Libel: *Taskett v. KING Broadcasting Co.*—A New Washington Standard

Prior to 1964, states developed their defamation laws without imposing first amendment restraints on damage actions against publishers. Since 1964, when the United States Supreme Court applied constitutional limits on these actions, courts have struggled to determine the proper accommodation between competing concerns for the first amendment's rights of free speech and press, and the states' interest in compensating private individuals for harm caused by defamation. In *Taskett v. KING Broadcasting Co.*,[1] the Washington Supreme Court reevaluated the constitutional limits on libel law with regard to private individuals involved in matters of public interest, and held that private individuals can recover damages "on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false."[2] In adopting the reasonable care standard, the Washington Supreme Court sought to achieve an equitable balance between the media's first amendment rights of free speech and press and the state's interest in compensating private citizens for harm to their reputations. This comment analyzes the court's reasoning, determines whether the court has adequately protected the competing interests involved, and suggests a better approach to reconcile these interests.

The plaintiff in *Taskett* owned an advertising agency that placed business ads with radio and television stations. He brought a libel action for damages caused by defendant's newscast allegedly depicting him as a thief and swindler.[3] The plaintiff claimed the newscast was libelous per se and wholly unfounded in fact.[4] The trial court granted defendant's motion for summary judgment, relying on *Miller v. Argus Publishing Co.*,[5] which required plaintiffs to establish by clear and convincing evidence

1. 86 Wash. 2d 439, 546 P.2d 81 (1976).

2. *Id.* at 445, 546 P.2d at 85.

3. *Id.* at 441, 546 P.2d at 83.

4. A written publication is libelous per se if it tends to expose a living person to hatred, contempt, or ridicule, or deprive him of the benefit of public confidence. Spangler v. Glover, 50 Wash. 2d 473, 313 P.2d 354 (1957); Owens v. Scott Publishing Co., 46 Wash. 2d 666, 284 P.2d 296 (1955), *cert. denied*, 350 U.S. 968 (1956); WASH. REV. CODE § 9.58.010 (1976).

5. 79 Wash. 2d 816, 490 P.2d 101 (1971). *See also* 7 GONZ. L. REV. 344 (1972). The trial judge found Taskett to be a private individual involved in a public matter, placing the case squarely under *Miller*.

that defendant knew the statement was false or acted with reckless disregard of its truth or falsity.[6] The Washington Supreme Court reversed, overruling *Miller*.[7] The court based its decision on the United States Supreme Court holding in *Gertz v. Robert Welch, Inc.*,[8] that states could adopt their own standards for libel actions brought by private individuals as long as they did not allow liability without fault.[9]

Prior to 1964, courts considered libel unworthy of constitutional protection;[10] publishers printing materials susceptible of a defamatory meaning did so at their peril,[11] although a privilege of fair comment on matters of public interest and concern existed if the published information had a substantial basis in fact.[12] Concerned that a rule compelling the critic of official conduct to guarantee the truth of all his factual assertions would lead to self-censorship, the United States Supreme Court in *New York Times Co. v. Sullivan*[13] first enunciated federal constitutional limits on state defamation law. Realizing some erroneous statements inevitably occur in free debate,[14] the Court concluded that the fair

6. This requirement was first announced in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This test of knowledge of falsity or reckless disregard is also referred to as actual malice.

7. *Taskett* applied the new rule retroactively, using the test for retroactivity in civil cases provided by Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The court questioned whether the defendant had relied on clear precedent of long standing, it being "evident that *Rosenbloom* [*Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)] did not represent the final word as to the propriety of applying an actual malice standard to private individuals." 86 Wash. 2d at 448, 546 P.2d at 87. For a discussion of the *Rosenbloom* decision see the text accompanying notes 24-25 *infra*. The court held retroactive application was necessary to effectuate fully the new reasonable care rule's purpose of providing a realistic remedy to private individuals injured by defamatory falsehoods. 86 Wash. 2d at 449, 546 P.2d at 87. The court further held retroactive application would not produce inequitable results of overriding magnitude, but rather would produce more equitable results by allowing the plaintiff to benefit from the new rules. 86 Wash. 2d at 450, 546 P.2d at 87.

8. 418 U.S. 323 (1974).

9. *Id.* at 347.

10. Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

11. A defamatory publication concerning another rendered its publisher strictly liable under common law principles. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113 (4th ed. 1971); Comment, *An Outline of the Law of Libel in Washington*, 30 WASH. L. REV. 36 (1955).

