Liability and Damages in Libel and Slander Law

Melinda J. Branscomb

Follow this and additional works at: https://digitalcommons.law.seattleu.edu/faculty

Part of the Other Law Commons

Recommended Citation

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact coteconor@seattleu.edu.
LIABILITY AND DAMAGES IN LIBEL AND SLANDER LAW

I. INTRODUCTION

Defamation\(^1\) is speech that tends to injure one's reputation by lowering his esteem in the community or by deterring persons from associating with him.\(^3\) Traditionally, “libel” referred to written defamation and “slander” to oral defamation, but the distinction between the two has narrowed significantly.\(^3\) For example, libel now generally is considered to include any form of communication, including radio and television,\(^4\) that has the po-

---

1. The elements of the cause of action for defamation are (1) false, (2) unprivileged, (3) communication (publication), (4) to a third party, (5) tending to injure one's reputation (defame). See generally W. Prosser, HANDBOOK OF THE LAW OF TORTS § 111, at 737-51 (4th ed. 1971) [hereinafter cited as W. Prosser]. Truth is an absolute defense to this cause of action. RESTATEMENT (SECOND) OF TORTS § 581A (1977).

The Restatement sets forth three types of privileges: absolute, conditional, and special. Absolutely privileged are communications to which one has consented, id. §§ 583-584, communications required by law, id. § 592A, those made between spouses, id. § 592, and those made by executive or administrative officers of the United States and by superior executive officers of the state in performance of official duties, id. § 591. Also absolutely privileged are certain statements made by judges, attorneys, parties, witnesses, and legislators that relate to their official, judicial, and legislative proceedings. Id. §§ 585-590A. Conditional privileges extend to the following communications: (1) Those protecting the publisher's interest, id. § 594; (2) those protecting an interest of a recipient or third party, id. § 595; (3) those shared with one having a common interest and who is entitled to know the information, id. § 596; (4) those protecting the well-being of a family member, id. § 597; (5) those involving an issue of important public interest concerning which the recipient may take action, id. § 598; and (6) those made by an inferior state officer in performance of his duties, id. § 598A. Conditional privileges may be lost if abused. Id. §§ 599-605A. Special privileges are available to persons making accurate, fair reports of official proceedings and public meetings, id. § 611, and to persons providing the means of publication for a communication that is privileged, reasonably believed to be privileged, or transmitted under a duty, id. § 612.

3. See id. § 568.
4. First Independent Baptist Church of Arab v. Southerland, 373 So. 2d
tentially harmful qualities typical of written words. Most commentators and critics agree that slander should not be treated differently from libel because the fault of defendants and the harm to plaintiffs may not depend upon whether the words are written or oral. How the actions (for libel and slander) should be treated, however, is not a subject of agreement, and efforts to simplify and reconcile the two actions have varied significantly.

At common law the rules governing the standard of liability for libel and slander were uniform; both libel and slander were subject to strict liability. Thus, if a plaintiff proved his cause of action, the defendant was liable regardless of fault. On the

647 (Ala. 1979) (church sermon broadcast by radio); Restatement (Second) of Torts § 568 (1977).
5. Restatement (Second) of Torts § 568 (1977).
7. By interpreting an insulting-words statute, Virginia has arrived at uniform rules for libel and slander. See Va. Code § 8.01-45 (1977) (previously codified at § 8-630 (1950)). In any written or oral defamation concerning the subject matter of the four traditional categories of slander actionable per se, plaintiff does not need to prove special damages. See text accompanying notes 21-23 infra. All other defamation requires proof of special damages. That extrinsic facts may be necessary to establish the defamatory nature of the statement does not affect the damages requirements. See, e.g., O'Neil v. Edmonds, 157 F. Supp. 649 (E.D. Va. 1958); Shupe v. Rose's Stores, Inc., 213 Va. 374, 192 S.E.2d 766 (1972); Weaver v. Beneficial Fin. Co., 200 Va. 572, 106 S.E.2d 620 (1959). The Virginia approach achieves uniformity but suffers from the same defects as traditional slander law.

Louisiana has abolished the distinction between libel and slander insofar as neither requires proof of special damages. See Makofsky v. Cunningham, 576 F.2d 1223, 1235-36 (5th Cir. 1978); Prosser, Libel Per Quod, 46 Va. L. Rev. 839, 848 & n.67 (1960) [hereinafter cited as Prosser]. Distinctions based on the nature of the words are relevant in Louisiana for proving the elements of defamation. For oral or written words of themselves defamatory, common-law malice (an element of the cause of action) is implied. For oral or written words made defamatory by extrinsic circumstances, malice must be proven. Makofsky v. Cunningham, 576 F.2d 1223 (5th Cir. 1978) (written words). See 28 La. L. Rev. 82, 89-92 (1967).
8. See note 1 supra.
9. L. Eldredge, supra 6, § 5; Restatement of Torts § 580 (1938). The courts frequently have said that because the communication was defama-
other hand, the requirements concerning proof and types of damages recoverable were divergent and complex. There were two approaches to proof of injury. Damages could be presumed in some cases but had to be actually proven in others.\textsuperscript{10} The following three types of damages were possibly recoverable: Compensatory damages, upon which this Comment will focus, which were designed to make the plaintiff whole for the loss he had incurred; nominal damages, which allowed the plaintiff publicly to establish the falsity of the statement and to clear his good name;\textsuperscript{11} and punitive damages, which were designed to deter\textsuperscript{12} and punish\textsuperscript{13} undesirable, spiteful\textsuperscript{14} conduct or possibly to reimburse the plaintiff for legal fees.\textsuperscript{15} For compensatory damages two subcategories were created. "Special damages" compensated for specifically identifiable, pecuniary loss, such as loss of identifiable customers, contracts, or employment opportunities.\textsuperscript{16} "General damages" compensated for all other injury, such as loss of reputation and esteem, loss of association of friends, mental anguish and suffering, and general decline in business.\textsuperscript{17} In addition to variances in the damages rules based upon whether the defamation was classified as libel or slander, dam-

tory, common-law malice could be presumed. Vedeer, \textit{The History and Theory of the Law of Defamation} (pt. 2), 4 \textit{COLUM. L. REV.} 33, 35-38 (1904) [hereinafter cited as Vedeer (pt. 2)]. This statement simply meant that defendant lacked a legal excuse for the defamation. \textit{Id.}

\textsuperscript{10} See notes 21-23 & 27-33 \textit{infra} and accompanying text.

\textsuperscript{11} \textit{Restatement} (Second) of Torts § 620, Comment a (1977).


\textsuperscript{13} 403 U.S. at 73-74.

\textsuperscript{14} Personal ill will or spite was generally known as common-law malice. See \textit{generally} W. \textit{PROSSER}, \textit{supra} note 1, § 2, at 9-14.

\textsuperscript{15} \textit{See} Comment, \textit{The Constitutionality of Punitive Damages in Libel Actions}, 45 \textit{FORDHAM L. REV.} 1382, 1385-1400 (1977). Punitive damages are forbidden in some states, such as Oregon. Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979) (prohibited by interpretation of state constitution).

While occasional mention of nominal and punitive damages will be necessary in this Comment, an in-depth discussion of these types of damages is beyond its scope.

