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The Search for Consistency in Constitutional Defamation Law

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Introduction

The constitutionalization of the tort of defamation has resulted in some rather great inconsistencies in the law. The state of today's defamation standard may be a result of the lack of certainty and consistency with which the Supreme Court has handed down defamation case rulings since the landmark decision in *New York Times v. Sullivan*.[1] The Supreme Court has developed a defamation standard based more on geography and psychology than on logic. In the future the Court will undoubtedly take up the question of a new national standard. The Court may move toward a return to the common law, moving away from a Constitution-based first amendment standard.

This article will review the Supreme Court's constitutionalization of defamation and will explore various considerations that must be made in finding a better national standard for the tort of defamation.

I
The Development of Constitutional Protection for the Tort of Defamation

The law of libel did not encompass federal constitutional guidelines until 1964 in the watershed decision of *New York Times v. Sullivan*.[2] In this historic decision, the Supreme Court ruled for the first time that there are constitutional limitations in the area of defamation. The Court was forced to hand down the *New York Times* ruling because of the national emergency arising from extreme resistance in the South to the enforcement of long delayed civil rights. Despite the care with

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1. 376 U.S. 254 (1964).
2. *Id.*

which the opinion was crafted, it had elements of haste in it, necessitating important changes from time to time as the Court looked more penetratingly into the complexities of the subject.

The Court's position has accordingly shifted in various directions since *New York Times*, beginning with the two cases that extended the constitutional protection of "actual malice"[3] from actions by public officials in their official activities to suits by public figures generally.[4] As initially interpreted, the tendency in federal and state courts was to find plaintiffs as public in character, no matter how unimportant they might appear to the casual observer, and so subject plaintiffs to the requirement that they prove "actual malice" with convincing clarity. Shortly thereafter, the Court decided *St. Amant v. Thompson*,[5] which made the constitutional test for "actual malice" so subjective as to be almost impossible to prove with the required convincing clarity.

The net effect of these pioneering cases was to create the impression that defamation cases were on the way out, at least as far as public characters were concerned. These cases were decided in the period of Justices Black, Douglas, Brennan and Goldberg, who felt, in varying degrees, that liability for libel was precluded by the absolutist terms of the first amendment. Indeed, the Court seemed to go even further in narrowing the scope of defamation and related actions when it decided *Time, Inc. v. Hill*,[6] in which it extended the *New York Times* actual malice rule to invasion of privacy cases. The Court also extended the *New York Times* rule in *Rosenbloom v. Metromedia*[7] to all plaintiffs, rather than only those individuals in the public eye, as earlier cases had done. A plurality of the Court declared that the "actual malice" rule would apply even for private individuals involved in matters of public or general interest.[8]

It was clear that some of the individual justices were greatly troubled by the situation, especially as concerned the issue of punitive damages in this case, because so many of them wrote

3. "Actual malice" was defined in *New York Times* as "knowledge of falsehood or reckless disregard of truth or falsity . . . ." *Id.* at 280.

4. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 418 S.W.2d 379 (Tex. Ct. App. 1967).

5. 390 U.S. 727 (1968).

6. 385 U.S. 374 (1967).

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

8. *Id.* at 43-44.

separate opinions in *Rosenbloom*.[9] Nevertheless, the lower courts seemed to assume that such was the direction in which the highest Court was going, and decisions reflecting that viewpoint were published in almost every jurisdiction.[10]

This progression was unexpectedly and completely interrupted in the landmark case in which I was the plaintiff, *Gertz v. Robert Welch, Inc.*[11] In that case the Supreme Court expressly overruled *Rosenbloom* and decided that private individuals, even if involved in matters of public or general interest, need not establish "actual malice" in order to recover for defamation. The court held that it was sufficient for such individuals to prove fault and "actual injury" as defined by state law. The Court indicated the difficulty in making *ad hoc* decisions based upon a factual or judicial determination as to what was of general or public interest. It was much easier, the majority said, to classify plaintiffs as public or private persons, regardless of what was involved in the particular situation out of which the case arose. The Court declared, moreover, that only in special limited circumstances would individuals be regarded as public figures. In *Gertz*, the Court devoted pages to retelling the public aspects of my career and then concluded that I was, nonetheless, a private person.