12. The fair comment privilege still allows private individuals to express personal opinions on matters of public concern and immunizes even inaccurate and vehement defamatory opinions. Owens v. Scott Publishing Co., 46 Wash. 2d 666, 284 P.2d 296 (1955), *cert. denied*, 350 U.S. 968 (1956); Cohen v. Cowles Publishing Co., 45 Wash. 2d 262, 273 P.2d 893 (1954). *See also* Comment, *An Outline of the Law of Libel in Washington*, 30 WASH. L. REV. 36 (1955).

13. 376 U.S. 254 (1964).

14. *Id.* at 271.

comment privilege's truth requirement did not provide adequate protection for the news media's constitutional rights of free speech and press. The Court therefore held that the first amendment protects comments critical of a public official, which relate to his official conduct,[15] unless the plaintiff proves the publisher made the statement "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[16]

The Court found public debate essential to self-government and, therefore, protected by the first amendment.[17] Focusing on the public official's decision-making role in society, it recognized that citizens have a legitimate and substantial interest in the conduct of such persons because in the American system of democracy the people govern themselves.[18] To effectuate the public's role in self-government, avenues of communication must stay open between the citizens and their representatives in government.[19] People must therefore have access to and be free to discuss information and opinions.[20] The Court reasoned that unencumbered public discussion may make elected officials more responsive to public opinion, thereby bringing about lawful governmental and social changes.[21] To ensure free dissemination of information to the public, the Court concluded the media must be given constitutional protection.[22]

The Court balanced the media's interest in freedom of press

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15. The *New York Times* opinion left open the question of how far down into the lower ranks of government employees the public official designation would extend. For a summary of the wide range of individuals held to be public officials, see Annot., 19 A.L.R.3d 1361 (1968). The Court analogized the new privilege for criticism of official conduct to the protection accorded the public official when he is sued for libel by a private citizen. *See* Barr v. Mateo, 360 U.S. 564 (1959).

16. 376 U.S. at 279-80. Since *New York Times,* what constitutes reckless disregard has undergone judicial refinement. "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 719, 459 P.2d 8, 15 (1969). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964), which required that to prove actual malice, plaintiff must establish that the defendant acted with a "high degree of awareness of . . . probable falsity." *Id.* at 74.

17. 376 U.S. at 275.

18. *Id.* at 274. *See also* Mieklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57; 1 ANTIEAU, MODERN CONSTITUTIONAL LAW 4 (1969).

19. 1 ANTIEAU, MODERN CONSTITUTIONAL LAW 4 (1969).

20. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 254-57.

21. 376 U.S. at 269.

22. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118 (4th ed. 1971).

and speech against the states' interest in compensating a public official for harm to his public reputation and good name. These state interests affect the opinion others in the community may have of the individual.[23] Injury to these interests may mean business, professional, political, and social ruin. Although a person's right to the protection of his reputation is a "basic of our constitutional system,"[24] the Court in *New York Times* subordinated it to the needs of freedom of speech and press vital to maintaining self-government.

In *Curtis Publishing Co. v. Butts,*[25] the United States Supreme Court expanded the *New York Times* rule to all libel actions brought by public figures.[26] Although all nine Justices stated that some protection should be given to defendants of libel actions brought by public figures, only three Justices favored extending the *New York Times* rule. Justices Black and Douglas joined in this extension only to permit a disposition of the case, opining that the first amendment was designed to leave the press absolutely free from the harassment of libel judgments.[27] Four Justices preferred an objective standard of highly unreasonable conduct rather than the subjective reckless disregard standard.[28]

In *Rosenbloom v. Metromedia, Inc.,*[29] a plurality of the United States Supreme Court extended the *New York Times* standard to private individuals, holding libelous statements about a private individual involved in a matter of public concern privileged unless the plaintiff establishes defendant's reckless disregard. The plurality determined that the first amendment right of free speech is not destroyed merely because the statement involves a private individual. In contrast to *New York Times,* however, *Rosenbloom* focused on the subject matter of the alleged defamatory remark, finding that the public's primary interest is in the event and the participant's conduct rather than the partici-

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23. *Id.* at § 111.

24. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

25. 388 U.S. 130 (1967).

26. The Court expanded the *New York Times* rule to include public figures because many are "intimately involved in the resolution of important public questions or, because of their fame, shape events in areas of concern to society at large." 388 U.S. at 164 (Warren, C.J., concurring).

