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As Times Goes by: Gertz v. Robert Welch, Inc. And Its Effect on California Defamation Law

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Comments

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Were it not for the fact that truth is a complete defense to libel, Dean Prosser's introduction to his discussion of defamation might well be tortious in itself:

> It must be confessed at the beginning that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.[1]

In *Gertz v. Robert Welch, Inc.*,[2] the United States Supreme Court echoed the sentiments of Dean Prosser by characterizing the law of defamation as an "oddity."[3] *Gertz* was a return to the ten-year struggle to "define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."[4] While the Court withdrew from the broad privilege envisioned in the earlier case of *Rosenbloom v. Metromedia, Inc.*,[5] it nevertheless placed new limitations upon the ability of the states to impose liability without fault and to award presumed and punitive damages. This comment reviews the development of the constitutional privilege[6] and the status of

1. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §111, at 737 (4th ed. 1971) [hereinafter cited as PROSSER].
2. 418 U.S. 323 (1974).
3. *Id.* at 349.
4. *Id.* at 325.
5. 403 U.S. 29, 52 (1971).
6. A general discussion of the constitutional privilege can be found in PROSSER, *supra* note 1, §118. This comment deals with the effect of *Gertz* upon the law of defamation in California. For a discussion of its effect on the constitutional privilege see,

the California law of civil defamation prior to the *Gertz* decision, and then analyzes how that law is affected by this recent case, examining in turn the impact of *Gertz* upon the cause of action and upon the defenses.

THE CONSTITUTIONAL PRIVILEGE TO DEFAME

A. The New York Times Privilege: 1964-1974

Prior to 1964, several United States Supreme Court cases suggested that defamatory remarks were not protected by the first amendment,[7] but the Court had not definitively applied the suggestion to civil libel or slander.[8] Then in *New York Times Co. v. Sullivan*[9] the Court held that the first and fourteenth amendments bar a public official from recovering damages for a defamatory statement about his official conduct unless he can prove that the statement was published with knowledge of its falsity or with reckless disregard for whether it was true or false. Although the Court drew upon analogies to seditious libel[10] and the public official's own privilege of defamation,[11] it based its holding on the rationale that nonreckless falsehood must be tolerated if freedom of expression is to have a necessary "breathing space."[12]

The *New York Times* majority proved insufficiently cohesive to survive the extension of the constitutional privilege to statements about subjects other than public officials. While *Curtis Publishing Co. v. Butts*[13] expanded the privilege to include remarks about public figures, and *Rosenbloom v. Metromedia, Inc.*[14] applied the holding to a discussion of a public event, neither case rested upon a majority opinion. In a plurality opinion in *Butts*, Justice Harlan argued that the state interest in protecting reputation varies with the public or private status of the plaintiff

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Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HAST. L.J. 777 (1975).

7. Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961); Times Film Co. v. City of Chicago, 365 U.S. 43, 48 (1961); Roth v. United States, 354 U.S. 476, 486-87 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

8. In Schenectady Union Publishing Co. v. Sweeney, 316 U.S. 642 (1942), *aff'g* 122 F.2d 288 (2d Cir. 1941), an equally divided Court affirmed a court of appeals decision which held that the first amendment did not protect defamation.

9. 376 U.S. 254, 279-80 (1964). Although the disposition of the *New York Times* case was unanimous, Justices Black, Douglas, and Goldberg were of the opinion that the privilege should be absolute rather than conditional. *Id.* at 293 (Black & Douglas, JJ., concurring), 298 (Goldberg & Douglas, JJ., concurring).

10. *Id.* at 273-78.

11. *Id.* at 282-83, *citing* Barr v. Matteo, 360 U.S. 564 (1959), for the holding that defamatory statements made by a public official in the course of his official duties are absolutely privileged.

12. 376 U.S. at 271-72.

13. 388 U.S. 130, 155 (1967).

14. 403 U.S. 29, 52 (1971).

because that status determines his ability to effectively respond to defamatory comments and the degree to which he has assumed the risk of such comments.[15] Justice Brennan, writing another plurality opinion in *Rosenbloom*, contended that the degree of first amendment protection is dependent upon the public's interest in the event: if the event is of public concern, then constitutional protection should attach without inquiry into the plaintiff's status.[16] A third approach, espoused by Justice Black in both *Butts* and *Rosenbloom*, would have held that defamation is absolutely protected by the first amendment.[17] Against this disconcerting background, the Court heard the *Gertz* case.