To show that it meant to decrease the possibility of plaintiffs being regarded as public figures, the Court decided three cases soon after *Gertz* in a manner that would not have been possible after *New York Times* was decided. In *Time, Inc. v. Firestone*,[12]

9. Justices Black and White concurred separately, while Harlan, Marshall and Stewart dissented.

10. *See, e.g.*, Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969).

11. 418 U.S. 323 (1974).

I have had the somewhat unusual opportunity to observe the law of libel in theory and in operation from several contrasting perspectives, and this possibly entitles me to express some views that may be useful, if unorthodox. As a litigant, I was the successful plaintiff in the landmark *Gertz* case, which is now cited as often as any libel case and is the subject of innumerable law review articles and is studied by every law student. As a trial lawyer in defamation cases, I have often represented plaintiffs and occasionally defendants. My cases include: Farnsworth v. Tribune, Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969); Zeinfeld v. Hayes Freight Lines, 41 Ill. 2d 345, 243 N.E.2d 217 (1968); Oberman v. Dun & Bradstreet, Inc., 586 F.2d 1173 (7th Cir. 1978); Parmelee v. Hearst Publishing, Co., 341 Ill. App. 339, 93 N.E.2d 512 (1950). These cases have concerned themselves with such vital issues as the extent to which truth is a constitutional defense, conditional privilege, credit reports, and the innocent construction rule. As a lawyer, I have represented authors (Henry Miller for one), publishers (a university press, Grove Press and tabloid newspapers), movie producers (such as Russ Meyer), and others concerned with possible liability.

12. 424 U.S. 448 (1973).

Wolston v. Reader's Digest Association,[13] and *Hutchinson v. Proxmire*,[14] the Court found that each of the three plaintiffs was a private person in circumstances in which two of the plaintiffs would earlier have been considered to be public figures and one a public official.[15]

Case after case followed in virtually all of the states, applying the *Gertz* rule.[16] In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*[17] the Court seemed to backtrack from *Gertz* and the many cases decided since then. While it was again only a plurality decision, the principal opinion was written by Justice Powell, the same justice who had written the majority opinion in *Gertz*. Justice Powell declared that the *Gertz* ruling was confined to individuals involved in matters of public or general interest and for private persons involved in purely private matters, here a credit report, the common law rules would apply and both actual and punitive damages could be recovered without proving fault or actual malice.[18] Again, Chief Justice Burger[19] and Justice White,[20] joining in the result, but not in the reasoning, made it clear that they were more skeptical than ever about both *New York Times* and *Gertz*, believing that both of those cases ought to be reconsidered and possibly overruled. Surprisingly, Justice Powell forgot or ignored what he had said in *Gertz* as to the difficulty of making *ad hoc* determinations of public or general issues. It may be argued that there is the same difficulty in determining the status of individuals.

In the same time period, the Court decided several other cases, continuing to modify the constitutional guidelines for defamation. *Keeton v. Hustler Magazine, Inc.*[21] held that plaintiffs could choose the jurisdiction in which to sue even if this

13. 443 U.S. 157 (1979).

14. 443 U.S. 111 (1979).

15. It should be noted, however, that even in deciding *Gertz*, two members of the Court, Chief Justice Burger and particularly Justice White, expressed skepticism about a special rule for private persons. They preferred either the law as it then stood or a more gradual development. Justice Blackmun went along with Justice Powell only to create a majority. Justices Douglas and Brennan, holding to their first amendment absolutist views, dissented completely. They would have upheld the dismissal of my case, although Brennan agreed that I was a private person and not a public figure.

16. *See generally*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS 805-812 (5th ed. 1984).

17. 472 U.S. 749 (1985).

18. *Id.* at 753-55.