\textsuperscript{16} \textit{See} \textit{Restatement} (Second) of Torts § 575, Comment b (1977); \textit{id.} § 621, Comment a. \textit{See generally} W. \textit{PROSSER}, \textit{supra} note 1, § 112, at 754-64; Vedeer (pt. 2), \textit{supra} note 9, at 50-52.

\textsuperscript{17} \textit{See} note 16 \textit{supra}.
ages requirements varied within libel and within slander, depending upon the subject matter of the statement. Thus, whether a defendant was liable and, if so, for what damages depended upon the type of defamation and upon its content.

By the turn of the century the law of defamation had developed such peculiar traits that in 1903 one critic was prompted to remark, "[P]erhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation." Part II of this Comment will cover the traditional law of defamation, with particular emphasis on standards of liability and proof of compensatory damages, and will point out inconsistencies in these rules and problems with their application.

Adding to the complex law of defamation, the United States Supreme Court, beginning in 1964, has announced constitutional limitations on liability and damages in state libel law when the defendant is a publisher or broadcaster. Part III of this Comment will analyze two major Supreme Court decisions that concern libel of public figures and officials and libel of private-citizen plaintiffs.

Part IV will discuss three recent Tennessee cases and their impact upon the state's defamation law. The Tennessee Supreme Court incorporated the United States Supreme Court's decisions into the state's defamation law in 1978 in a pair of companion cases. These cases resulted in the reinterpretation of the state constitution, the partial invalidation of a state statute, and the alteration of the state's common law. In another case, the Tennessee Court of Appeals ruled that these federal and state libel decisions alter slander law as well.

A less complex, more uniform law of defamation is needed in light of the intricacies of traditional defamation law and its recent changes at the Supreme Court and state court levels. Part V will suggest alterations in the standards of liability and in the proof of compensatory damages that would be a significant step toward the creation of such a uniform law.

II. HISTORICAL DEVELOPMENT

A. Slander

Slander originated in the ecclesiastical courts of England and was regarded as a sin. Responsibility for this sin was later transferred to the common-law courts and there treated as a tort. Since the inception of the cause of action, a defendant has been held liable regardless of fault for slanderous statements. Accompanying this strict liability, however, were the general requirements that a plaintiff prove his damages and, further, that his damages be special damages, those that are specifically identifiable and pecuniary. If a plaintiff could satisfy these requirements, general compensatory damages (such as those for mental anguish and general decline in business) and punitive damages could be tacked on to the award. Compensatory damages could be presumed only when the slander fell into one or more of the following four categories believed most harmful: Slander that imputed criminal activity, loathsome disease, unchastity, or inadequacy in one's trade or profession. Slander concerning these subjects was termed "actionable per se."

The slander rules of liability and damages have proven un-
satisfactory for both plaintiffs and defendants. The standard of strict liability is unduly harsh on defendants, and the courts have not always been able in good conscience to apply the rule. Partially counteracting this strict liability is the special damages requirement, which reduces the number of successful claims. The requirement, however, is overly burdensome on plaintiffs. A plaintiff may have incurred a provable injury but may be denied recovery because the injury lacks the pecuniary nature or specificity to qualify as special damages. For example, a plaintiff proving severe mental anguish could not recover because his injury was not financial, and a plaintiff proving a decline in business could not recover without specifying the names of customers lost. The categories of slander “actionable per se” that have traditionally enabled the presumption of damages also pose a problem because the seriousness of a remark is not based solely on its subject matter. The rigid categories are both overbroad and underinclusive. A plaintiff incurring only minimal injury from slander “actionable per se” could recover nominal damages or presumed, compensatory damages and possibly punitive damages; a plaintiff incurring extensive general damages from slander outside these categories, but no special damages, could recover nothing.

B. Libel

From its inception libel was treated differently from slander. Libel had criminal origins in the Star Chamber as an action for words tending to cause a breach of the peace. Like slander, libel traditionally has been accompanied by a standard of strict liability. Unlike slander, however, compensatory damages for all libel at common law were presumed from the writing

---

24. The recent decision of Moore v. Dreger, 576 S.W.2d 759 (Tenn. 1979), illustrates the reluctance of the Tennessee courts to allow recovery for slander that may not be serious. In Moore two waitresses alleged that defendant restaurant manager accused them, in the presence of customers, of giving poor service. In a two paragraph opinion, the court held simply that the statement was not “actionable under the circumstances.” Id. at 759.


26. See generally W. PROSSER, supra note 1, § 111, at 737-39.
and publication of the defamatory words.\textsuperscript{27} Because damages could be presumed, a plaintiff could recover without proof of pecuniary injury or any actual injury. Written defamation was treated differently from slander because it is in a more permanent form and, therefore, was considered more likely to cause widespread and continuing injury. Furthermore, in the calculated deliberation of reducing a harmful statement to writing, an added element of intent was inferred.

In the late nineteenth century, courts altered the damages requirements by creating the spurious rule of libel per quod.\textsuperscript{28} "Libel per se,"\textsuperscript{29} a writing that was defamatory on its face, was distinguished from "libel per quod,"\textsuperscript{30} an apparently innocent writing that became defamatory only in light of extrinsic circumstances. For libel per se the courts continued to allow the presumption of damages. Similarly, damages could be presumed for libel per quod when the proven extrinsic facts revealed an accusation falling within one of the four traditional, subject-matter categories of slander termed "actionable per se."\textsuperscript{31} For all

\textsuperscript{27} The rule that damages could be presumed in libel was announced in 1670 and was well settled law by the early nineteenth century. \textit{Restatement (Second) of Torts} § 568, Comment b (1977). \textit{See also} L. Eldredge, \textit{ supra} note 6, § 17; Vedeer (pts. 1 & 2), \textit{ supra} notes 9 & 18. Because it was unnecessary to prove damages to constitute a cause of action, all libel was "actionable per se." Later the courts confused "actionable per se" with the nineteenth-century development of "libel per se." \textit{See} notes 28-33 \textit{infra} and accompanying text.

\textsuperscript{28} The libel per quod rule apparently evolved through the courts' misinterpretation of a treatise, J. Townsend, \textit{Slander and Libel} (3d ed. 1877), which ironically was intended to clarify the confusing libel and slander terminology. \textit{See generally} Prosser, \textit{ supra} note 7; 13 \textit{Vand. L. Rev.} 730, 732-34 (1960).

\textsuperscript{29} "Libel per se" is to be distinguished from libel "actionable per se," although the terminology has caused confusion in the courts. \textit{See note} 27 \textit{ supra}.

\textsuperscript{30} In the classic case of libel per quod, defendant published that plaintiff had given birth to twins. The extraneous circumstances were that plaintiff had been married only one month. Morrison v. Ritchie & Co., 4 Fr. Sess. Cas. 645 (Scot. 2d Div.), 39 Scot. L.R. 432 (1902).

