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Strict Liability Versus Negligence: An Economic Analysis of the Law of Libel

I. INTRODUCTION

At common law, the publisher of a defamatory statement was held strictly liable for any injury inflicted upon the person defamed. The plaintiff in a libel action was not required to prove negligence. The defendant could defend only by proving that the defamatory statement was true or that it came within one of the recognized privileges.¹

In *New York Times Co. v. Sullivan*,² the Supreme Court radically altered the common-law rule by holding that strict liability for libel was unconstitutional when the person defamed was a public official. The Court criticized the strict liability rule because "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."³ Thus, in order to avoid unduly suppressing the publication of defamatory statements, the Court required a defamed public official to prove "actual malice" in order to recover damages.⁴

The New York Times rule was extended to all public figures in *Curtis Publishing Co. v. Butts*⁵ and its companion case, *Associated Press v. Walker*.⁶ However, in *Gertz v. Robert Welch, Inc.*,⁷ which was decided ten years after *New York Times*, the Court drew a distinction between public figures and private figures and held that a defamed private figure need not prove actual malice in order to recover. Strict liability was, however, still prohibited. Thus, short of imposing strict liability, the states were left free to "define for themselves the appropriate standard of liability."⁸

1. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 776-801 (4th ed. 1971).

2. 376 U.S. 254 (1964).

3. *Id.* at 279.

4. *Id.* at 279-80. "Actual malice" was defined as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Id.* at 280.

5. 388 U.S. 130 (1967).

6. *Id.* (consolidated opinion).

7. 418 U.S. 323 (1974).

8. *Id.* at 347. The Court gave two reasons for its decision to treat public figures

The *Gertz* decision emphasized that a proper balance must be struck between freedom of speech and "the state interest in compensating injury to the reputation of private individuals."⁹ The Court noted that while the actual malice standard of *New York Times*

administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander, . . . it exacts a correspondingly high price from the victims of the defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.¹⁰

Gertz thus reflects the Court's efforts to formulate a liability rule that will not induce an excessive amount of self-censorship while at the same time not encouraging an excessive amount of defamation. The Court concluded that a negligence rule best accommodates these competing interests, at least when private persons are defamed.

At a time when many areas of the law are characterized by a shift from negligence toward strict liability, a shift in the opposite direction is a rather curious phenomenon. The Supreme Court is apparently convinced that a negligence rule is more likely than a strict liability rule to induce publishers to publish the "efficient" level of defamation.¹¹ This Comment will provide an economic analysis and comparison of strict liability and negligence in the peculiar context of libel and will inquire into the practical effect of a constitutional preference for negligence over strict liability.

differently than private figures. First, public figures have better access to the media and can more easily correct erroneous statements. Secondly, public figures are less deserving of recovery because they assume the risk of defamation by injecting themselves into public life. *Id.* at 344-45.

9. *Id.* at 343.

10. *Id.* at 342.

11. If the benefit from reducing the amount of false defamation exceeds the cost of doing so, it is efficient to reduce the amount of false defamation. When the amount of false defamation can be reduced no further except by excessively inhibiting the publication of true defamation, then it is not efficient to further reduce the amount of false defamation.

II. ANALYSIS

A. *The Problem of Property Rights*

It is very difficult to acquire and enforce property rights in information. Although patent and copyright laws create enforceable rights in some kinds of information, rights in other kinds of information are not so well protected. News reporters, for example, cannot effectively enforce property rights in the information they gather.¹² The first reporter to learn of or report the occurrence of a certain event cannot preclude others from also reporting it as soon as they acquire the information. The inability of the news reporter to preclude consumers from purchasing an item of information from a competitor means that no reporter can appropriate the entire social benefit of that information. Thus, the social benefit of the information exceeds its private benefit.¹³

Defamatory statements are merely a special kind of information. Unlike other kinds of information, however, defamation can cause great injury. While true defamatory statements convey valuable information to those who interact with the person defamed, false defamatory statements injure the person defamed as well as those who rely upon the erroneous information.¹⁴

Unfortunately, it is often very costly to ascertain truth. A publisher is not always certain whether a defamatory statement is true or false. In view of this uncertainty, there is always some risk that it is false. Thus, false defamatory statements are properly viewed as an unavoidable cost of publishing true defamatory statements. It is therefore the goal of the law of libel to create a liability rule that will provide publishers with the incentive to publish the "efficient," or cost-justified, amount of libel. Strict liability and negligence have traditionally been the competing alternatives between which the courts must choose.

12. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 544 (2d ed. 1977).

13. Social benefit is the aggregate benefit of the information to society. Private benefit is the value that a particular publisher derives from publication.

14. This analysis assumes that true defamation as discerned by judges and juries is desirable while false defamation is not, even though true defamation may be more damaging to the defamed person because it is more likely to be believed. This also appears to be the implicit assumption of the Supreme Court in *Gertz*. Thus, no attempt is made to consider the issue whether truth should be determined by courts or by the market. See P. POSNER, *supra* note 12, at 544.

B. Incentives Created by Alternative Rules

1. Strict liability

If a publisher is strictly liable for the publication of a libelous statement, the publisher must either prove the defamatory statement to be true or pay damages to the person defamed.¹⁵ If the cost of proving the truth of a statement exceeds the damages caused by the statement, the publisher will choose to pay damages. If, however, the cost of damages exceeds the cost of proving the truth of the statement, the publisher will elect to defend himself by proving the truth. Therefore, the publisher who is strictly liable for libel will publish a defamatory statement only if the private benefit of publishing the statement exceeds the lower of the cost of proving truth or the cost of paying damages.

2. Negligence

Under a negligence rule, a publisher can avoid both the cost of proving truth and the cost of paying damages as long as publication is not negligent. Because the goal of a negligence rule is to provide an incentive for the publisher to behave efficiently, efficiency should be the standard of care by which a publisher's conduct is measured. Thus, a publisher should be found negligent if, and only if, the expected cost to society of avoiding a libel is less than the expected damages to society resulting from its publication.¹⁶

Assuming that the cost of proving the truth of a defamatory statement exceeds the damages caused by the statement,¹⁷ the only way to avoid libel is not to publish the statement. The cost of not publishing a true defamatory statement is the value the statement would have had to society had it been published. Since, by hypothesis, it is not feasible to determine whether the statement is in fact true, the expected cost of avoiding libel is

15. This assumes that none of the recognized privileges are available as affirmative defenses.

16. An analogous standard of care was articulated by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). See also Posner, *A Theory Of Negligence*, 1 J. LEGAL STUD. 29 (1972).

17. Because the cost of proving truth is not affected by the liability rule, it will be assumed that the cost of proving truth always exceeds the cost of paying damages. Therefore, publishers are assumed to be concerned only with the cost of damages since it is even more costly to avoid damages by proving truth.

the value to society of the statement if it were true discounted by the probability that it is true. The expected damages caused by a defamatory statement are measured by the expected cost to society of a false statement discounted by the probability that the statement is false.

Under a negligence rule, a publisher will incur the cost of damages for libel only if the expected social cost of publication exceeds the expected social value. The publisher is thereby encouraged to incorporate social costs and benefits into his own private cost benefit analysis in determining what should be published. Thus, defamation should be neither more nor less likely to be underproduced than any other kind of information.¹⁸

C. *Comparison of Strict Liability with Negligence*

Professor Posner has argued that strict liability and negligence are both efficient when efficiency requires the producer of an injury-causing good to take some action to reduce the amount of the injury.¹⁹ This argument assumes, however, that social benefit equals private benefit. If the producer of the good is strictly liable for all injuries caused by the good, but does not appropriate the entire social benefit of the good, it is quite possible that private cost will exceed private benefit even though social benefits exceed social costs. In that event, the good will not be produced even though production would be efficient.²⁰ This is precisely the problem with defamation which the negligence rule is intended to rectify.

The following table illustrates the publication decisions that obtain under strict liability and negligence rules in fifteen possible combinations of expected costs and benefits. It is not intended to exhaust all the possibilities, but does illustrate the more interesting ones. Categories 1-3 illustrate cases where the social benefit of publication exceeds the private benefit and the

18. This does not mean that a negligence rule would result in the publication of the efficient amount of defamation. It would, however, prevent the threat of liability from aggravating the problem of inadequately defined property rights in information.