B. *Gertz v. Robert Welch, Inc.*

Elmer Gertz, an attorney, represented a family in a civil suit against the Chicago policeman who had previously been convicted for the murder of their son. *American Opinion*, a publication of the John Birch Society, published an article in which the criminal trial was viewed as part of a nationwide conspiracy to discredit local police forces, and Gertz was accused of being a Communist and a criminal and of framing the policeman. In fact the attorney had had only nominal contacts with the criminal trial, and there was no basis for the statements that he was either a Communist or a criminal.[18]

In a diversity suit for libel, the trial court, foreshadowing *Rosenbloom*, held that the determinant of the constitutional privilege was the public nature of the event which gave rise to the defamation.[19] Since the policeman's trial was an event of public interest, and since the plaintiff had failed to prove knowing or reckless falsity, judgment was entered for the defendant, notwithstanding a $50,000 jury verdict for the plaintiff.[20] The Seventh Circuit, rendering its decision after *Rosenbloom*, approved the adoption of the public event test and affirmed the judgment.[21]

On certiorari, the Supreme Court reversed in a long-awaited majority opinion written by Justice Powell.[22] The majority, concluding that the

15. 388 U.S. at 154-55 (Harlan, Clark, Stewart & Fortas, JJ., concurring).
16. 403 U.S. at 44 (Brennan, J., Burger, C.J., and Blackmun, J., concurring).
17. Curtis Publishing Co. v. Butts, 388 U.S. at 170 (Black & Douglas, JJ., concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. at 57 (Black, J., concurring).
18. 418 U.S. at 325-26. A complete list of the libelous statements can be found in Moorman, *Comments on the Current State of the Law of Libel in the United States—Protection of the Defamatory Falsehood and the Careless Liar*, 1971 TRIAL LAWYER'S GUIDE 40, 57-59.
19. 322 F. Supp. 997, 1000 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).
20. *Id.* at 1000.
21. 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974).
22. Justice Powell was joined by Justices Stewart, Marshall, Blackmun, and Rehn-

plaintiff was neither a public official nor a public figure,[23] found that application of the public event test to remarks defaming private individuals results in an uncalled-for abridgment of the legitimate state interest in compensating such individuals for injury to reputation.[24] Like the earlier arguments of Justice Harlan, the *Gertz* opinion noted that private individuals are to be distinguished from public figures because they lack "access to the channels of effective communication" and therefore do not have "a realistic opportunity to counteract false statements."[25] The majority was also of the opinion that while the media are entitled to act on the assumption that public figures "run the risk of closer public scrutiny,"[26] they cannot further assume that private figures who become involved in public events run a similar risk.[27] The Court further noted that not only does the public event test fail to protect the interests of the individual, it also fails to adequately safeguard freedom of the press.[28] Faced with a standard of strict liability when a trial judge, in hindsight, determines that the event was of only private interest, the defendant will likely be deterred from publishing even protected expression.[29]

To eliminate this threat of self-censorship and yet accommodate the state interest in compensating private individuals for injury to reputation, the Court held that "*so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.*"[30] Any such definition of fault, however, must be correlated with the various state interests served by the law of defamation and with the different damage awards which that law permits.[31] The in-

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quist. 418 U.S. at 324. Justice Blackmun also concurred separately to explain his reasons for joining the majority: the limitations on state law would provide adequate breathing space for the press, and it was of paramount importance to present a majority opinion. *Id.* at 353-54 (Blackmun, J., concurring). Justices Douglas and Brennan dissented, stating that the decision of the court of appeals should have been affirmed. *Id.* at 360 (Douglas, J., dissenting), 369 (Brennan, J., dissenting). Justice Douglas was of the opinion that the defendant's article was absolutely privileged. *Id.* at 360. Justice Brennan felt that it was conditionally privileged but that knowing or reckless falsity had not been shown. *Id.* at 369. The Chief Justice and Justice White also dissented, preferring to reinstate the verdict for the plaintiff rather than remand for further proceedings. *Id.* at 355 (Burger, C.J., dissenting), 404 (White, J., dissenting). The Chief Justice noted that the important social role served by attorneys would be imperiled if they were subject to the type of criticism which had been directed at Mr. Gertz. He also questioned the propriety of federalizing the law of defamation. *Id.* at 354-55. In a lengthy opinion Justice White criticized the federalization of state tort law. *Id.* at 369-404.