19. *Id.* at 763-64 (Burger, C.J., concurring in judgment).

20. *Id.* at 765-73 (White, J., concurring in judgment).

21. 465 U.S. 770 (1984).

might enlarge their right to extend the statute of limitations and revive an otherwise dead case. In *Bose Corporation v. Consumers Union*[22] the Court decided that every finding of "actual malice" required an independent constitutional review. Finally, in *Philadelphia Newspapers v. Hepps*[23] the Court decided that the burden of proof as to falsity lay with the plaintiff, not with the defendant as in common law.

II
The Localization of Constitutional Protection

From a glimpse of the above cases, it is clear that certainty has gone out of the Court's rulings in this highly controverted area of the law. The Court has also applied the first amendment in such a way that a constitutional result in defamation depends upon geography rather than upon general principles of national application. The geographic fixation of the Court is evidenced in the defamation cases following *New York Times*. In *Gertz*, Justice Powell declared for the Court: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[24]

The rationale for the Court's approach stems from the competing concerns of states' interests and the rights granted by the first amendment. The Supreme Court has found that different first amendment interpretations are required so as to allow for diversity within states, while protecting speech from a possible chilling effect on media defendants.[25]

We must assume that the Court did not stumble into this bizarre situation. Indeed, Chief Justice Burger expressly stated his awareness of the less than clear-cut determination of cases in the first amendment area.[26] It could be said that the Court was swayed more by psychology than by pure logic.

The majority of the Court, as well as, perhaps, the majority of the American people, has an extreme distaste for cutting off relief for those whose reputations have been grossly assaulted

22. 466 U.S. 485 (1984).
23. 106 S. Ct. 1558 (1986).
24. *Gertz*, 418 U.S. at 347-48.
25. *Id.* at 342-45.
26. *Id.* at 354-55.

by the media. It is easy in these circumstances to bend constitutional interpretation to what is believed to be the greater good. Generally, the Court resists and stands for basic federal constitutional requirements, but we can understand, without approving, when it wanders from the required course when highly-charged, emotional issues are involved.

I am not too much troubled by the diverse results in monetary judgments that come from such a general standard, as long as the standard survives. The very same individual with the same cause of action, be it for loss of life or limb or for wronged reputation, may achieve totally different results. In my own case, the first trial resulted in a verdict of $50,000 and the second trial in one of $400,000. The first verdict was set aside by the trial court, and its ruling was affirmed by the Federal Appellate Court,[27] but later overruled by the Supreme Court. The second, far more substantial result was sustained from beginning to end. The case is not unique within the defamation area. Such variety is normal, and there is no constitutional principle that can prevent such diversity.

It is only natural that the Court should use its broad constitutional powers to give meaning and implementation to the various provisions of the Constitution since the Constitution, and particularly the Bill of Rights, is phrased so succinctly and is lacking, for the most part, in specificity. Otherwise, the Constitution would have little meaning and no life.[28] However, it is a different situation when the Court grants the states and local communities the right to apply, in their own ways, the constitutional guidelines with respect to defamation. This aberration has caused the Court to make many changes with respect to defamation law since its decision in *New York Times*.

It may be argued that the Court has gone too far in defining the scope of defamation law. In the long run, we might be better off if we remained content to rely upon the common law or

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

28. This is illustrated best, I think, in connection with the Court's rulings, under the fourteenth amendment, in trying to bring about the desegregation of public schools. The Court utilizes the wide scope of its equitable powers, inherent in all judicial bodies, in order to frame decrees applicable to specific and often dissimilar situations. Less broadly, but just as effectively, the Court has given viability to the fifth amendment provision against self-incrimination and the sixth amendment right to counsel by fashioning the *Miranda* rule. When a provision is not self-enforcing or crystal clear, the Court will give meaning somehow to it if the area is important enough and the time is ripe for constitutional interpretation.

such few statutes as might be enacted by the state legislatures. The efforts of the Supreme Court have been rather imperfect, requiring frequent modification, and leading one to ponder whether a better, more consistent approach is possible.