\textsuperscript{31} \textit{See} Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579 (5th Cir. 1967). \textit{See generally} Prosser, \textit{ supra} note 7, at 844 n.20. \textit{See also} W. Prosser, \textit{ supra} note 1, § 112, at 763 n.32. Because the four categories originally were significant in slander, not libel, \textit{see} notes 21-23 \textit{ supra} and accompanying text,
other libel per quod, however, the courts required that damages be proved and, further, that they be special damages.\textsuperscript{32} On the other hand, if a plaintiff was required to and did prove special damages, general compensatory damages and punitive damages could be awarded as well. By the mid-twentieth century the libel per quod rule had been accepted by a majority of the states.\textsuperscript{33}

Categorical distinctions between libel per se and libel per quod are not justifiable on any logical basis. In libel per se and in libel per quod the injuries may be equivalent, the plaintiffs equally deserving of recovery, and the defendants equally culpable. The usual explanation given for adoption of the libel per quod rule is that the courts simply were confused about the law.\textsuperscript{34} Another possible explanation\textsuperscript{35} is that since the words as written were not outwardly defamatory and became so only with proof of additional, unwritten facts, the courts believed that the general rule for oral defamation, slander,\textsuperscript{36} was more appropri-

\textsuperscript{32} The requirement that plaintiff prove special damages was the same as that required in all slander except slander falling within the four categories of slander “actionable per se.” See notes 21-23 supra and accompanying text.

\textsuperscript{33} In his 1955, second-edition treatise on torts, Prosser stated that liability without proof of special damages was the established rule in England and was the rule in a substantial minority of American states. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 587 (2d ed. 1955), questioned in Eldredge, The Spurious Rule of Libel Per Quod, 79 HARV. L. REV. 733, 734 (1966) [hereinafter cited as Eldredge]. In 1960, however, Prosser stated that the rule of libel per quod was accepted in the “overwhelming majority” of jurisdictions. Prosser, supra note 7, at 844. For a contrary opinion of how widespread the libel per quod rule was in the 1960s, see Eldredge, supra, at 735-56. But see Prosser, More Libel Per Quod, 79 HARV. L. REV. 1629 (1966) (Prosser’s rebuttal).

\textsuperscript{34} See Prosser, supra note 7, at 848.

\textsuperscript{35} Id. at 849. Prosser stated, “It may be suggested that, as is so often the case, the courts have known exactly what they were doing, and that it is the critics who are confused.” Id. Prosser cited no cases for the proposition that the courts adopted the rule because they considered libel per quod to be similar to slander, and this writer has found none.

\textsuperscript{36} See text accompanying note 21 supra.
ate. Even though the rule was a step toward similar treatment of libel and slander, it caused the same undesirable results in libel per quod as it had caused in slander: overinclusiveness and underinclusiveness of the four categories in which damages could be presumed and lack of compensation to a plaintiff who had incurred actual but not special damages. Perhaps the reason for the swift, widespread adoption of the special damages requirement of libel per quod stemmed from dissatisfaction with the standard of liability. By imposing rigorous damages requirements on plaintiffs, the courts could counteract the harsh strict liability of defendants. The courts frequently have expressed the opinion that libel claims may be insignificant, petty, or unfounded. Furthermore, the courts have been wary of the possibility of excessive verdicts when damages are presumed, since there is no assurance that presumed damages approximate the injury; indeed, there may have been no injury at all. Moreover, the courts may have been motivated by a special desire to protect defendants in libel per quod because an innocent speaker may have been unaware of extrinsic facts that made his statement defamatory.

The protections of the libel per quod rule are not completely logical. Even a defendant who is aware of the extraneous facts that make his statement defamatory can claim the protection of the rule. Furthermore, a plaintiff who can prove special damages also can receive punitive damages and general, compensatory damages, while a plaintiff who cannot prove special damages is denied any compensation. Finally, the rule does not affect damages in libel per se and, consequently, leaves a defendant exposed to possibly unfounded claims or excessive, presumed verdicts.

37. See text following note 23 and preceding note 25 supra.
39. For example, in stating that a person has given birth to twins, a defendant may have been unaware that the person had been married less than nine months. See note 30 supra.
III. CONSTITUTIONAL LIMITATIONS ON STATE DEFAMATION LAWS

A. New York Times Co. v. Sullivan

In *New York Times Co. v. Sullivan* the United States Supreme Court first placed constitutional limits on the states' defamation laws. Plaintiff, the Montgomery, Alabama city commissioner in charge of the police department, brought a suit for libel against four individuals and the *New York Times*. Plaintiff alleged that he was defamed by an advertisement in the *Times* that contained false statements describing police involvement in racial incidents. The Court held that the first amendment's guarantees of freedom of speech and press compelled adoption of an actual-malice standard of liability. Absent knowledge of the statement's falsity or "reckless disregard" for its truthfulness, the press would not be liable for printing defamatory statements about the official conduct of a public official. The Court

42. Prior to *Sullivan*, the Supreme Court had regarded false speech to be beyond the protection of the first amendment; therefore, the Constitution did not restrict the states' ability to provide for liability for defamation. See *Chaplinski v. New Hampshire*, 315 U.S. 568 (1942). See generally L. EL-DREDGE, supra note 6, §§ 47-50.
43. 376 U.S. at 279-80. "Actual malice," as used by the Court, is to be distinguished from "common-law malice," that personal ill will or spite enabling the recovery of punitive damages at common law. See note 14 supra.
44. 376 U.S. at 279-80. The Supreme Court has subsequently defined reckless disregard as a high degree of awareness of the probable falsity of the statement, *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or as entertaining "serious doubts as to the truth" of the publication, *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).
45. 376 U.S. at 279-80. The Court subsequently extended *Sullivan* to defamation of public figures on issues of public interest. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). "Public figure" was defined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973), as a person who "assume[s] special prominence in the resolution of public questions." *Id.* at 351. Such prominence may be achieved involuntarily. In case of pervasive notoriety, a person may be a "public figure for all purposes and in all contexts." *Id.* More commonly, a person becomes a public figure for a limited range of issues by voluntarily injecting himself or being drawn into a public controversy. *Id.* The term was narrowed in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In that case plaintiff, a wealthy industrialist's wife, who was frequently discussed in local news and who subscribed to a press-clipping service, was held not to be a public figure. Mrs. Firestone, the Court reasoned, had not "assume[d] any role of especial
based its holding on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Free debate, the Court said, requires protection of even erroneous statements in order to give freedom of expression the breathing space it needs for survival.

The Supreme Court in Sullivan was concerned about the economic effect of large verdicts against the media; it observed that the Times currently risked exposure in excess of $2,500,000 in four additional libel suits. Additionally, the Court feared that the practice of presuming damages may overcompensate plaintiffs. The Court noted that under Alabama law, damages could be presumed in libel per se with no proof of actual injury. The size of the jury's award in the case before the Court was one thousand times greater than Alabama's maximum fine for violation of the criminal libel statute. Despite this concern, however, the Court did not alter the proof of damages but, instead, altered the standard of liability. Thus, the Court did not foreclose the presumption of damages when actual malice is present.

prominence in the affairs of society" and had not "thrust herself into the forefront" of any public controversy in order to influence its resolution. Id. at 453.

46. 376 U.S. at 270.
47. Id. at 271-72 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).
48. Id. at 278 n.18.
49. Id. at 262, 267.
50. Id. at 277.
51. Id. Whether the general verdict awarded compensatory or punitive damages is unclear. Id. at 284.
52. Nor did the Sullivan Court preclude an award of punitive damages once actual malice is established. Because the trial court's failure to find actual malice was reversible error, it was "unnecessary . . . to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages." Id. at 284 n.24. The Court has since considered and affirmed an award of punitive damages in favor of a public figure. The Court stated that such damages "serve a wholly legitimate purpose in the protection of individual reputation." Curtis Publishing Co. v. Butts, 388 U.S. 130, 161 (1967).

