now presents additional problems of determining what type of evidence is competent to establish actual injury and how courts will apply the discretion accorded them in limiting unjustified jury awards. Rather than being a definitive ruling on the state of the law, as Justice Blackmun asserts, *Gertz* may create confusion and uncertainty in the law of defamation if courts do not adequately deal with the new challenges posed by this ruling.

Constitutional Law —Equal Protection — Discrimination Against Pregnancy Is Not Sex Discrimination — *Geduldig v. Aiello,* 417 U.S. 484 (1974).

In a 6-3 decision, the United States Supreme Court held in *Geduldig v. Aiello*[1] that four California women who were refused state insurance benefits for pregnancy-related disabilities were not denied equal protection of the laws under the fourteenth amendment.[2] Moreover, in the opinion of the majority, disparate treatment of pregnant persons vis à vis nonpregnant persons was not sex discrimination.[3]

I. The Case

Carolyn Aiello and three other women, each suffering from a pregnancy-related disability,[4] were denied state disability insurance

[58]If the premise that freedom of the press needs more protection than it presently receives is rejected, the approach suggested becomes oppressive to the libel victim. As with all balancing problems, however, a line must be drawn. The approach detailed represents one believed to be equitable to both interests.

[1]Geduldig v. Aiello, 417 U.S. 484 (1974).

[2]"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

[3]417 U.S. at 496-97 & n.20.

[4]The four disability claims consisted of an ectopic pregnancy, a tubal pregnancy, a miscarriage, and a claim of physical incapacitation. Aiello v. Hansen, 359 F. Supp. 792, 794-95 (N.D. Cal. 1973).