23. *Id.* at 351-52.
24. *Id.* at 345-46.
25. *Id.* at 344.
26. *Id.*
27. *Id.* at 345.
28. *Id.* at 346.
29. *See id.*
30. *Id.* at 347 (emphasis added).
31. *Id.* at 349.

tentional or reckless lie has long been held to be beyond the pale of first amendment protection,[32] and consequently the states are not prohibited from imposing punitive damages in furtherance of a legitimate interest in deterring such remarks.[33] On the other hand, when the error is less culpably made, the *Gertz* Court expressly refused to acknowledge any interest other than compensation for actual injury.[34] In reaching this conclusion the Court noted that recovery of damages beyond those awarded for the compensation of actual injury not only results in an unnecessary deterrent to the exercise of first amendment rights, but also exceeds the state's legitimate interest in compensation by providing a mechanism whereby juries can punish unpopular speech with largely uncontrolled discretion.[35] Therefore, *"the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."*[36]

California Defamation Prior to Gertz

The effect of *Gertz* upon California law cannot, of course, be understood without at least a cursory description of the law as it existed immediately prior to the *Gertz* decision. The organization which seems to be best suited to this survey is to review, in order, the different types of defamatory statements for which an action can be brought, the elements of the plaintiff's cause of action, and the available defenses.[37]

A. Types of Defamatory Statements

The right to be free from injury to reputation is recognized in California[38] and is protected by the law of defamation, which categorizes actionable statements as either libel or slander.[39] The former is published "by writing, printing, picture, effigy, or other fixed representation to the eye."[40] All other publications, including oral utterances and all communications by radio or other mechanical means, are slander.[41] A further distinction is made between those statements which are actionable per se and those which are actionable only when the plaintiff pleads that as a result of the statement he has suffered special damages.[42]

32. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
33. *Cf. id.* at 74.
34. 418 U.S. at 349.
35. *Id.* at 349-50.
36. *Id.* at 349 (emphasis added).
37. For a more extensive discussion of California law prior to *Gertz*, see 4 B. Witkin, Summary of California Law, *Torts* §§271-326 (8th ed. 1974).
38. Cal. Civ. Code §43.
39. Cal. Civ. Code §44.
40. Cal. Civ. Code §45.
41. Cal. Civ. Code §46.
42. *See* Prosser, *supra* note 1, §112.

Much of the confusion in the law of defamation stems from the fact that the distinction between those statements which are actionable per se and those which are not (also termed actionable per quod) is not the same for libel as for slander.[43] In the former, the distinction turns upon whether the defamation is complete within the content of the published remark,[44] whereas slander is differentiated according to the particular imputation which is made,[45] regardless of whether that imputation is complete on the face of the utterance or is made so only by allegation of extrinsic fact.[46] Libel per se in California is that "which is defamatory of the plaintiff without the necessity of explanatory matter, such as inducement, innuendo or other extrinsic fact,"[47] and all other libel is termed libel per quod.[48] Slander per se includes those utterances which, either on their face or by resort to extrinsic evidence,[49] impute to the plaintiff commission of a crime, loathsome disease, impotence or lack of chastity, or directly tend to injure him in his occupation.[50] All other slander, which may be termed slander per quod,[51] is not actionable unless the plaintiff alleges that it has resulted in special damages,[52] regardless of its content.[53]

B. The Plaintiff's Cause of Action

In order to state a cause of action for defamation, the plaintiff must allege that the defendant published matter defamatory of the plaintiff and that, as a result, the plaintiff has suffered injury.[54] It is also necessary, where the complaint reveals that the defendant published under a conditional or constitutional privilege, or where exemplary damages are sought, to allege that the defendant acted with malice.[55] Three of the

43. *Id.*
44. CAL. CIV. CODE §45a.
45. CAL. CIV. CODE §46.
46. White v. Valenta, 234 Cal. App. 2d 243, 252, 44 Cal. Rptr. 241, 246 (1965).
47. CAL. CIV. CODE §45a.
48. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 844 (1960).
49. White v. Valenta, 234 Cal. App. 2d 243, 252, 44 Cal. Rptr. 241, 246 (1965).
50. CAL. CIV. CODE §46(1-4).
51. The use of "per quod," as can be seen from the text, is confusing at best. PROSSER, *supra* note 1, does not use the term in connection with slander, but its use in this context is not improper, *see* 1 A. HANSON, LIBEL AND RELATED TORTS ¶46 (1969).
52. The slander statute uses the term "actual damages." CAL. CIV. CODE §46(5). In contrast, the libel statute refers to "special damages," CAL. CIV. CODE §45a. Though actual damage is often considered to include both special and general damages, Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 288-89, 38 P. 903, 904 (1894), in the context of slander it seems to refer only to special damages. *Cf.* Correia v. Santos, 191 Cal. App. 2d 844, 856, 13 Cal. Rptr. 132, 139 (1961). *See also* PROSSER, *supra* note 1, §112, at 760-61.
53. CAL. CIV. CODE §46(5).
54. For a more extensive discussion of pleading defamation in California prior to *Gertz*, see 3 B. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§594-605, 792 (2d ed. 1971).
55. Hale Co. v. Lea, 191 Cal. 202, 215 P. 900 (1923) (conditional privilege); Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966) (constitutional

elements of the cause of action—the publication, the defamatory content, and the reference to the plaintiff—go to the defendant's liability, whereas an allegation of malice may bear upon both liability and damages.[56]

