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Philadelphia Newspapers v. Hepps: Unanswered Defamation Questions

by JOHN L. DIAMOND*

The Supreme Court's recent decision on defamation law, *Philadelphia Newspapers v. Hepps*[1] is far more intriguing for the questions it leaves open, than for its narrow holding. In *Hepps*, the Court held that "the common-law presumptions that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."[2] Consequently, in such cases, the plaintiff bears the burden of proving that the defamatory speech is false in order to recover damages. A state cannot place the burden of proving the truth of allegedly defamatory statements on the defendant.

What is now known about constitutional defamation law can be summarized succinctly. Since the Supreme Court first interposed constitutional restrictions on defamation actions in its 1964 decision, *New York Times v. Sullivan*,[3] a public official, and by subsequent decision, a public figure,[4] have been required to establish "with convincing clarity" "actual malice," which the Court defined to be publication of a statement "with knowledge that it was false or with reckless disregard of whether it was false or not,"[5] before recovering damages from a media defendant. In *Gertz v. Robert Welch, Inc.*,[6] the Supreme Court held that a private plaintiff must establish that a media

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1. 106 S. Ct. 1558 (1986).

2. *Id.* at 1564.

3. 376 U.S. 254 (1964).

4. New York Times v. Sullivan, 376 U.S. 254 (1964) (public official must prove with convincing clarity actual malice by a media defendant); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (extending constitutional privilege to defamatory criticism of public figures).

5. 376 U.S. 254 (1964). In St. Amant v. Thompson, 390 U.S. 727, 731 (1968), the Court defined "reckless disregard" as "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

6. 418 U.S. 323 (1974).

defendant was "at fault" before recovering any damages in a defamation claim. The *Gertz* Court also held that a private plaintiff's recovery is limited to "actual damages" upon a showing of "fault," but is constitutionally permitted to recover all damages with a showing of "actual malice" as defined in *The New York Times* case. "Actual damages" was defined in *Gertz* as "proven losses," which includes both demonstrated pecuniary and emotional injury, but would clearly preclude punitive damages.[7] *Gertz* in brief dictum also suggested that only false facts and not opinions could be the basis of a defamation action.[8]

In 1985, the Supreme Court decided *Dun & Bradstreet v. Greenmoss Builders*,[9] which held that the *Gertz* restriction against a private plaintiff recovering more than "actual damages," i.e., "punitive damages," without a showing of "actual malice" was not applicable when the defamation did not involve an issue of "public concern." Prior to *Greenmoss*, lower courts had been divided over whether the restrictions in *Gertz* protected all defendants or only media defendants.[10] *Greenmoss* appeared to resolve that issue by restricting *Gertz* to public issues and rejecting a dichotomy endorsed by the Vermont Supreme Court in *Greenmoss* based on whether the defendant was media or non-media.[11]

After *Greenmoss*, a private plaintiff suing either a media or non-media defendant over a defamatory assertion of fact not involving a public issue would appear to be free of any constitutional limitations on recovery. Since *Greenmoss*, on its facts, dealt with the "actual damages" limitations imposed by *Gertz*, a future Supreme Court decision might still impose *Gertz's* requirement of "fault" on defamation involving non-public issues. The Supreme Court in *Greenmoss*, however, emphasized that *Gertz* was not applicable to "non-public" defamation, wiping

7. *Id.*

8. *Id.* at 339-40.

9. 472 U.S. 749 (1985).

10. *Id.* at 753 n.1; Compare Denny v. Mertz, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982)(*Gertz* inapplicable to private figure suits against nonmedia defendants); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) (same); Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978) (same); and Harley-Davidson Motorsports, Inc. v. Markley, 279 Ore. 361, 568 P.2d 1359 (1977) (same), with Antwerp Diamond Exchange, Inc. v. Better Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981) (*Gertz* applicable in such situations); and Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (same).

11. 472 U.S. at 753.

the constitutional slate clean rather than simply modifying *Gertz*. After *Greenmoss*, a major unanswered question in American defamation law remains: what, if any, constitutional protection exists when a private plaintiff sues over "non-public" defamation.