19. See Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973).

20. It is quite possible that the social cost of false defamation exceeds its cost to the person defamed. Thus it is possible that social cost will exceed social benefit but that private benefit will exceed private cost. If this occurs the defamation will be published even though it is inefficient to do so. This problem might be remedied by giving a cause of action to all those harmed rather than restricting the cause of action to the person defamed. It is not, however, affected by the choice of strict liability or negligence, and will not, therefore, be further discussed.

social cost equals the private cost. Categories 4-6 illustrate cases where social benefit equals private benefit and social cost equals private cost. Categories 7-9 illustrate cases where social benefit equals private benefit and social cost exceeds private cost. Categories 10-15 illustrate cases where social benefit exceeds private benefit and social cost exceeds private cost.

		B_p	C_p	B_s	C_s	P_t	Strict Liability Outcome	Negligence Outcome	Efficient Outcome
$B_s > B_p$	1	\$10	\$1000	\$1000	\$1000	.5	No Publication	Publication*	Indifferent
	2	\$10	\$1000	\$2000	\$1000	.5	No Publication	Publication	Publication
$C_s = C_p$	3	\$10	\$2000	\$1000	\$2000	.5	No Publication	No Publication	No Publication
$B_s = B_p$	4	\$1000	\$2000	\$1000	\$2000	.5	No Publication	No Publication	No Publication
	5	\$1000	\$1000	\$1000	\$1000	.5	Indifferent	Publication*	Indifferent
$C_s = C_p$	6	\$2000	\$1000	\$2000	\$1000	.5	Publication	Publication	Publication
$B_s = B_p$	7	\$1000	\$100	\$1000	\$1000	.5	Publication	Publication	Indifferent
	8	\$2000	\$100	\$2000	\$1000	.5	Publication	Publication	Publication
$C_s > C_p$	9	\$1000	\$100	\$1000	\$2000	.5	Publication	Publication	No Publication
$B_s > B_p$	10	\$10	\$50	\$1000	\$1000	.5	No Publication	Publication*	Indifferent
	11	\$10	\$50	\$2000	\$1000	.5	No Publication	Publication	Publication
$C_s > C_p$	12	\$10	\$50	\$1000	\$2000	.5	No Publication	No Publication	No Publication
$C_s > C_p$	13	\$50	\$10	\$1000	\$1000	.5	Publication	Publication	Indifferent
	14	\$50	\$10	\$2000	\$1000	.5	Publication	Publication	Publication
	15	\$50	\$10	\$1000	\$2000	.5	Publication	Publication*	No Publication

- B_p = Private benefit (value of publication to publisher)
 C_p = Private cost (cost of publication to publisher if held liable)
 B_s = Social benefit (benefit of publication to society)
 C_s = Social cost (cost of publication to society)
 P_t = Probability that statement is true

* This result is reached because the plaintiff has the burden of proving negligence.

An examination of the table reveals that neither negligence nor strict liability always leads to the efficient outcome. Whenever the value of publication to the publisher exceeds the damages to the plaintiff, the defamatory statement will be published regardless of the liability rule chosen. Since strict liability and negligence lead to identical results in these cases, cases 6-9 and 13-15 are irrelevant in deciding which rule is preferable.

Having eliminated all cases in which the value to the pub-

lisher exceeds the damages to the plaintiff, the only remaining cases are those in which a strict liability rule leads to no publication. Because a negligence rule will also result in no publication where $(P_t)(B_s)$ is less than $(1-P_t)(C_s)$, cases 3, 4, and 12 are not instructive and can also be ignored. This leaves only cases 1, 2, 5, 10, and 11 as relevant.

The differences between strict liability and negligence obtained in 1, 5, and 10 are attributable to the law's requirement that the plaintiff bear the burden of proving negligence. Thus, when negligence is not proven, the plaintiff loses. Cases $(P_t)(B_s) = (1-P_t)(C_s)$ are likely to be very rare. Furthermore, even when they do occur, there is no basis for preferring one liability rule over the other.