One lower court case in Tennessee has incorrectly interpreted Sullivan as imposing a requirement of proof of actual damages in addition to actual malice. McNabb v. Tennessean Newspapers, Inc., 55 Tenn. App. 380, 390-91, 400 S.W.2d 871, 876 (1965), cert. denied, id. at 380, 400 S.W.2d at 871 (Tenn. 1966).
In *Gertz v. Robert Welch, Inc.* the Supreme Court ruled that the Constitution does not require the states to apply the *Sullivan* standard of liability to the media in the libel of a private individual. Plaintiff, an attorney, had conducted civil litigation against a policeman for the murder of a youth. The magazine of the John Birch Society falsely portrayed plaintiff as a communist who planned a "'frame-up'" causing a false criminal charge. The district court, believing that *Sullivan* was controlling, held that plaintiff had failed to prove actual malice, and the court of appeals affirmed. In reversing, the Supreme Court held that the actual-malice standard of *Sullivan* was not constitutionally compelled when publishers or broadcasters defame private individuals. "'[S]o long as they do not impose liability without fault,' the Court held, "the States may define for themselves the appropriate standard of liability.'" The Court's reasoning did not ignore the first amendment interests of the defendant; instead, it emphasized the competing, legitimate state interest in compensating private individuals for injury to reputation. The Court distinguished the needs of private plaintiffs

54. Id. at 326.
55. Id.
56. The trial court ruled that plaintiff was not a public figure or official, and therefore defendant could not claim the *Sullivan* protections. 322 F. Supp. 997, 998 (N.D. Ill. 1970). The jury returned a verdict for plaintiff. Id. at 999. The court then concluded that *Sullivan* was applicable and entered a judgment notwithstanding the verdict. Id. at 998.
58. 418 U.S. at 342-43.
59. Id. at 347.
60. Id. at 340-42.
61. Id. at 348. The Court said that the *Sullivan* rule accommodated the interest of the media in free speech and the limited interest of the state in protecting public persons from libel. *Id.* at 343. As to private-citizen plaintiffs, the Court stated, "[A] different rule should obtain." *Id.* The Court apparently meant that a different rule of constitutional law should obtain, not a different rule of liability. Without violating *Gertz*, then, a state may apply the same standard of liability, actual malice, to both private and public plaintiffs, and
from those of public officials and public figures. In general, the latter assume public notoriety voluntarily and possess ready access to the media to rebut false charges. Thus, the test in *Gertz* turned on the status of the plaintiff, not on the content of the libel. The Court rejected a test based on whether the libel concerned public or private issues. Such a test would inadequately protect private citizens' reputations and the media's free speech and would force "state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest.'"

The *Gertz* Court placed constitutional limitations not only on the standard of liability but also on damages. If liability is imposed under a standard less demanding than actual malice, recovery is limited to compensation for proven injury, which the Court termed "actual injury." Actual injury is not limited to out-of-pocket loss, but includes mental anguish and suffering, personal humiliation, and impairment of reputation and standing in the community. The Court refused to allow recovery for presumed or punitive damages without proof of actual malice because the recovery may exceed the injury, may be used to punish unpopular opinions, and may reach further than necessary to protect legitimate state interests.

Since *Gertz* the state courts have adopted varying standards

---

62. *Sullivan* subsequently has been extended to defamation suits by public figures. See note 45 *supra*.
63. 418 U.S. at 344-45.
64. *Id.* at 346. A test based on the public or private nature of the issue had been adopted by Justice Brennan, writing for a three-judge plurality in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).
65. 418 U.S. at 346.
66. *Id.* at 349-50.
67. *Id.* at 349.
68. *Id.* at 350.
69. *Id.* at 349-50. The principle of adoption of the least restrictive alternative dictates that when the government is justified in abridging first amendment freedoms, it must do so in the least restrictive manner. *See generally Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria, 27 Vand. L. Rev. 971 (1974).*
of liability\textsuperscript{70} for media defamation of private plaintiffs.\textsuperscript{71} The courts have looked to pre-\textit{Gertz} decisions and to state constitutions for guidance in choosing from among the permissible standards. Interestingly enough, several states have chosen different standards based on almost identical state constitutional provisions.\textsuperscript{72} The first state to apply \textit{Gertz} adopted the \textit{Sullivan} actual-malice standard of liability.\textsuperscript{73} A minority of states have fol-

\textsuperscript{70} \textit{Gertz} would permit adoption of standards of liability ranging from actual malice to negligence—or even immunity from liability. Prosser discussed three degrees of legal fault for negligence. W. Prosser, supra note 1, § 34, at 180-85. Each standard of liability corresponds to a degree of care. \textit{Id}. To avoid "slight negligence," a defendant must exercise great care; to avoid "ordinary negligence," he must exercise ordinary care; to avoid "gross negligence," he merely must exercise slight care. \textit{Id}. at 181.

\textsuperscript{71} For a discussion of state court responses to \textit{Gertz}, see 29 \textit{Vand. L. Rev.} 1431 (1976).

\textsuperscript{72} For example, Indiana held that the following state constitutional provision pointed to the actual-malice standard in defamation concerning all issues of public interest: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely on any subject whatever: but for the abuse of that right, every person shall be responsible." \textit{Ind. Const.} art. 1, § 9, \textit{construed in Aafco Heating \\& Air Conditioning Co. v. Northwest Publications, Inc.}, 162 Ind. App. 671, 678-79, 321 N.E.2d 580, 585-86 (1974). By comparison, Oklahoma rejected the public issue-private matter distinction and adopted an ordinary negligence test on the basis of a similar provision: "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right . . . ." \textit{Okla. Const.} art. II, § 22, \textit{construed in Martin v. Griffin Television, Inc.}, 549 P.2d 85, 92 (Okla. 1976). The \textit{Martin} court stated, "Expressly in its constitution, Oklahoma has weighted the right with the responsibility for an abuse of that right." 549 P.2d at 92. Tennessee also adopted an ordinary negligence standard; however, it did so without discussing its constitutional provision, which is almost identical to Oklahoma's. \textit{See Memphis Publishing Co. v. Nichols}, 569 S.W.2d 412 (Tenn. 1978); notes 94-104 \textit{infra} and accompanying text. Kansas adopted a negligence standard based on the duty of care of a reasonably careful publisher or broadcaster on the basis of the following provisions: "[A]ll persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such rights," and "all persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law." \textit{Kan. Const.} Bill of Rights §§ 11, 18, \textit{cited in Gobin v. Globe Publishing Co.}, 216 Kan. 223, 232, 531 P.2d 76, 83 (1975).


HeinOnline -- 47 Tenn. L. Rev. 827 1979-1980
owed in requiring actual malice but generally have done so only for defamation concerning matters of public concern. One court imposed a slightly stricter standard and prescribed liability upon proof either of actual malice or of spite or ill will (common-law malice). Most states, as well as the Second Restatement of Torts, have adopted an ordinary negligence standard.