III
A Reassessment of the Constitutionalization of the Tort of Defamation

As the Court continues its deliberations in this area, particularly with changes in the personnel of the Court, there will be reexaminations of prior decisions, leading to further refinements and possibly reversals. It appears doubtful at this time that the Court will ultimately veer to an interpretation that allows a national standard of fault for private persons who have been defamed. Defamation most likely will not be treated like personal injury torts that have a negligence standard for liability. Although unlikely, it would not be impossible, however, for the Court to swing back completely to the common law, or at least something substantially different from the current law.

The media argue that the liberalization of the law, especially a return to the common law, would chill the freedom of the press and imperil publishers and broadcasters with the risk of heavy verdicts and, in any event, excessive costs and fees in defending actions. However, before the *New York Times* decision was handed down in 1964, the media lived well as a "six percent investment," in the words of William Allan White, without the protection of that case and its progeny. If not for the special circumstances in which the *New York Times* case arose — the hysteria of the response in the South to the struggle for civil rights — we might very well have continued to flourish without any such decision. For generations prior to 1787, the common law had served everyone, including the media, well, and with consistency.

All individuals and entities ought to guard themselves against the consequences of causing injury through their own negligence or through violating the rights of others. It is one of the costs of existing and doing business in a crowded world filled with sensitive people. An injury to reputation or an intrusion into one's privacy can be as harmful in some instances as the loss of life or limb. By exercising due care and adhering to

standards of decency, such harm can be avoided or circumscribed.

Let me again take my own case as an example. Those connected with the writing, publication and distribution of the offending article, in which I was defamed, did not bother to make inquiry of me or of those having knowledge of me. They read none of my numerous articles, reviews and books. They did not even bother to look at the easily accessible references to me in such standard works as *Who's Who in America*. They just barged ahead, heedless of my rights, in the confidence that I would have no redress because of their version of the freedom of the press. For example, they charged me with being the architect of a communist conspiracy to frame a police officer for murder, seemingly oblivious that I had been director of public relations of the Illinois Police Association. Since theirs was a monthly publication, there was no necessity for haste or lack of deliberation. Nor would due care have required excessive cost.

Many defamation cases are similar to mine, with the offending parties carelessly rushing in to publish falsehoods. If human bodies were involved, as in the usual personal injury tort, there would be no question as to the necessity on the defamer's part of proving due care and absence of negligence. I suggest that the same care should be required in situations where reputations are involved.

In every case involving the reputation of a professional person, such as a lawyer, clergyman or physician, it is immediately apparent that certain kinds of statements are inherently dangerous and damaging and can result in the loss or diminution of earnings, as well as loss of reputation, humiliation and embarrassment. There should be pause before publication, with at least a minimum of inquiry and research. Constitutional guidelines should not preclude such requirements.

When publishers can rely completely upon built-in constitutional protections, they will be indifferent to the rights of those they may wrong. Only when they are held to accountability will they exercise due care. One example stems from the days when I was the lawyer for two tabloid publications. I examined each proposed article in manuscript form before releasing it for publication. I was on guard against defamation, invasions of privacy, obscenity and other possible offenses. In that period, these two publications were not sued. Yet, instead of profiting from that experience, the editors decided that they would rely

upon their own educated judgment without submitting the proposed articles to me, indicating that they would consult me only if they were sued. Thus, the degree of care that editors will exercise is proportionate to the degree of safety they feel in publication. They may act considerably more recklessly if they feel that built-in constitutional protections shield them from liability.

A. Things Better Left Unchanged

Assuming a general return to the common law, certain protections would be likely to remain. As the Court stated in *Gertz*, mere opinions are not actionable, no matter how cruel or obnoxious.[29] It is only allegations of fact that can give rise to an action for defamation. Of course, the line between opinion and fact is often obscure and might require a judicial determination or even a jury finding. For the same reason, fair comment would continue to be protected in the circumstances heretofore defined by the courts.