As defamation is an injury to reputation—the opinion which others have of the plaintiff—it is essential to the tort that the statements were published to persons other than the plaintiff.[57] Prior to *Gertz*, this was the only element for which the defendant was not strictly liable,[58] and in California, if publication to a third party is neither intended nor reasonably foreseeable, there is no liability.[59] However, before *Gertz*, once it was shown that the defendant was at fault for the fact of publication, he was held strictly liable for the statement's defamatory content and its reference to the plaintiff.[60] Absent a privilege, it was not proper, in ascertaining liability, to consider the defendant's good faith belief in the truth of the statements[61] or the fact that the reference to the particular plaintiff was unintended or the result of innocent mistake,[62] although these circumstances may have been of importance in the determination of whether exemplary damages could be awarded.[63]

The final element in every action for defamation is injury to the plaintiff. In California, three categories of damages—general, special, and exemplary—are potentially available to a successful defamation plaintiff.[64] General damages include loss of reputation as well as pain and suffering,[65] and prior to *Gertz*, they were presumed whenever the defamatory publication was libelous per se or slanderous per se.[66] Special damages include injury to property and occupation, as well as out of

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privilege); Taylor v. Lewis, 132 Cal. App. 381, 22 P.2d 569 (1933) (exemplary damages).

56. PROSSER, *supra* note 1, §115, at 794-95.

57. PROSSER, *supra* note 1, §113, at 766. In the law of defamation, "publish" is a word of art which means only this essential communication to third parties. Farr v. Bramblett, 132 Cal. App. 2d 36, 46, 281 P.2d 372, 378 (1955).

58. PROSSER, *supra* note 1, §113, at 771.

59. Shoemaker v. Friedberg, 80 Cal. App. 2d 911, 183 P.2d 318 (1947).

60. PROSSER, *supra* note 1, §113, at 771.

61. *Cf.* Morris v. Lachman, 68 Cal. 109, 112, 8 P. 799, 800 (1885).

62. Taylor v. Hearst, 107 Cal. 262, 270, 40 P. 392, 394 (1895).

63. Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911).

64. *Cf.* CAL. CIV. CODE § 48a(2). Although a literal reading of section 48a would limit its definition of damages to actions under the correction statute, California courts have applied these definitions to other defamation actions. *E.g.*, Campbell v. Jewish Comm. for Personal Serv., 125 Cal. App. 2d 771, 775-76, 271 P.2d 185, 188 (1954).

65. Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 288-89, 38 P. 903, 904 (1894); CAL. CIV. CODE §48a(4)(a).

66. Clark v. McClurg, 215 Cal. 279, 284, 9 P.2d 505, 507 (1932) (libel); Moranville v. Aletto, 153 Cal. App. 2d 667, 672, 315 P.2d 91, 94 (1957) (slander). This rule has been justified on the ground that it is too difficult to find witnesses who are willing to testify that their opinions of the plaintiff have been in any way affected by the statement, even when it is probable that the plaintiff's reputation has in fact been injured. Note, *Developments in the Law—Defamation*, 69 HARV. L. REV. 875, 891-92 (1956).

pocket losses,[67] and in order to state a cause of action, must be pleaded when the statement falls within the categories of either libel per quod or slander per quod.[68] Exemplary damages are awarded for the sake of example and punishment and are available in the court's discretion when it is alleged and proved that the defendant published with the requisite malice.[69]

"Malice" is a confusing term in the law of defamation. This confusion is due, at least in part, to the indiscriminate use of the terms "malice in law" and "malice in fact."[70] Malice in law is primarily of historical importance[71] and may be defined as a state of mind evidenced by a "wrongful act, done intentionally, without just cause or excuse."[72] Though presumed in every action for libel or slander,[73] malice in law is of no consequence in the determination of exemplary awards.[74] Malice in fact is "a spiteful or rancorous disposition which causes an act to be done for mischief,"[75] and unlike malice in law, it is never presumed.[76] It is an important element of the cause of action where the plaintiff seeks an award of exemplary damages[77] or the complaint reveals that the defendant published under one of the statutory conditional privileges.[78] A third type of malice, which became important with the development of the *New York Times* privilege, is the standard of knowing or reckless falsity.[79] Prior to *Gertz*, this constitutional malice had to be alleged whenever the complaint revealed the applicability of the public official, public figure, or public event privilege.[80]