The Washington Supreme Court applied the constitutional privilege for the first time in Grayson v. Curtis Publishing Co., 72 Wash. 2d 999, 436 P.2d 756 (1967), *noted in,* 44 WASH. L. REV. 461 (1969). *See also* Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 459 P.2d 8 (1969); Amsbury v. Cowles Publishing Co., 76 Wash. 2d 733, 458 P.2d 882 (1969).

27. 388 U.S. at 170 (1967) (Black and Douglas, JJ., concurring in result).

28. *Id.* at 155. For a discussion of the actual malice standard, see note 16 *supra.*

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

pant's prior anonymity or notoriety.[30]

Although state and federal courts widely accepted the *Rosenbloom* plurality opinion's extension of the *New York Times* test to private individuals involved in public matters,[31] the United States Supreme Court rejected it in *Gertz v. Robert Welch, Inc.*[32] The *Gertz* majority found the *Rosenbloom* plurality's approach inadequate to protect the state interest in furnishing a remedy for wrongful injury to private reputations.[33] The Court declared the public interest test for determining the applicability of the *New York Times* standard unacceptable because it forced trial courts to decide which issues were of general or public interest. Such *ad hoc* determinations, the Court reasoned, inadequately serve both the private individual's right to recover damages for injury to his reputation and the media's first amendment rights of free press and speech.[34] When a trial court decides a particular controversy is a matter of public concern, the plaintiff must satisfy the stringent *New York Times* actual malice test. If the trial court finds the published material did not relate to a matter of public concern, however, the publisher could be liable even if he exercised extreme caution to ensure the statement's accuracy.[35] This subjectivity, the Court reasoned, leads to uncertainty for publishers who, rather than risk liability, may not publish at all.

Stressing the state's legitimate interest in compensating private individuals for harm to their reputations, the Court in *Gertz* held states could adopt their own liability standards for defamation actions brought by these individuals.[36] To obviate media self-censorship, the Court abolished the common law concept of strict liability for private defamation, and prohibited liability without

30. *Id.* at 43. In Miller v. Argus Publishing Co., 79 Wash. 2d 816, 490 P.2d 101 (1971), the Washington Supreme Court adopted the *Rosenbloom* plurality opinion's rationale. The lack of an agreement by a majority of the United States Supreme Court on the principles of law involved in *Rosenbloom* prevents it from being an authoritative determination of other cases. *See generally* Ohio v. Price, 364 U.S. 263, 264 (1960); United States v. Pink, 315 U.S. 203, 216 (1942).

31. For a summary of other decisions which extended the *New York Times* constitutional privilege to libel actions brought by private individuals, see Mr. Justice White's dissent in Gertz v. Robert Welch, Inc., 418 U.S. at 377-80, n.10 (White, J., dissenting).

32. 418 U.S. 323 (1974).

33. *Id.* at 346. Although Mr. Justice Blackmun thought the *Rosenbloom* decision was more logical, he concurred only to create a clear majority on this constitutional problem and to eliminate the uncertainty caused by the *Rosenbloom* plurality. *Id.* at 353-54 (Blackmun, J., concurring).

34. *Id.* at 346.

35. *Id.*

36. *Id.* at 347.

fault.[37] Additionally, because the state interest includes only compensation for actual injury, the Court held that plaintiffs cannot recover presumed or punitive damages in the absence of a showing of reckless disregard.[38]

In *Taskett v. KING Broadcasting Co.*,[39] the Washington Supreme Court agreed with the *Gertz* majority that the reckless disregard standard, applied to private individuals, imposed an unacceptable burden.[40] In its place the court held:

> [A] private individual, who is neither a public figure nor official, may recover actual damages for a defamatory falsehood, concerning a subject of general or public interest, where the substance makes substantial dangers to reputation apparent, on a showing that in publishing the statement, the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect.[41]

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37. *Id.*

38. *Id.* at 349. At common law, if an article were libelous per se, the plaintiff was entitled to damages without proving or alleging special damage; such damages were presumed. Getchell v. Auto Bar Systems Northwest, Inc., 73 Wash. 2d 831, 440 P.2d 843 (1968); Luna de la Peunte v. Seattle Times Co., 186 Wash. 618, 59 P.2d 753 (1936); Dick v. Northern Pac. Ry., 86 Wash. 211, 150 P. 8 (1915).