75. The public issue-private matter distinction discussed in the Rosenbloom plurality decision thus has continuing vitality even after Gertz. See text accompanying notes 64-65 supra.


The concept of negligence is flexible enough to allow varying duties of care under which defendants must act. At least one court has adopted a gross-negligence standard under which a defendant becomes liable upon a gross departure from ordinary care. See Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 669, 379 N.Y.S.2d 61 (1975). Most jurisdictions require the duty of care of a reasonable person under the circumstances. Some impose the degree of care of the reasonably prudent publisher or broadcaster under the circumstances. See Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975). This "journalistic malpractice" test was expressly rejected in Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975), and in Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978), discussed in notes 94-104 infra and accompanying text. It is also possible to impose a duty of great care, but no courts have taken this route. Since a duty of great care is more closely aligned with pre-Gertz strict liability, it is surprising that there has been no discussion of this possibility. Perhaps this standard has not been employed because negligence is based typically on a violation of ordinary care. Of course, imposition of a duty of great care must not be used as a pretext for imposing strict liability, which was forbidden by Gertz.
IV. Effect of Constitutional Limitations on Defamation Law in Tennessee


In Press, Inc. v. Verran the Tennessee Supreme Court incorporated Sullivan’s standard of liability into the state libel law. In Verran a newspaper reported that plaintiff, a social worker for the Department of Human Services, had coerced a mother into submitting to sterilization to regain custody of her children. The trial court and court of appeals disagreed over whether or not plaintiff was a public official. The Tennessee Supreme Court held that she was a public official and remanded for consideration of fault under the Sullivan actual-malice standard of liability. In adopting that standard, the court interpreted the Tennessee Constitution’s freedom of the press provision, which provides that

the printing presses shall be free to every person to examine the proceedings of . . . any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

The court equated the phrase “abuse of that liberty” with “ac-

---

78. 569 S.W.2d 435 (Tenn. 1978).
79. A post-Sullivan case previously decided by the Tennessee Supreme Court had involved libel by the media, but plaintiff was a municipal corporation, not a public official or figure. In Johnson City v. Cowles Communications, Inc., 477 S.W.2d 750 (Tenn. 1972), the court held that plaintiff was not a “person” within the meaning of the state criminal libel statute and, therefore, could not be libeled. The court also held that defendant was absolutely privileged. Id. at 754.
80. 569 S.W.2d at 437.
81. Id. at 443. In dictum, the court adopted the Restatement position that one incurs liability for defamation of private plaintiffs by acting negligently or with actual malice. Id. at 442. See Restatement (Second) of Torts § 580B (1977).
82. Tenn. Const. art. 1, § 19.
83. Id.
"tual malice" when publishers libel public figures and officials. The Tennessee court's analysis was clearly reasonable, since the state constitution cannot be interpreted to provide for greater liability than that permitted by the United States Constitution as interpreted in *Sullivan*.

By virtue of the *Sullivan* liability requirements the Tennessee retraction statute was rendered unconstitutional as applied to media defamation of public figures and officials. The retraction statute requires that a plaintiff give five-days notice to the newspaper or periodical as a precondition of suing for defamation. The statute also provides that if an article was published by a newspaper or periodical in "good faith," based upon an "honest mistake of the facts," and with "reasonable grounds" for believing it true, then a publisher who makes a full correction, apology, or retraction, nevertheless, shall be liable. Liability,

84. The court's holding does not explicitly or implicitly extend to defamation by nonmedia defendants. The court quoted and adopted "as the law of this jurisdiction" section 580A of the *Restatement* that requires actual malice for liability for defamation of a public figure or official. 569 S.W.2d at 442. The court did not mention the Comments to the *Restatement* that state that the same protections should be afforded to a defendant regardless of whether he issues a statement privately or through the media. See *Restatement* (Second) of Torts § 580A, Comment h (1977).

85. But see text accompanying notes 98-100 infra (court's approach concerning the same constitutional provision when a private person is defamed).

86. U.S. CONST. art. VI, cl. 2. See Leech v. American Booksellers Ass'n, 582 S.W.2d 738, 745 (Tenn. 1979).


88. The notice provision has not been interpreted as an absolute precondition to suit. A party failing to give such notice may maintain the action for compensatory damages but forfeits any claim to punitive damages. Langford v. Vanderbilt Univ., 199 Tenn. 389, 393-94, 287 S.W.2d 32, 34-35 (1956).

89. The statute provides, in part:

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten (10) days after the service of said notice, or in the next regular edition of said newspaper or periodical, if more than ten (10) days from date of notice a full and fair correction, apology, or retraction was published . . . then the plaintiff shall recover only actual, and not punitive, damages . . . .

however, will extend only to awards of compensatory, not punitive, damages. The statute is now unconstitutional insofar as it permits any recovery by public figures and officials against such media defendants, who clearly lack actual malice. By definition, those defendants acted without knowledge or reckless disregard for the statement's falsity. The Verran court noted that the defendant newspaper refused to make a retraction in that case, but the court did not discuss the constitutionality of the statute, since the sole issue addressed was whether plaintiff was a public figure or official.


1. Standard of Liability

In Memphis Publishing Co. v. Nichols the Tennessee Supreme Court responded to the Gertz requirement that the states fashion some standard other than liability without fault in me-

90. The statute provides for recovery of "actual damages" in such circumstances. Actual damages has been construed to mean compensatory damages, both presumed and actually proven. See McNabb v. Tennessean Newspapers, Inc., 55 Tenn. App. 380, 400 S.W.2d 871 (1965), cert. denied, id., 400 S.W.2d 871 (Tenn. 1966). "[P]rior to ... Sullivan, the law in Tennessee was that, in [libel per se] cases, actual damages and malice would be presumed ... ." Id. at 390, 400 S.W.2d at 876.

91. At common law, if a publisher was notified that he made a false statement and if he repeated it or refused to retract it, such conduct could be considered to indicate personal ill will, animosity, or lack of good faith and could lead to the imposition of punitive damages. Mattson v. Albert, 97 Tenn. 232, 36 S.W. 1090 (1896) (repetition of statements).

The Sullivan actual-malice standard invalidates the Tennessee retraction statute's proviso for punitive damages as well. The proviso states that the exemption from punitive damages is not available when publishers libel political candidates within ten days of elections. TENN. CODE ANN. § 23-2605 (Supp. 1979). The apparent legislative intent was to give political candidates special protection against defamation and to deter false statements that could distort the results of impending elections. The proviso is unconstitutional after Sullivan because it permits recovery of punitive damages against media defendants who acted without actual malice.

92. See notes 43-45 supra and accompanying text.

93. 569 S.W.2d at 437.

94. 569 S.W.2d 412 (Tenn. 1978).
Plaintiff had been shot by a woman, and a local newspaper falsely implied that the motive for the shooting was an illicit affair between plaintiff and the assailant’s husband. The lower courts were uncertain of the applicable standard of liability after Gertz, and the Tennessee Supreme Court granted certiorari to consider the issue. Weighing the competing interests at stake, the court held that ordinary negligence “is the only standard of liability that achieves the desired accommodation of first amendment guarantees and the interest in protecting individual reputation.”