In 1931 California enacted a correction statute which substantially altered the plaintiff's cause of action against a media defendant,[81] Under

67. Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 288, 38 P. 903, 904 (1894); CAL. CIV. CODE §48a(4)(b).
68. *See* CAL. CIV. CODE §§45a, 46(5).
69. CAL. CIV. CODE §§48a(4)(c), 3294.
70. "The jumble in some modern text-books on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice and express malice . . . is a striking testimony of the limitations of the human mind." Ullrich v. New York Press Co., 23 Misc. 168, 171-72, 50 N.Y.S. 788, 791 (App. Div. 1898).
71. *See* PROSSER, *supra* note 1, §113, at 771-72.
72. Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 288, 38 P. 903, 904 (1894).
73. *Id.*
74. *Cf.* CAL. CIV. CODE §48a(4)(c-d).
75. Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 288 38 P. 903, 904 (1894).
76. Davis v. Hearst, 160 Cal. 143, 179, 116 P. 530, 546 (1911).
77. *Id.* at 163, 116 P. at 539.
78. Locke v. Mitchell, 7 Cal. 2d 599, 61 P.2d 922 (1936). Common law malice-in-fact exists when the narrower standard of constitutional malice is proved. New York Times v. Sullivan, 376 U.S. at 292 n.30, *cited in* Mullins v. Brando, 13 Cal. App. 3d 409, 418, 91 Cal. Rptr. 796, 802 (1970).
79. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964).
80. *E.g.*, Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817 (1966) (public figure).
81. CAL. CIV. CODE §48a.

the statute, a person who seeks damages for newspaper libel or broadcast slander must plead that he notified the defendant of the defamation and demanded a correction.[82] Prior to *Gertz*, if the publisher or broadcaster refused to make a timely and proper correction after such notice and demand, the successful plaintiff could, upon proper pleading and proof, recover general, special, and, when appropriate, exemplary damages.[83] If the correction was properly made, or if the plaintiff did not comply with the statute, only special damages could be awarded.[84]

C. *Defenses*

At common law there were two affirmative defenses to a defamation action—privilege and truth.[85] California, while preserving these defenses, has added a third, due care, which is available in limited instances.[86]

The defense of privilege is based upon the rationale that certain publications are made in furtherance of social interests "which [are] entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation."[87] An absolute privilege protects statements made by a public official in the proper discharge of an official duty and those made in the course of a legislative, judicial, or other official proceeding.[88] California law, unlike the common law majority rule,[89] extends the absolute privilege to fair and true reports of official or other public proceedings.[90] A conditional privilege is recognized in California when the parties to a communication share a common interest or stand in such a relation to each other as to provide a reasonable ground for supposing that the motive for the communication is innocent, or when the listener requests the publication.[91] By judicial construction this privilege has incorporated most of the common law privileges for statements made in the speaker's own interest, in the interests of others, in a common interest, to one who acts in the public interest, and in fair comment on matters of public con-

82. CAL. CIV. CODE §48a(1). Because the correction must be published or broadcast within three weeks of the plaintiff's notice and demand, the statute does not apply to actions against monthly periodicals. Morris v. National Fed'n of the Blind, 192 Cal. App. 2d 162, 165-66, 13 Cal. Rptr. 336, 338-39 (1961).

83. CAL. CIV. CODE §48a(2).

84. CAL. CIV. CODE §48a(1).

85. PROSSER, *supra* note 1, §§114-116. Consent is sometimes considered a defense, but may also be classified as a particular form of privilege. *Id.* §114, at 784-85.

86. CAL. CIV. CODE §48.5. See text accompanying notes 107-109 *infra*.

87. PROSSER, *supra* note 1, §114, at 776.

88. CAL. CIV. CODE §47(1-2).

89. PROSSER, *supra* note 1, §115, at 792, §118, at 830-33.

90. CAL. CIV. CODE §47(4-5); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §302 (8th ed. 1974).

91. CAL. CIV. CODE §47(3).

cern.[92] The distinction between these two broad categories of privileges is that a conditional privilege is lost if the defendant abuses it, whereas an absolute privilege cannot be lost through abuse.[93] The *New York Times* privilege, though of comparatively recent origin, is similar to the statutory conditional privileges in that it, too, may be lost when the defendant publishes with malice,[94] but this constitutional malice differs from the standard of malice in fact which will vitiate the traditional conditional privileges.[95]