The *Hepps* decision, while adding little more to what is known about constitutional defamation law, actually increases uncertainty. Footnote 4 to Justice O'Connor's majority opinion in *Hepps* expressly reserved the question of "what standards would apply if the plaintiff sues a non-media defendant."[12] The footnote forced Justices Brennan and Blackmun, who otherwise agreed with Justice O'Connor, to file a brief concurrence disagreeing with the footnote's suggestion that media defendants should be treated differently from non-media defendants.[13] Consequently, what appeared to be resolved only a year earlier in *Greenmoss* has become more unraveled. We do not know whether the distinction between media and non-media defendants has been replaced by the distinction between public and non-public issues, or whether both still have vitality.

After *Hepps* and *Greenmoss*, *Gertz's* constitutional protection requiring a finding of "fault" for any damages and "actual malice" for recovery beyond "actual damages" clearly applies only to a defamatory assertion involving "public issues" by "media defendants." Indeed, the *Hepps* footnote cites a footnote in a 1979 Supreme Court case[14] which noted that the requirement that public officials and figures prove "actual malice" to recover any damages may also only apply to media defendants. What, if any, constitutional protection applies to non-media defendants, whether speaking on an issue of "public" or "private concern," and whether being sued by a public or private plaintiff now remains an open question. Conceivably, *Hepps* may be the beginning of the Supreme Court's withdrawal from much of defamation law; at the least it creates an opportunity to rewrite the standard. As the majority opinion observed, "When the speech is of exclusively private concern and the plaintiff is a private figure, . . . the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape."[15]

12. Philadelphia Newspapers v. Hepps, 106 S. Ct. 1558, 1565 n.4 (1986).
13. *Id.* at 1565.
14. Hutchinson v. Proxmire, 443 U.S. 111 (1979).
15. *Hepps*, 106 S. Ct. at 1565.

The reopening of questions, apparently resolved in part only a year prior, should not distract from the answers a majority of the court did provide in *Hepps*. The plaintiffs in *Hepps* included the principal stockholder of a corporation that franchised a chain of stores, the corporation itself, and franchisees. The article in the *Philadelphia Inquirer* linked the plaintiffs to organized crime and attempts to improperly influence the state's governmental administration and the Liquor Control Board in Pennsylvania. *Gertz* was held to be clearly applicable because the defendant was Philadelphia Newspapers, a media defendant, and the defamatory allegations were deemed to involve issues of "public concern." (There was no suggestion that any of the plaintiffs were public figures, invoking the "actual malice" requirement for all damage recovery under *New York Times*.) *Hepps* is the first Supreme Court opinion to apply the public versus private issue dichotomy since *Greenmoss* held *Gertz* only applied to defamatory statements relating to issues of "public concern."[16] As such, it provides an example, along with *Gertz*, of what kinds of issues satisfy the *Greenmoss* "public issue" standard.

Furthermore, *Hepps* clearly holds that a private plaintiff must prove falsity in addition to fault against a media defendant accused of defamation relating to a public issue. The *Hepps* majority affirms that this burden also exists for public plaintiffs subject to the *New York Times* standard. The majority was also unpersuaded that Pennsylvania's "shield" law, which allows media employees to refuse to divulge sources, altered the constitutional burden although the majority reserved decision on the "permissible reach of such laws."[17]

The majority noted that "to provide 'breathing space' for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability and has imposed additional requirements of fault upon the plaintiff in a suit for defamation."[18] The majority, therefore correctly concluded that it had not really broken new ground by "insulating speech that is not even demonstrably false."[19] The opinion also noted that as a practical matter it was very unlikely a jury could be persuaded a defendant had inadequately investi-

16. 472 U.S. 749 (1985).
17. *Hepps*, 106 S. Ct. at 1565.
18. *Id.* at 1565.
19. *Id.*

gated the truth of a statement, when it was unproven that the published statements were false.