It is not clear whether the Nichols court considered the ordinary negligence standard to be compelled by or merely consistent with the state constitution. In Nichols’ companion case, Verran, the court had based its holding on state constitutional grounds and had equated abuse of freedom of the press with actual malice in defamation of public figures and officials. In deciding Nichols, however, the court did not equate the constitutional phrase with ordinary negligence in defamation of private plaintiffs; the court did not mention the Tennessee Constitution at all.

The Nichols holding overrides the standard of strict liability in the state retraction statute for publishers’ defamation of private plaintiffs. The Nichols court quoted the retraction statute in another context but did not comment upon the effect of the new standard of liability on the statute. Nichols dictates that the media defendant is never liable when it has exercised ordinary care. The statute, on the other hand, allows liability for

95. Plaintiff’s husband joined her in the suit.
96. The trial court indicated uncertainty concerning the standard. The court of appeals used an ordinary-negligence standard. 569 S.W.2d at 415.
97. Id. at 418. The court adopted the test of the reasonably prudent person and rejected the “journalistic malpractice” standard used in some jurisdictions. Id.
98. See the court’s response concerning libel of public figures and officials in the text accompanying notes 82-85 supra.
99. 569 S.W.2d 435 (Tenn. 1978).
100. See notes 82-86 supra and accompanying text.
102. The reference to the statute was in the context of the effect of Gertz upon presumed and punitive damages. 569 S.W.2d at 421.
compensatory damages even when the publisher exercises ordinary care and good faith, if he retracts, corrects, or apologizes.  

2. Recovery of Damages

The Supreme Court in Gertz forbade the presumption of damages except when the media defendant acted with actual malice. Thus, the case precluded the practice in Tennessee and in other states of presuming damages in libel per se. In this respect, as noted by the Nichols court, “the per se/per quod distinction no longer has any practical meaning,” because both types of libel require proof of actual damages.

On the other hand, Gertz does not alter the states’ power to require special damages in libel as long as all compensatory damages, special or general, are actually proven. Thus, the per se-per quod distinction continues to have practical meaning in states such as Tennessee that require proof of special damages in libel per quod. Since Gertz, the Tennessee Supreme Court has not had occasion to address directly the libel per quod rule. In Nichols the defamation was libel per se. Although in a foot-

103. See note 90 supra.

There is one standard of liability that the Nichols court could have adopted to avoid complete invalidation of the retraction statute: a negligence standard accompanied by a duty of great care. Under this standard, a media defendant who failed to exercise great care would be liable whether or not it exercised ordinary care. Such a result is consistent with the retraction statute, which imposes liability even on good-faith retracting publishers. A negligence standard of either great care or ordinary care is permissible under Gertz, which merely forbids liability without fault. Either would have been permissible under Tennessee law, assuming the Nichols result is not compelled by the state constitution.
105. 418 U.S. at 349-50.
106. 569 S.W.2d at 419.
107. See text accompanying notes 66-69 supra.
109. The article on its face implied that plaintiff was an adulteress. See 569 S.W.2d at 414. Furthermore, Tennessee has abolished the special damages
note the court implied that it did not intend for the *Nichols* decision to alter the *libel per quod* rule,\textsuperscript{110} the court did acknowledge the "illogical distinctions" between *libel per se* and *libel per quod," most of them relics from centuries past."\textsuperscript{111} The Tennessee Court of Appeals, on the other hand, has recently stated incorrectly that *Gertz* compels the substitution of an actual damages requirement for the more particular special damages requirement.\textsuperscript{112}

C. Current Slander Law

The United States Supreme Court has not outlined constitutional restrictions on state slander law. The cases addressed by the Court have involved *libel by the media.*\textsuperscript{113} Similarly, the Tennessee Supreme Court in *Verran* and *Nichols* has incorporated *Sullivan* and *Gertz* into the Tennessee law concerning *libel by the media.* These cases may not affect the Tennessee standard of strict liability in slander\textsuperscript{114} or the common-law practice of presuming compensatory damages and requiring special damages in various cases.\textsuperscript{115}

---

\textsuperscript{110} "[S]pecial damages are most significant in a case of *libel per quod.* In such cases, the plaintiff has no cause of action at all unless he can prove special damages. If special damages are proven, the plaintiff may then recover general damages." 569 S.W.2d at 420 n.8.

\textsuperscript{111} Id. at 419 (quoting Eaton, *The American Law of Defamation Through Gertz v. Robert Welch and Beyond,* 61 Va. L. Rev. 1349, 1434 (1975)).

\textsuperscript{112} Handley v. May, 588 S.W.2d 772 (Tenn. Ct. App. 1979). See notes 116-122 *infra* and accompanying text.

\textsuperscript{113} Defamation by the media is generally treated as *libel.* The *Restatement* defines *libel* as "publication of defamatory matter by written or printed words, by its embodiment in physical form or by any other form of communication that has the potentially harmful qualities characteristic of written or printed words." *Restatement (Second) of Torts* § 568 (1977). The *Restatement* also provides that "[b]roadcasting of defamatory matter by means of radio or television is *libel,* whether or not it is read from a manuscript." *Id.* § 568A.

\textsuperscript{114} See text accompanying note 20 *supra*.

\textsuperscript{115} See notes 21-23 *supra* and accompanying text.
1. Recovery of Damages

In *Handley v. May* the Tennessee Court of Appeals recently applied the Gertz requirement of proof of actual damages to a slander action. In *Handley* defendant allegedly stated over the telephone to a third party that plaintiff participated in organized crime. The third party related the statement to his son who, in turn, informed the plaintiff. The trial court directed a verdict for defendant because the defamatory words were not pleaded verbatim as proven at trial. The court of appeals disagreed but affirmed on the grounds that there was "no material evidence in the record on the issue of damages." The court stated that no evidence of impairment to reputation was offered, and the court characterized plaintiff's reaction to the defamation as "mere annoyance," partially caused by other factors. The *Handley* court based its holding on the questionable conclusion that *Gertz* and *Nichols* preclude the presumption of damages in the slander of one private citizen by another.

*Handley* involved (1) private communication (2) of slander (3) by a nonmedia defendant; *Gertz* and *Nichols* involved (1) public dissemination (2) of libel (3) by a media defendant. Although abandonment of presumed damages in slander was not compelled by *Gertz* or *Nichols*, nevertheless, it has the advantage of creating uniform rules of damages for libel and slander.

In addition to addressing presumed damages, the *Handley* court determined that after *Gertz* and *Nichols*, "[f]ailure to prove special damages or out of pocket loss is not necessarily
determinative” in defamation. The court incorrectly concluded that those cases overturn the states’ special damages requirements. Even if Gertz and Nichols do extend to slander, they do not require abolition of special damages, but merely require proof of all compensatory damages. Handley’s abandonment of the special damages rule, however, is a welcome change from the stiff requirement of proving specifically identifiable, pecuniary injury for slander falling outside the four categories of slander “actionable per se.”

2. Standard of Liability

Should the courts wish to reduce further the likelihood of recovery for slander, they may do so by altering the standard of liability as well as by changing the requirements of proof of damages. Ironically, the Handley court did not mention the fault standard imposed by Gertz and Nichols for libel; therefore, Handley did not overturn the standard of strict liability for slander in Tennessee.