The conditional privilege of fair comment deserves special attention, not only because its common law counterpart is generally considered to be the predecessor of the New York Times privilege,[96] but also because of the greater importance it is likely to assume after *Gertz*. While it can be broadly stated that this privilege protects remarks made to the public at large about matters of legitimate public concern,[97] the limits of legitimate public concern have not been determined with certainty. The fair comment privilege in California clearly applies to remarks about public officials and public figures,[98] but the cases decided prior to *New York Times* were not definite as to whether the privilege also applied to statements concerning events of public interest.[99] With the rapid expansion of the *New York Times* holding, particularly in the plurality opinion in *Rosenbloom*, the need to clarify the California law was stayed by the development of a constitutional privilege which did encompass discussions of public events.[100] However, since *Gertz* eliminates the federal

92. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§301-310 (8th ed. 1974); PROSSER, *supra* note 1, §115, at 785-92, §118, at 819-20.

93. PROSSER, *supra* note 1, §114, at 776-77.

94. New York Times v. Sullivan, 376 U.S. at 279-80.

95. See text accompanying notes 70-80 *supra*. The *New York Times* privilege is also unique in that its abuse must be proved by clear and convincing evidence. 376 U.S. at 285-86. In contrast, the statutory conditional privilege is lost if the plaintiff proves its abuse by a preponderance of the evidence. *See* CAL. EVID. CODE §115.

96. PROSSER, *supra* note 1, §118, at 819.

97. *Id.*

98. Maidman v. Jewish Publications, 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (1960) (prominent attorney); Maher v. Devlin, 203 Cal. 270, 263 P. 812 (1928) (mayor); Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1 (1921) (police chief); Babcock v. McClatchy Newspapers, 82 Cal. App. 2d 528, 186 P.2d 737 (1947) (political candidate); Harris v. Curtis Publishing Co., 49 Cal. App. 2d 340, 121 P.2d 761 (1942) (school board president); Taylor v. Lewis, 132 Cal. App. 381, 22 P.2d 569 (1933) (city councilman); Eva v. Smith, 89 Cal. App. 324, 264 P. 803 (1928) (city councilman); Jones v. Express Publishing Co., 87 Cal. App. 246, 262 P. 78 (1927) (deputy district attorney).

99. *See* Williams v. Daily Review, Inc., 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965); Glenn v. Gibson, 75 Cal. App. 2d 649, 171 P.2d 118 (1946). In both cases the result may have been reached on the basis that the publication was protected by the absolute privilege of fair and true report of a public proceeding.

100. For cases applying the *New York Times* privilege in California see Cerrito v. Time, Inc., 449 F.2d 306 (9th Cir. 1971), *aff'g* 302 F. Supp. 1071 (N.D. Cal. 1969) (public events); Belli v. Curtis Publishing Co., 25 Cal. App. 3d 384, 102 Cal. Rptr. 122 (1972) (public figures); Noonan v. Rousselot, 239 Cal. App. 2d 447, 48 Cal. Rptr. 817

public event privilege, it will again become necessary to determine whether the California fair comment privilege protects statements about public events.

The second general defense to defamation is truth, which unlike the conditional privileges, is a complete defense even when the defendant publishes with actual malice.[101] It was once the rule that the burden of pleading falsity was upon the plaintiff,[102] but upon proof that the publication was defamatory, a presumption of falsity arose which shifted the burden of proving the truth to the defendant.[103] The defendant then had the burden of demonstrating by a preponderance of the evidence that the gist of the defamatory charge was true.[104] In *Lipman v. Brisbane Elementary School District*,[105] the California Supreme Court recognized the inconsistency of requiring one party to plead falsity and forcing the other party to bear the burden of proof upon that same issue. In resolving this anomaly the court struck down the requirement that the plaintiff plead falsity,[106] and prior to *Gertz*, the burden of both the pleading and proof of the issue of truth was consequently upon the defendant.

A third defense available in California before *Gertz* was that of due care. As defamation has been, at least as to defamatory content and reference to the plaintiff, a strict liability tort,[107] due care was never a defense to an action for libel or slander at common law and could not be considered in the determination of compensatory damages.[108] By statute in California, however, an owner, licensee, operator, agent, or employee of a television or radio broadcast station cannot be held liable for a slander made over the broadcast facilities by anyone other than such owner, licensee, operator, agent, or employee if he alleges and proves that he exercised due care to prevent the broadcast of the slanderous remark.[109]

The Effect of Gertz on California Law

One of the *Gertz* holdings dealt with fault[110] and the other with damages.[111] In order to analyze the impact of these holdings on the law of

(1966) (political candidate); Kramer v. Ferguson, 230 Cal. App. 2d 237, 41 Cal. Rptr. 61 (1964) (public officials).