In cases 2 and 11, negligence is preferred to strict liability because the results obtained with the negligence rule correspond to the efficient result, whereas the results obtained under strict liability are inefficient. One can thus extract from these cases a general rule favoring negligence if, and only if, $(P_t)(B_s)$ is greater than $(1-P_t)(C_s)$ and B_p is less than C_p .

Without the benefit of empirical evidence, it is impossible to know whether these conditions occur often enough for a negligence rule to be significantly more efficient than strict liability. Nevertheless, it seems quite reasonable to conclude that these conditions exist in a significant number of cases and probably in most cases. Thus, a perfectly applied negligence rule is probably significantly more efficient than strict liability.

D. Practical Problems

Under either strict liability or negligence, a publisher will publish a defamatory statement only if the expected benefit exceeds the expected cost. Negligence is preferred to strict liability whenever $(P_t)(B_s) > (1-P_t)(C_s)$ and $B_p < C_p$ only because it permits the publisher to assume that damages are zero when it is economically efficient to do so. However, the publisher can assume that damages are zero only when the probability of being found negligent is also zero. Whenever there is a positive probability of being held liable, the publisher will expect to pay damages in an amount equal to the total damages discounted by the probability of being held liable and modify his publication decision accordingly.

Information regarding social costs and benefits of a defamatory statement is very costly for juries and publishers to obtain.

For example, how does one estimate the value to society of knowing that an individual is a communist?²¹ An equally difficult problem is estimating the probability that a given statement is true.²² Given these uncertainties, there will almost certainly be a positive probability that the publisher of a defamatory statement will be held liable despite his best efforts to act non-negligently. In practice, therefore, the theoretical advantages of a negligence rule are mitigated by the uncertainty that results from imperfect information.

This problem is further complicated by the inability of most publishers to appropriate the entire social benefit of a publication. The injury to a defamed person's reputation often far exceeds the benefit the publisher derives from publication. This fact, coupled with the positive probability that a publisher will be held liable, can result in no publication even when publication would be efficient. Assume, for example, that a publisher expects to be held liable for libel twenty percent of the time despite his best efforts to act non-negligently. Assume further that the expected private benefit of publication is \$1,000, but that the damages caused to the defamed person equal \$10,000. Because the expected private benefit of publication is \$1,000, while the expected cost is \$2,000 ($.20 \times \$10,000$), the publisher would not publish the statement no matter how great the social benefit of publication might be. Assuming a twenty percent chance of liability, a defamatory statement will be published only if the damages caused the defamed person are less than five times the private benefit of publication. Even a very small probability that a publisher will be held liable will result in no publication if the disparity between private benefit and private cost is very large.²³

21. The defamatory publication that gave rise to the litigation in *Gertz* included a statement that Mr. Gertz was a Communist. See *Gertz*, 418 U.S. at 326.

22. The preponderance of the evidence test, generally applied in civil cases, requires a jury to determine whether the probability that certain allegations are true is greater or less than .5. However, the negligence rule described above requires a jury to be precise in estimating the probability that a statement is true. Thus, for example, rather than determine whether that probability is greater or less than .5, the jury must determine whether it is .2, .4, .7, or .9. It seems unreasonable to assume that juries can adequately perform this task.

23. If the probability that a publisher will have to pay damages is greater than the ratio of private benefit to damages caused the plaintiff, then the publisher will not publish the defamatory statement.

III. CONCLUSION

The inefficiency resulting from the disparity between the private benefit and the social benefit of publishing defamatory statements is aggravated by a strict liability rule for libel. A negligence rule would in theory induce publishers to be more efficient by immunizing them from liability when the social benefit of publication exceeds its social cost. However, since neither juries nor publishers can always accurately determine social costs and benefits, there will always be a positive probability that a publisher will be held liable despite his best efforts to act non-negligently. If the probability of being held liable multiplied by the expected damages caused to the defamed person exceeds the private benefit of publication, then the publisher will not publish even though publication would be efficient. Thus, it is quite possible that a negligence rule will induce the same behavior as strict liability. Empirical studies are the only means of determining whether the negligence rule has had an important impact on the publication decisions of publishers.

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