39. 86 Wash. 2d 439, 546 P.2d 81 (1976).

40. *Id.* at 444, 546 P.2d at 84. *Accord,* Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (Super. Ct. 1975); Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Jacron Sales Co. v. Sindorf, 276 Md. 2d 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Thomas H. Maloney & Sons, Inc. v. E.W. Scribbs Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied,* 423 U.S. 833 (1975). Cases adopting an actual malice standard include: Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 547 P.2d 1074 (1976); Walker v. Colorado Springs Sun, Inc., 188 Colo. 186, 538 P.2d 450 (1975); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974). One court established a standard of gross irresponsibility: Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 341 N.E.2d 569 (1975).

41. 86 Wash. 2d at 445, 546 P.2d at 85. *Taskett* thus adopts *Gertz*'s suggested reasonable care standard for private defamation actions. *Gertz* at one point referred to the *reasonably prudent editor or broadcaster.* 418 U.S. at 348 (emphasis added). In prohibiting punitive damages, the Court stated that such "damages are wholly irrelevant to the state interest that justifies a *negligence standard* for private defamation actions." *Id.* at 350 (emphasis added). Mr. Justice Blackmun flatly states that "the Court now conditions a libel action by a private person on a showing of negligence . . . ." *Id.* at 353 (Blackmun, J., concurring). *See also* RESTATEMENT (SECOND) OF TORTS § 580B (Tent. Draft No. 21, 1975).

Taskett retains the public interest test although the rules expounded in *Gertz* would apply to all defamatory statements about private individuals irrespective of the subject matter of the publications. *See* Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment,* 26 HASTINGS L.J. 777, 792 (1975). For a discussion of the problems *Gertz* found with the public interest test, see the text accompanying notes 30-35 *supra.*

Taskett thus adopted *Gertz*'s suggested focus on the plaintiffs' individual status rather than *Rosenbloom*'s emphasis on the subject matter of the defamatory statement. The *Taskett* majority concluded private individuals deserve recovery more than public figures and discussed two reasons for distinguishing them: public figures presumably have greater access to the media, enabling them to obtain effective rebuttals of defamatory statements, and, by assuming such positions, they have willingly assumed the risk of defamation.[42]

The distinction between private and public figures based on the latter's greater access to the media to refute defamatory statements is of questionable validity. Whether a defamation victim will have access is difficult to predict. The United States Supreme Court made this evident in *Miami Herald Publishing Co. v. Tornillo*,[43] holding states cannot require the media to provide individuals with the right to reply to a news story. Whether public figures enjoy effective opportunities to respond through the media therefore depends on the same unpredictable factor as a private individual's ability to respond: the person's continuing newsworthiness.[44] Although some very prominent people may command continuing media attention, that attention cannot be guaranteed for the entire public figure class.[45] In addition, the opportunity for rebuttal, even when granted, rarely remedies the harm of defama-

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Both *Taskett* and *Gertz* raise the issue of what standard will apply if the publication is not found to be libel per se. However, neither opinion provides an answer. Mr. Justice White in his dissent in *Gertz* asserts that the *New York Times* standard would apply, not strict liability. 418 U.S. at 389 n.27 (White, J., dissenting).

Taskett and *Gertz* both leave unresolved the issue of whether this new privilege extends to nonmedia as well as media defendants. Commentators and courts are split on the question. For arguments that it does extend to nonmedia defendants, see Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT. CAM. L.J. 471, 510 (1975); *The Supreme Court, 1973 Term, Freedom of Speech and Press*, 88 HARV. L. REV. 139, 148 n.52 (1974); RESTATEMENT (SECOND) OF TORTS § 580B, Comment e (Tent. Draft No. 21, 1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976). *Contra*, Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902, 941-42 (1974); Calero v. Del Chemical Co., 68 Wis. 2d 292, 228 N.W.2d 737 (1975). As one commentator stated, the application to nonmedia speakers "is not only subject to, but seeks clarification by the Court." Comment, *As Time Goes By: Gertz v. Robert Welch, Inc. and Its Effect on California Defamation Law*, 6 PAC. L.J. 565, 578 (1975).

42. 86 Wash. 2d at 445, 546 P.2d at 85. *Gertz* relied on these same distinctions and is therefore subject to the same analysis. Gertz v. Robert Welch, Inc., 418 U.S. at 344.

43. 418 U.S. 241 (1974).