Even this undramatic holding in *Hepps* was subject to dissent by four Justices. Justice Stevens, writing in dissent for Chief Justice Burger, Justice White, and Justice Rehnquist, concluded that if fault can be established, "the strong and legitimate [state] interest in compensating private individuals for injury to reputation" justifies liability.[20] By illustration, the minority noted that even deliberate, malicious character assassination would be protected so long as the actual falsity of the published statement was unprovable. The dissenting Justices agreed that the majority is "doubtless correct that the government or its agents must at a minimum shoulder the burden of proving that the speech is false and must do so with sufficient reliability that we can be confident that true speech is not suppressed."[21] However, the dissent distinguished between legislation suppressing particular points of view or seditious libel and private defamation actions. Indeed, in a footnote, the minority would dismiss as incorrect dictum previous language imposing on public officials the burden of proving falsity and most certainly would not impose it on private plaintiffs.[22] While the minority's example of the deliberate character assassin who publishes statements that cannot be proved false is provocative, it ignores the principle that without an injury to a legally protected interest, there should be no recovery. Whatever the motive or culpability, under defamation law, truthful statements do not injure legally protected interests.

After *Hepps*, the future of constitutional defamation law remains uncertain. We still need guidance on these open questions:

(1) Is there any constitutional protection at all for statements of non-media defendants? If so, what is the standard? Depending on whether the statements relate to public or private issues, and whether they defame public or private plaintiffs, the Court's future answers could vary.
(2) Is there any protection for media defendants addressing non-public issues? If so, what is the standard?
(3) What is a "public" issue? Will it be interpreted broadly or narrowly? The stakes may be very high if "private" defa-

20. *Id.* at 1570.
21. *Id.*
22. *Id.* at 1570 n.10.

mation warrants no or very limited constitutional protection.

(4) Do issues that relate to prominent public figures automatically relate to matters of public concern? If not, is the Court suggesting that private issues relating to public figures warrants no protection? This would repudiate the all-purpose public figure concept which has previously required proof of *New York Times* malice for all matters involving truly prominent figures.[23]

(5) If, as *Gertz* suggested in dictum, opinions cannot be the basis of a defamation claim, what is the constitutional test for distinguishing the assertion of fact from opinion?[24]

(6) Is there a constitutional standard for when a publication is false?[25]

(7) Is there a constitutional standard for what level of proof is required to prove falsity? This question is specifically reserved by *Hepps*.[26]

(8) Is there a constitutional limit to the "permissible reach" of shield laws which allow media employees to refuse to divulge sources? As noted above, this question is also specifically reserved in *Hepps*.[27]

(9) Is the requirement of proving falsity relevant in an action not seeking damages? This question was expressly left open by *Hepps*.[28]

(10) Is there a distinct constitutional privilege to report false statements made at public meetings or in public records? And if so, what is the scope of the privilege?[29]

(11) Is there any constitutional right to report allegations or rumors?[30]

In short, twenty-two years after the Supreme Court held that the first amendment restricts state defamation law, the scope and dimensions of that protection and when it applies are remarkably open questions. If *Hepps*, a 5-4 decision, demon-

23. *Gertz*, 418 U.S. at 335.

24. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

25. Herbert v. Lando, 781 F.2d 298 (2d Cir.), *cert. denied*, 106 S. Ct. 2916 (1986).

26. *Hepps*, 106 S. Ct. at 1565 n.4.

27. *Id.*

28. *Id.*

29. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Time, Inc. v. Pape, 401 U.S. 279 (1971); *see also* Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Reporting*, 54 N.Y.U. L. REV. 467 (1979).

30. *See* Edwards v. Nat'l Audubon Soc'y, 556 F.2d 113 (2d Cir.), *cert. denied sub nom.* Edwards v. New York Times Co., 434 U.S. 1002 (1977). *Contra* Dixson v. Newsweek, Inc., 562 F.2d 626 (10th Cir. 1977).

strates anything clearly, it is that most of constitutional defamation law has yet to be written.