V. TOWARD A UNIFORM LAW OF DEFAMATION

A. Extension of Constitutional Protections to Nonmedia Defendants and to Slander

Both Sullivan and Gertz involved libel by media defendants, and the United States Supreme Court wrote its decisions in terms of the “news media” and “publishers and broadcasters.” Consequently, it is unclear whether the constitutional protections accorded in those cases extend to slander or to libel by nonmedia defendants. It is generally agreed that slander and

122. The court stated, “The issue is whether the record contains any material evidence of the types of injury outlined in Gertz. If there is material evidence of any of the elements of damages, the cause must be submitted to the jury.” Id. at 776.
123. See notes 21-23 supra and accompanying text.
124. See note 24 supra and accompanying text.
125. The Restatement takes the position that the cases should be extended to slander and to libel by nonmedia defendants. RESTATEMENT (SECOND) OF TORTS § 580A, Comment h (1977); id. § 580B, Comment e. The Tennessee Supreme Court has applied Sullivan and Gertz only to libel by the media; the Tennessee Court of Appeals has applied Sullivan and Gertz to slan-
libel should not automatically receive disparate treatment, because the form of the statement does not automatically determine the statement's harm. Furthermore, freedom of speech should not be relegated to a position inferior to that of freedom of the press. Also, nonmedia defendants are likely to cause less harm than today's mass media. A cohesive law of defamation is needed for various defendants and forms of defamation. To argue, however, that the identical rules accorded to libel by the media must, ipso facto, be applied to slander and to all speakers is analytically insufficient. Whether a statement is written, visual, or oral frequently does affect its capacity to inflict harm. Furthermore, whether a speaker is a media defendant or a nonmedia defendant does affect his role in informing the public of current events, the time constraints under which he communicates, his ability to investigate the facts, his awareness of the potential for injury, his position to insure against the risk of defamation, and his ability to pass the cost of such insurance along to his audience. Thus, while Sullivan and Gertz should be part of a cohesive law of defamation for differing forms of speech and various defendants, the law should be both practical and sensitive to these conflicting tensions. The following sections propose changes in the rules of damages and liability that would reflect more accurately a defendant's particular circumstances and that could be extended in a uniform fashion to nonmedia defendants and to slander.

B. Abolition of Presumed Damages

One step toward uniformity in defamation law would be the creation of a single rule of proof of compensatory damages, since whether damages may be presumed or must be proven presently varies from libel to slander and within each cause of action. As the Supreme Court noted in Sullivan, awards of presumed damages may overtax defendants and overpay plaintiffs. The Sullivan Court, however, altered the standard of liability, not proof of damages. Later, the Supreme Court stated in Gertz that

---

126. See text accompanying notes 21-23 & 27-33 supra.
127. 376 U.S. at 262, 267, 277. One lower court case in Tennessee has incorrectly interpreted Sullivan as imposing a requirement of proof of actual
presumed damages are an "oddity of tort law" and that they compensate for injury without evidence of loss in derogation of the first amendment principle that state remedies must "reach no farther than is necessary to protect the legitimate interest involved." Yet the Gertz decision forbids presumed damages only when private plaintiffs recover for libel by the media under a standard of liability less demanding than actual malice.

The courts' concerns about presumed damages are well founded, and the courts could abolish presumed damages in all defamation, as did the Tennessee Court of Appeals in Handley. Recovery for compensatory damages would be denied when a plaintiff suspects but cannot prove injury. Unfortu-
nately, some deserving plaintiffs would go uncompensated, because loss of community esteem is one injury that is particularly hard to prove. Recovery for speculative injury, however, is outweighed by the defendant's first amendment guarantee of free speech and the states' obligation to adopt the least restrictive manner of regulating it.

C. Abolition of the Special Damages Requirement

The United States Supreme Court has not altered the states' ability to require proof of special damages, the specifically identifiable pecuniary loss generally required in slander (except slander within the categories termed "actionable per se") and in libel per quod (except libel per quod within those same four categories). Like the Tennessee Court of Appeals in Handley, the courts could abolish the special damages requirement in all cases. If the original justification for the rule was added protection for defendants or reduction of petty claims, the Supreme Court's recent alterations in liability and damages largely fulfill those purposes. A requirement that injury be specific and pecuniary in nature is no longer necessary in libel by the media because a private plaintiff must now prove fault and actual injury and because a public figure or official must prove actual malice. Abandonment of presumed damages and of strict liability for compensatory damages in all defamation would afford adequate protection for defendants. Abolition of

were not discussed. Possible liability for nominal damages would hamper little the necessary robust, free debate on which the Court based its holdings. Furthermore, nominal damages would not expose a defendant to an excessive verdict and could not be improperly used by juries to punish unpopular opinions.

134. Loss of reputation is difficult to prove because persons who no longer respect the plaintiff are unlikely to inform him of that fact and unlikely to testify on his behalf.

135. The Handley court incorrectly interpreted Gertz and Nichols as abolishing the special damages requirement. See text accompanying notes 122-23 supra.

136. See notes 21-23 supra and accompanying text.

137. See notes 28-40 supra and accompanying text.

138. See note 122 supra and accompanying text.

139. See text accompanying notes 58-65 & 96-97 supra.

140. See text accompanying notes 43-52 & 81-86 supra.
the special damages requirement is appropriate in light of the states’ interest in protecting the reputations of citizens.\footnote{141}

\textbf{D. Extension and Redefinition of the Malice and Fault Standards of Liability}

When the United States Supreme Court in \textit{Sullivan} and \textit{Gertz} abolished strict liability of media defendants in defamation, the Court replaced the standard with tests that depend on the defendant's subjective knowledge of the statement's falsity. Actual malice, required in defamation of public figures and officials, was defined by the \textit{Sullivan} Court in terms of knowledge or reckless disregard of the statement's falsity. Fault, required in defamation of private plaintiffs, was not defined by the \textit{Gertz} Court. Probably influenced by \textit{Sullivan}'s actual malice definition, however, state courts adopting a negligence standard have viewed fault as the culpable failure to ascertain whether a statement was true or false.\footnote{142} Yet, the Supreme Court had concluded even prior to \textit{Sullivan} that "the Constitution protects expression . . . without regard to . . . the truth, popularity, or social utility of the ideas."\footnote{143} The \textit{Sullivan} Court also reiterated that

\footnote{141. In Tennessee, for example, the state's interest in protecting reputation is expressed in its constitution, Tenn. Const. art. 1, § 19, and statutes, Tenn. Code Ann. §§ 23-2601, -2602, -2605, -2608 (Supp. 1979). It is also expressed in Tennessee case law. For example, in Hartsell v. Depew, 10 Tenn. App. 141 (1929), statements concerning plaintiff's conduct and drunkenness while serving jury duty were true, but they referred to conduct that had occurred six years earlier. Mindful of the fact that "[i]t is the right and duty of a man to reform," the court upheld the jury's award of $6.00 plus costs. \textit{Id.} at 144. In Henson v. Pollock, 159 Tenn. 1, 15 S.W.2d 737, 738 (1929), defendant had circulated a card carrying plaintiff's name that advertised, \textit{inter alia}, "OUT FOR A GOOD TIME . . . Expert Lover — Wholesaler and Retailer in LOVE, KISSES AND UP-TO-DATE HUGS," obviously in jest. \textit{Id.} at 3, 15 S.W.2d at 738. The Tennessee Supreme Court reversed the lower court's judgment sustaining a demurrer stating, "All the world loves a lover, and well it may, but all the world scorns the promiscuous, professional lovemaker, 'out for a good time,' shallow hearted and shallow pated, who preys on the preserves of others, and whose sole ambition is to flirt with flocks." \textit{Id.} at 5, 15 S.W.2d at 738.