44. 86 Wash. 2d at 474, 546 P.2d at 102 (Horowitz, J., dissenting) *quoting* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971).

45. *Id.*

tory falsehoods,[46] because denials, retractions, and corrections seldom receive the prominence of the original story. Even a well-publicized retraction may not reach all persons exposed to the defamatory falsehood, and those who do hear or see the retraction may persist in their belief of the defamatory statement's truth.

Taskett's second basis for differentiating private from public figures is that by "intentionally"[47] placing themselves before the public and accepting an influential role in the ordering of society,[48] public figures willingly assume the risk that comes with the resulting publicity.[49] Because of the public figure's special prominence in the resolution of public questions,[50] the court reasoned the public's interest in full discussion is at its maximum.[51] Public opinion may be the only instrument by which society can influence the public figure's conduct.[52] The media can therefore assume public figures have voluntarily exposed themselves to the increased risk of defamatory harm.[53] Private individuals, the court reasoned, have not chosen to submit to closer public scrutiny and therefore are more deserving of recovery.[54]

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46. Gertz v. Robert Welch, Inc., 418 U.S. at 344 n.9. *Taskett* seems to admit this argument when it later recognizes that "the truth never catches up with the lie." 86 Wash. 2d at 445, 546 P.2d at 85, citing Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 714, 459 P.2d 8, 12 (1969).

47. *Taskett*'s use of the word "intentional" is inappropriate when describing public figures. Although some public figures may indeed intend to become such, it is not always the case: "[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own." Gertz v. Robert Welch, Inc., 418 U.S. at 345. The focus seems to be not on the individual's intent, but rather the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352. Requiring the defendant to establish the plaintiff's intention of becoming a public figure goes beyond *Gertz*'s definition of public figure. Because *Gertz* based its public figure definition on the first amendment, however, its interpretation is the supreme law and states are required to follow it. *See* Cooper v. Aaron, 358 U.S. 1, 18-19 (1958). The Washington Supreme Court cannot adopt a definition of public figure that is more restrictive than *Gertz*'s. *See* Cooper v. Aaron, *id.* *Taskett*'s use of the word "intentional" is therefore inappropriate because it would require the media to meet a stricter proof requirement than the federal constitutional standard. Already having cited with approval the *Gertz* definition of public figure, 86 Wash. 2d at 446, 546 P.2d at 85, it is unlikely the court intended to deviate from the federal standard.

48. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result).

49. 86 Wash. 2d at 445, 546 P.2d at 85.

50. *Id.* at 446, 546 P.2d at 85.

51. *Id.*

52. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).

53. Gertz v. Robert Welch, Inc., 418 U.S. at 345.

54. 86 Wash. 2d at 446, 546 P.2d at 85, citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The dissent rejected this distinction as a legal fiction, arguing:

> Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters

In focusing on the individual's status rather than the defamatory statement's subject matter, the *Taskett* court specified two instances when individuals assume the status of public figures. Some individuals have achieved such prominence in society that they are public figures "for all purposes and in all contexts."[55] More often, people will become public figures because of their prominence in a particular public controversy, thus becoming public figures for a limited range of issues.[56]

To include an individual in the class of limited public figures entails a two-step analysis.[57] The courts must first ascertain whether the defamation relates to a public controversy. This requirement undermines *Gertz*'s major objection to *Rosenbloom*'s subject matter test, that it required trial courts to make *ad hoc* rulings as to what constitutes a public controversy.[58] If courts must still determine whether a controversy is public to decide whether the *New York Times* rule applies, *Taskett* has not eliminated the problems of self-censorship for which *Gertz* condemned *Rosenbloom*.[59] Because the court's determination of the scope of a controversy will set the standard of care by which a publisher's liability will be judged, publishers must guess whether courts will assess a particular controversy the same way they do, possibly leading to self-censorship.[60]

If courts decide the defamation relates to a public controversy, they must make a second *ad hoc* determination of whether the plaintiff has assumed an influential role in the public contro-

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> of public or general concern. . . . In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.

86 Wash. 2d at 473, 546 P.2d at 101 (Horowitz, J., dissenting), quoting Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971). Although this argument may be true with respect to all-purpose public figures who assume their position for all controversies, 86 Wash. 2d at 446, 546 P.2d at 85, it is not true for limited public figures who assume their status only for some controversies.

55. 86 Wash. 2d at 446, 546 P.2d at 85.