101. Swaffield v. Universal Ecsco Corp., 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680, 690 (1969).
102. Glenn v. Gibson, 75 Cal. App. 2d 649, 661, 171 P.2d 118, 125 (1946).
103. Prosser, *supra* note 1, §116, at 798.
104. Hearne v. De Young, 119 Cal. 670, 681-82, 52 P. 150, 154 (1898).
105. 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).
106. *Id.* at 233, 359 P.2d at 469, 11 Cal. Rptr. at 101.
107. See text accompanying notes 57-63 *supra*.
108. Taylor v. Hearst, 118 Cal. 366, 50 P. 541 (1897).
109. Cal. Civ. Code §48.5(1).
110. 418 U.S. at 347.
111. *Id.* at 349.

defamation in California, it is necessary to determine the parties to which the *Gertz* decision must be applied and the effect of each holding on the cause of action and the defenses. From the language of the *Gertz* decision it is apparent that its applicability is a function of both the status of the defendant and the status of the plaintiff. The determination of whether the defendant is a member of the media is important because the holdings on fault and damages both apply when the defendant is of the media,[112] while only the damages holding applies to actions brought against nonmedia speakers.[113] In contrast, the determination of whether the plaintiff is a public or private figure determines whether *Gertz* is applicable at all.

Looking first to the status of the plaintiff, it is critical to examine how the delineation between public figures and private figures is to be drawn. The Court suggested several guidelines for categorizing an individual as a public figure, all of which were based largely upon the rationale that such persons have assumed the risk of public criticism.[114] Recognizing that it is possible to become a public figure passively as well as purposefully, the Court stated that in either instance the media are entitled to act on the assumption that such criticism has been invited.[115] The media cannot assume, however, that a person's prominence in certain affairs renders him a public figure for all purposes, for in the last analysis the question must be resolved in light of the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[116] The *Gertz* description of a public figure thus represents a departure from the test proposed by Justice Harlan in *Butts*, which would define a public figure as one who has attained public interest independent of the controversy at hand.[117] If, pursuant to *Gertz*, it it determined that the public figure privilege is apparent on the face of the complaint, then a cause of action is not complete without alleging that the defendant acted with constitutional malice.[118] On the other hand, when the plaintiff is a private figure the *New York Times* privilege is not applicable, and the plaintiff must frame his complaint in accordance with the *Gertz* holdings on fault and damages. Once it has been determined that

112. See text accompanying notes 150-154 *infra.*
113. See text accompanying notes 122-130 *infra.*
114. 418 U.S. at 344. The Court partially discounted the argument that public figures have a greater opportunity for rebuttal by noting that "the truth rarely catches up with a lie." *Id.* at 344 n.9. Justice Brennan had long discredited this argument. *Id.* at 363 (Brennan, J., dissenting).
115. *Id.* at 345.
116. *Id.* at 354.
117. 388 U.S. at 154-55.
118. Noonan v. Rousselot, 239 Cal. App. 2d 447, 452, 48 Cal. Rptr. 817, 821 (1966).

the plaintiff is a private figure, and therefore that the *New York Times* privilege is not applicable, then the significance of *Gertz* will depend upon the status of the defendant.

In order to determine which party must bear the burden of alleging and proving fault and damages, it is initially necessary to decide whether *Gertz* merely expands the constitutional defenses first developed in *New York Times* or whether it applies directly to the plaintiff's cause of action. Since the necessity of alleging damages has traditionally rested with the plaintiff and since the *Gertz* damages holding merely modifies and explains the damages which are available in a defamation action, it is clear that the plaintiff will continue to bear the burden of pleading and proving damages. In contrast, the procedural impact of the fault holding is not so clear.