Certain state laws should remain in effect. There are also many jurisdictional and procedural issues that should continue to be matters of determination by constitutional fiat. Consider, for example, the statute of limitations, discovery, and trial procedure. The movement for uniform state laws, so successful in the past in other situations,[30] should be encouraged in the law of defamation, rather than preempted.

Punitive damages are also scarcely a matter for constitutional determination by the Supreme Court. Trial judges are best qualified to grant remittiturs or new trials and, in the first instance, to give proper instructions as to damages. It is clear, too, that if the offense is sufficiently heinous, juries or judges will be able to disguise the award of punitive damages as compensatory damages. The line between the two is not always sharp and clear.

In any event, what is so bad about punitive damages in proper cases? Elsewhere in the law, punitive damages are allowed where there is the necessity to punish or discourage certain kinds of offensive conduct.[31] Like other potential losses, those involved in defamation can often be covered by the appropriate

29. *Gertz*, 418 U.S. at 339-40.

30. *See, e.g.*, the adoption of the Uniform Commercial Code in most states.

31. *See generally*, PROSSER & KEETON ON TORTS, *supra* note 16, at 14-15.

kind of insurance, most probably a legitimate cost of doing business, and deductible on tax returns.

B. The Use of Categorical Distinctions

While one might contrast the *New York Times* with the *National Enquirer*, pointing out that the former upholds the highest standards of journalism and the later exemplifies what is dubious and meretricious, there is, however, a Gresham's Law in journalism — the bad tends to drive out the good, or at least to degrade it. One has only to observe the nature of what is published in every kind of newspaper and magazine to understand that differentiations are only in degree. Therefore, we have the same standards of liability for all, heedless of the ensuing corruption.

Is it reasonable to advocate different rules, dependent on the nature of the newspaper, magazine or book? Should all newspapers, for example, be held to the standard of the best publication in each community? At the heart of Justice Powell's plurality opinion in *Dun and Bradstreet*[32] is the question as to whether there are varying degrees of entitlement to first amendment protections. The answer to this question might enable us to differentiate between the *New York Times* and the *National Enquirer*.

Such content-based restrictions, however, like geographical distinctions, may lead to much variance in the law by failing to provide a concise definition of what is to be protected under the first amendment. Thus, as the Court searches for consistency, it must avoid such categorical differentiations.[33]

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32. 472 U.S. 749 (1985).

33. One can best visualize and sum up the intricacies and complexities of the constitutional guidelines with respect to defamation when one views them in summary form. Here is an attempt at it:

I. Status of Plaintiffs and Defendants
   - A. Public Officials, public figures, private persons
   - B. Media or non-media
   - C. Corporations or other legal entities

II. Nature of Offending Material
   - A. Factual material or opinions
   - B. Fiction, parody, poetic license
   - C. Private material
   - D. Material of general or public interest

III. Privileges
   - A. Absolute or limited privileges
   - B. Freedom of the press

Conclusion

The many variations and complexities of constitutional defamation law allows one to tolerate the difficulties the Supreme Court is having in finally setting the law to rest. The present phase of the law began with *New York Times*, which revolved around great human struggles. It may be that a somewhat similar struggle will be required in order for the Court to have a flash of illumination, resulting in exactly the right constitutional guidelines, at least for a season.

C. Congressional and executive privileges
D. Fair comment
E. Governmental documents and proceedings and judicial proceedings
F. Shield laws
G. Truth or falsity
H. Right of reply statute
I. Innocent construction rule
J. Statute of limitations
K. Fighting Words

IV. Damages
A. Compensatory
B. Actual injuries
C. Actual malice and constitutional review
D. Punitive
E. Intentional infliction of emotional distress
F. Roles of courts and juries
G. Means of reducing damages, such as retraction

V. Place of Suit and its Consequences
A. What determines where suit can be filed and the right of plaintiffs to choose
B. Long arm statutes
C. Extension of statute of limitation by reason of jurisdiction chosen
D. Procedural consequences