56. *Id.*

57. *See* Note, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1210 (1976) [hereinafter cited as *Relatives of Public Persons*].

58. Gertz v. Robert Welch, Inc., 418 U.S. at 346.

59. The United States Supreme Court has itself made these *ad hoc* determinations in Time, Inc. v. Firestone, 424 U.S. 448 (1976), finding that: "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." *Id.* at 454.

60. *See, Relatives of Public Persons, supra* note 57, at 1211-12.

versy. Incidental involvement in a public controversy will not result in public figure status. The plaintiff must have assumed special prominence in resolving public questions.[61] Even then, individuals may assume this status with respect to only certain controversies, remaining private individuals in other controversies.

An individual may also achieve such fame and prominence that he assumes public figure status for all purposes.[62] Some famous people are public figures "in all contexts,"[63] making inquiry into the public nature of the controversy irrelevant. Courts, however, must still make *ad hoc* decisions when dealing with this category of public figure. They must determine at what point the individual will be deemed prominent enough to be a public figure for all purposes.

These subjective determinations of prominence create uncertainty for publishers who may refuse to publish rather than risk liability for defamation.[64] Publishers cannot rely on the plaintiff's apparent prominence, but must establish actual prominence in the resolution of a public issue. Unable to determine whether their publications will expose them to liability, they may avoid publishing even protected speech, fearing a court will deem the speech unprotected in subsequent litigation. This uncertainty may lead the media to such self-censorship that first amendment rights are abridged to an extent the state's interest in compensating its citizens for defamatory remarks cannot justify.

Taskett rejects, as without merit, the argument that the reasonable care standard will lead to debilitating self-censorship.[65] Self-censorship can be abated, claims the court, by controlling the jury's damage awards, because uncontrolled discretion of juries to award damages for the expression of unpopular opinions causes self-censorship.[66] Should juries find the defendant failed to use reasonable care to discover the truth of the defamatory statement, they shall be limited to awarding the amount of money

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61. 86 Wash. 2d at 446, 546 P.2d at 85. One commentator has suggested this determination about plaintiff's publicity-seeking activities would entail factual disputes, thus preventing summary judgment. *The Supreme Court, 1973 Term, Freedom of Speech and Press*, 88 HARV. L. REV. 139, 144 n.32 (1972).

62. 86 Wash. 2d at 445-46, 546 P.2d at 85.

63. *Id.*

64. This subjectivity is illustrated by the determination in Gertz v. Robert Welch, Inc., 418 U.S. at 352, that the plaintiff was not an all-purpose public figure because none of the jurors knew who he was or had ever heard of him.

65. 86 Wash. 2d at 446, 546 P.2d at 86.

66. *Id.* at 447, 546 P.2d at 86.

which will reasonably and fairly compensate the plaintiff for actual damages.[67] Juries may presume the existence of damages only on proof the defendant knew the publication was false or acted with reckless disregard of the publication's truth or falsity.[68]

The extent to which these new damage rules will reduce self-censorship is uncertain. Plaintiffs, according to *Gertz,* can recover for "impairment of reputation and standing in the community, personal humiliation, and mental anquish and suffering."[69] Although the plaintiff has the burden of proving the extent of his actual injury, no fixed standards exist by which to measure personal humiliation, mental anguish, and impairment of professional reputation. With reference to the proper measure of these damages, jurors are given great latitude.[70] Within these broad categories, therefore, jurors can still punish unpopular opinions by awarding large recoveries under the guise of actual damages.[71] Unless the award is so excessive that it manifests the likelihood the jury acted out of passion or prejudice, courts hesitate to interfere with the jury's determination.[72] Jurors thus retain broad discretion and publishers, still fearing large damage recoveries, may be less vigorous in their publishing.

Concerns other than high damage awards may also cause self-censorship. The mere cost of litigating a libel suit can cause a "chilling effect" on the media.[73] They may be deterred from publishing information reasonably believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or the concern of having to do so.[74]

Judicial control at the summary judgment stage would assist in mitigating the apprehension of pending litigation because publishers would not face the expense of the protracted judicial process caused by lawsuits resolvable only by full trials. A negligence standard, however, inhibits the use of the summary judgment

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67. *Id.*

68. *Id.*

69. Gertz v. Robert Welch, Inc., 418 U.S. at 350.

Taskett failed to enumerate what constituted actual damages. Under common law, the principal elements of general damages were injury to plaintiff's reputation, the general falling off of business, wounded feelings, and humiliation. *See* Comment, *An Outline of the Law of Libel in Washington,* 30 WASH. L. REV. 36, 45 (1955).