142. The \textit{Restatement} has taken the same approach in defining fault. \textit{See Restatement (Second) of Torts} § 580B (1977).

"[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth."\textsuperscript{144} The central issue, therefore, is not whether the false speech is protected as an initial proposition but at what point it loses that protection because of the competing interests\textsuperscript{145} of a plaintiff's reputation or a defendant's bad motive. Tests of liability that turn only on whether a defendant knew of the statement's falsity are inadequate indicia of either unreasonableness or bad motive and are insufficient bases for automatic forfeiture of first amendment protection. These tests afford insufficient protection to a defendant who knows that a statement is derogatory but is unaware that it is false and to a defendant who knows that a statement is false but is unaware that it is derogatory. The focus in the malice and fault analysis should not be solely on whether a defendant should have known the statement was false but also on whether he should have made the statement. The standard of liability for libel and slander should be based on knowledge of falsity and foreseeability of injury.\textsuperscript{146}

Actual malice in the defamation of public figures and officials could be redefined as knowledge or reckless disregard of the statement's falsity and knowledge or reckless disregard of the statement's foreseeable injury. Fault in the defamation of private plaintiffs could be redefined as failure to exercise ordinary care to ascertain the statement's falsity and failure to exercise ordinary care to ascertain the statement's foreseeable injury. The requisite degree of care imposed upon defendants under this proposed test remains defined as lack of knowledge and lack of reckless disregard for actual malice and lack of ordinary care for fault. To incur liability under this test, however, a defendant must fail to exercise the requisite care (actual malice or fault, depending upon the status of the plaintiff) concerning both fals-

\textsuperscript{145}. Id.
\textsuperscript{146}. Defamation should be distinguished from other torts in which a defendant may be held liable for unforeseeable harm, because defamation involves not only injury to plaintiffs but also curtailment of defendants' constitutional right to speak.
sity and injuriousness. Redefined in this manner, the actual malice standard of liability could be extended to all libel and slander by all defendants concerning public figures or officials. Similarly, the fault standard could be applied to all defamation concerning private plaintiffs.

Under the proposed standards, a defendant who failed to exercise the requisite degree of care to ascertain falsity and foreseeable injury would be liable for the defamation. A defendant who exercised the requisite care concerning falsity and probable injury would not be liable if the statement turned out to be false and injurious. A defendant who knew that the statement was derogatory (or who failed to exercise the requisite care to ascertain this fact) but who did exercise the requisite care to ascertain its veracity would not be liable if, unexpectedly, the statement turned out to be false. Similarly, a defendant who knew that a statement was false (or who failed to exercise the requisite care to ascertain this fact) but who did exercise the requisite care to ascertain its injuriousness would not be liable, if, unforeseeably, it turned out to be harmful.

Inquiry into foreseeable injury would be new to defamation law. A number of factors should be considered by the courts in assessing foreseeability of injury. First, the courts should evaluate whether the statement, along with any relevant, extraneous facts known to the defendant, was derogatory in nature. A defendant may have intended humor or sarcasm by his remark, and it may have been the hearer or reader who acted unreasonably in believing that the statement was true. Moreover, consideration of the nature of the statement in context would eliminate two illogical aspects of the libel per quod rule: that even a defendant unaware of extrinsic facts causing his statement to be defamatory incurs liability and that a defendant aware of such extraneous facts still can claim the protections of the special damages rule.147 Second, whether the subject matter of the statement concerns a public issue or a private matter is relevant. The democratic system is benefited by open discussion of political and public issues, and more tolerance has been recognized for false statements regarding public issues than for those re-

147. See text accompanying notes 29-33 supra.
garding private matters. Third, the tenor of the statement should also be evaluated. Some serious accusations would fall within the four categories that receive special treatment in slander and libel, and some would not. The rigid categories should be abolished, and the courts should assess the probable injury that the particular plaintiff would foreseeably incur from the particular remark. Fourth, whether the statement is written, oral, or pictorial frequently affects the extent and duration of foreseeable injury. Thus, the form of the speech should be considered. It would not be considered to the exclusion of other factors, however, and the troublesome distinction between libel and slander would be abolished. Fifth, the number of persons to whom the statement was communicated is relevant. A defendant may not incur liability by making a casual but derogatory remark to a friend on the telephone but would be more likely to incur liability by making the same remark in a public address. Last, the composition of the audience to whom the statement was communicated should be considered. It may be reasonable to make a derogatory remark to one’s spouse or best friend under circumstances in which it is unlikely to be repeated; it may be unreasonable, however, to make the same remark to a plaintiff’s boss.

The proposed redefinition of actual malice and fault may be adopted by state courts without contravening Sullivan or Gertz. The standards may be applied to all defamation. They are sensitive to individual plaintiffs and defendants, since the circumstances of the speaker, his statement, and his audience are evaluated.

149. See notes 21-23 & 28-40 supra and accompanying text.
150. In light of defendants' first amendment interests, under Sullivan plaintiffs must prove knowledge or reckless disregard of falsity. The proposed definition of actual malice raises that threshold level of proof to include foreseeable injury. Gertz imposed a fault requirement, and the proposal defines fault in terms of lack of care concerning falsity and injury.
151. Concerning the obligation to ascertain truthfulness, for example, a media defendant with resources to investigate the facts may be liable for a statement when a private citizen lacking such resources would not be. Concerning the obligation to avoid foreseeable injury, a newspaper with a large audi-
VI. Conclusion

The law of defamation has gradually been molded by the courts to accord speakers increased protection of freedom of speech and of the press. While at common law defamation subjected defendants to strict liability, a stiff special damages requirement in slander protected many defendants from liability. Damages could be presumed for libel at early common law, but by the mid-twentieth century the libel per quod rule shielded defendants when the libel was innocent on its face and the plaintiff was unable to prove identifiable pecuniary injury. Concluding that this body of defamation law inadequately protected broadcasters and publishers, the United States Supreme Court has forbidden state awards of presumed damages in one context and state imposition of strict liability on media defendants in all contexts. In Tennessee alone, those cases have affected statutory, constitutional, and common law.

The present status of defamation law is complex and uncertain. State courts in various circumstances continue to allow presumed damages, to require special damages, to distinguish between rigid subject-matter categories, and to distinguish between libel and slander. Significant steps toward uniformity and simplicity could be taken by requiring proof of injury in order to receive compensatory damages for any defamation, by abandoning the special damages requirement, and by extending the actual malice and fault standards to all defendants. Defining these standards of liability to encompass foreseeable injury, however, would abolish the distinction between libel and slander and would be more sensitive to the position of defendants, while still providing plaintiffs with a remedy for injury to reputation.

Melinda J. Branscomb