70. Aronson v. City of Everett, 136 Wash. 312, 321, 239 P. 1011, 1014-15 (1925).

71. This concern was expressed in Mr. Justice Brennan's dissent in Gertz v. Robert Welch, Inc., 418 U.S. at 367 (Brennan, J., dissenting).

72. Kramer v. Portland-Seattle Auto Freight, Inc., 43 Wash. 2d 386, 396, 261 P.2d 692, 697 (1953).

73. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52-53 (1971).

74. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

procedure because juries are usually required to resolve the factual disputes which accompany the standard.[75] The most important obstacle to summary procedure, however, is the uncertain definition of negligence.[76] Because the standard provides no clear guidelines for the jury,[77] publishers, fearing jurors will wrongfully assess the reasonableness of their news gathering procedures, may pursue news items less vigorously.[78] Under a negligence-based standard, a reporter cannot rely on his own belief in the truth of what he reports, but must speculate whether he could convince a jury that his decision to report was reasonable.[79] Unless courts precisely define the appropriate standards of conduct and proof required to establish negligence, jurors will be given broad discretion to set their own guidelines on reasonableness, and the trial court will seldom be justified in granting defendants' motions for summary judgment or directed verdict.

Trial courts and jurors would receive some guidance by

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75. 86 Wash. 2d at 479, 546 P.2d at 104 (Horowitz, J., dissenting).

76. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 457 (1975).

77. Time, Inc. v. Hill, 385 U.S. 374 (1967). AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. App. 1974). Chief Justice Warren commented in his concurring opinion in *Curtis Publishing Co. v. Butts*, that he could not "believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society." 388 U.S. 130, 163 (1967). *See also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971). *See generally* Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267.

The dissent in *Taskett* identifies seven difficulties with the negligence standard:

a. The negligence standard's uncertainties.

b. States adopting the negligence standard will not be able to rely solely upon the existing negligence law developed in physical torts.

c. The negligence standard could be unduly harsh on the media.

d. The negligence standard's undesirable burden of proof.

e. The negligence standard will lead to self-censorship of media; it virtually requires a guarantee of truth.

f. The negligence standard inhibits summary judgment, thereby increasing the likelihood of self-censorship.

g. Appellate review of the determination of negligence cannot be avoided.

86 Wash. 2d at 476-480, 546 P.2d at 103-05 (Horowitz, J., dissenting).

78. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971).

79. This policy argument was raised by counsel for respondent KING Broadcasting Co. Brief for Respondent at 17-18, Taskett v. KING Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976). Mr. Justice Horowitz claimed:

> [u]nder a reasonable-care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the news-gathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy.

86 Wash. 2d at 476, 546 P.2d at 103 (Horowitz, J., dissenting), citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 366 (1974) (Brennan, J., dissenting).

adopting a clear standard of conduct with which the media must comply. The traditional negligence standard, measuring conduct by that of a reasonably prudent person,[80] gives a jury little guidance by which to gauge the publisher's actions. Because most people know little about the journalistic process, they judge its reasonableness in a very general manner. To solve this problem, courts could adopt a media malpractice standard,[81] under which a publisher would be required to act reasonably as measured by that standard ordinarily possessed and applied by others in the profession.[82] In *Curtis Publishing Co. v. Butts,*[83] four Justices of the United States Supreme Court advocated a malpractice standard for public figures, allowing recovery for defamatory falsehoods on a showing of defendant's extreme departure from the conduct ordinarily adhered to by responsible publishers.[84]

The media malpractice standard, analogous to that used for doctors and other professions,[85] would give publishers the privilege of setting their own legal standards of conduct.[86] Other professional publishers' testimony would establish whether a defendant has met the profession's recognized standard. Courts have allowed this privilege in other professions because of their respect for the learning and expertise of a fellow professional and their reluctance to overburden professions with liability based on uneducated judgment.[87] There should be even greater reluctance to overburden a profession with liability when constitutional rights are at stake. With a media malpractice standard, lay persons, who may not be familiar with the ordinary procedures involved in publication, will have a clearer standard, established by other publishers, by which to evaluate defendant's conduct. This clarity would diminish publishers' concern of unlimited jury discretion in assessing the reasonableness of news gathering procedures

80. Ulve v. City of Raymond, 51 Wash. 2d 241, 317 P.2d 908 (1957).

81. This duty of care has been adopted in one other case establishing the negligence standard. Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975). Another case has expressly eliminated it. Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

82. This similar practice requirement is essential to ensure no bias in favor of the news media. *See* Anderson, *Libel and Press Self-Censorship,* 53 TEX. L. REV. 422, 455 (1975).

83. 388 U.S. 130 (1967) (Harlan, Clark, Stewart, and Fortas, J.J., concurring in result).

84. *Id.* at 155.

85. *See* Teig v. St. John's Hospital, 63 Wash. 2d 369, 387 P.2d 527 (1963). For a further description of the professional standard of care, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971).

86. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971).

87. *Id.*

employed, thereby reducing potential self-censorship.

Requiring a higher standard of proof to establish negligence would also provide greater judicial control over jury discretion.[88] The standard of mere preponderance of the evidence has traditionally been the requirement to establish negligence.[89] A standard of proof requiring clear and convincing evidence that the defendant reasonably doubted the truth of the defamatory statement would allow the trial court to exercise more control over juror discretion. The clear and convincing evidence standard is the constitutionally required standard of proof to establish defendant's reckless disregard in libel actions brought by public figures.[90] In *Miller v. Argus Publishing Co.*,[91] the Washington Supreme Court also adopted this standard for libel actions brought by private individuals involved in a public matter. In applying the clear and convincing evidence standard, trial courts would initially determine whether the plaintiff has offered sufficient evidence to establish a prima facie case of defamation. If the jury would not be able to find clear and convincing proof of unreasonable conduct, the trial court should grant defendant's motion for summary judgment, or at a later stage, for a directed verdict.[92] Because this would reduce the probability of unfounded cases reaching the jury, the media's concern of uncontrolled discretion would be reduced, lessening the extent of media self-censorship. This added protection is justified to offset the adverse effects on the media caused by the adoption of the reasonable care standard. To encourage the adequate flow of information to the public, the states' interest in compensating individuals who fail to meet the clear and convincing proof requirement must yield to

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88. *Taskett* leaves unresolved the question of what standard of proof will be required.

89. Hutton v. Martin, 41 Wash. 2d 780, 252 P.2d 581 (1953); Gordon v. Deer Park School Dist. No. 414, 71 Wash. 2d 119, 426 P.2d 824 (1967). The following cases adopting a negligence standard also require preponderance of the evidence as a standard of proof: Jacron Sales Co. v. Sindorf, 276 Md. 580; 350 A.2d 688 (1976); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975).

The dissent argues that a preponderance standard increases the possibility of erroneous verdicts and therefore increases the likelihood of self-censorship. 86 Wash. 2d at 477-78, 546 P.2d at 104 (Horowitz, J., dissenting).

90. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). *See also* Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 459 P.2d 8 (1969); Chase v. Daily Record, Inc., 83 Wash. 2d 37, 515 P.2d 154 (1973).

91. 79 Wash. 2d 816, 490 P.2d 101 (1971).

92. This procedure was used in analyzing the actual malice standard in *Miller, id.*, and Chase v. Daily Record, Inc., 83 Wash. 2d 37, 515 P.2d 154 (1973). The clear and convincing evidence standard does not, however, demand conclusive evidence of unreasonable conduct. *See* Miller v. Argus Publishing Co., 79 Wash. 2d 816, 490 P.2d 101 (1971).

the media's fundamental right of free speech and press.[93]

Taskett v. KING Broadcasting Co. sought to resolve the inherent conflict between the state's interest in protecting the reputations of its citizens and the constitutional command that freedom of press and speech be unabridged. Adoption of the new reasonable care standard, however, may severely abridge the media's constitutional rights. Unless the elements of the reasonable care standard are precisely defined and a higher standard of proof adopted, jurors will exercise broad discretion, creating uncertainty for the media as to how juries will assess the reasonableness of various publishing procedures. *Taskett* also fails to eliminate the uncertainty associated with judicial *ad hoc* determinations of who is a public or private person, which may cause self-censorship. Adoption of the media malpractice standard of conduct and the clear and convincing evidentiary standard would mitigate this potential self-censorship.

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93. *See* Miller v. Argus Publishing Co., 79 Wash. 2d at 827, 490 P.2d at 108; Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 49-50 (1971).