It is possible to look at the *Gertz* holding on fault in either of two ways. The first is that it establishes a new privilege, available to the media, which is abused when the defendant is at fault. Under this view the plaintiff would only be required to plead fault when the complaint clearly reveals that the defendant falls within the definition of "media." In all other instances a demurrer for failure to allege fault would be denied, and the action would proceed towards trial. A second approach would view *Gertz* as creating a new element in the plaintiff's cause of action whenever the defendant is from the media. Under this view, a general demurrer for failure to allege fault would lie whenever the complaint clearly reveals the media character of the defendant. Under this approach, however, it could be argued that when the status of the defendant is uncertain, the plaintiff should be required to allege the media or nonmedia character of the defendant with specificity.[119] If the plaintiff is required to specifically plead the status of the defendant, his complaint will also reveal whether it is necessary to allege fault in order to state a cause of action. Since there would be a greater likelihood that a demurrer would be sustained if the plaintiff were required to allege fault, there would correspondingly be a greater likelihood of dismissing such a case on pretrial motions. Dismissal of vexatious and hastily filed actions would spare the defendant from the cost of further litigation, which in itself may be a deterrent to freedom of expression.[120] Since the *Gertz* fault holding is based on a rationale of minimizing the deterrent effect of

119. *Cf.* Noonan v. Rousselot, 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817, 821 (1966) (necessity of specifically pleading malice in fact).

120. Gertz v. Robert Welch, Inc., 418 U.S. at 367-68 (Brennan, J., dissenting). In Belli v. Curtis Publishing Co., 25 Cal. App. 3d 384, 389, 102 Cal. Rptr. 122, 125 (1972), this same principle was considered in regard to a summary judgment for the defendant.

defamation suits against the media,[121] applying the holding to the defendant's case in the form of a privilege would least serve the intentions of the Court. Therefore, the holding on fault, like that on damages, should apply directly to the plaintiff's cause of action.

A. The Cause of Action: the Fault Holding

The *Gertz* opinion examined at length the chilling effect on the media of the common law standard of strict liability, and the first holding, proscribing the ability of the states to impose liability without fault, was expressly limited to actions against a "publisher or broadcaster."[122] Unless the ramifications of strict liability on the media are different from those on other speakers, this limitation would appear to be unwarranted. The existence of a distinction between media and nonmedia defendants has not been given a great deal of attention by the writers,[123] and the Justices themselves are not in agreement as to whether *New York Times* and its progeny have created such a distinction. In his dissenting opinion, Justice White assumed that the *Gertz* majority would apply to "each and every defamation action."[124] On the other hand, Justice Stewart has stated that "the Court has never suggested that the constitutional right of free *speech* gives an *individual* any immunity from liability for either libel or slander."[125] Clearly, then, what is said here about the application of *Gertz* to nonmedia speakers is not only subject to, but seeks clarification by the Court.

Some practical differences between the media and other speakers may support the Court's limitation. The first factor is the vulnerability of the media to large and frequent judgments.[126] This vulnerability is not so much a matter of financial resources as it is a result of the frequency with which the media publish.[127] Secondly, the media are subject to an increased risk of defamatory error brought on by the pressures of dealing with "hot news" and deadlines, as well as the rigors of collecting

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121. See text accompanying notes 28-30 *supra.*

122. 418 U.S. at 347. Although "publish" is a word of art in the law of defamation, see note 57 *supra,* the Court in *Gertz* appeared to use it in its more conventional sense. In discussing the holding on fault the Court noted that it "shields the press and broadcast media from the rigors of strict liability for defamation." 418 U.S. at 348.

123. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?,* 26 HAST. L.J. 639, 639 (1975).

124. 418 U.S. at 370 (White, J., dissenting).

125. Stewart, *"Or of the Press,"* 26 HAST. L.J. 631, 635 (1975) (excerpted from a speech delivered at Yale Law School, Nov. 2, 1974). *But see* Curtis Publishing Co. v. Butts, 388 U.S. 130, 164-65 (1967) in which Chief Justice Warren reiterated that "the *New York Times* standard is an important safeguard for the rights of the *press* and *public* to inform and be informed on matters of legitimate interest."

126. Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants,* 47 S. CAL. L. REV. 902, 932 (1974).

127. *Id.*

information from numerous and diffuse sources.[128] A third difference is inherent in the very function of the media: in a nation profoundly committed "to the principle that debate on public issues should be uninhibited, robust and wide open,"[129] it can be argued that the media are worthy of protection as the primary forum of that debate.[130]

On the other hand, experience dictates that a nonmedia speaker may also be vulnerable to a large judgment and in the course of discussion may make hurried and unverified statements. Together with the important contributions which such a speaker may have for the marketplace of ideas, these considerations present a compelling argument for removing the spectre of strict liability from all defamation actions, regardless of the character of the defendant. Considered as a whole, however, the probability that a nonmedia speaker is less likely to publish frequent, hurried, and widely circulated remarks offers some arguable support for the Court's apparent distinction.

If the distinction is to be maintained it will sooner or later be necessary to define the term "media."[131] No simple formula exists for this definition, but the factors discussed in distinguishing the two types of speakers are indicative of the relevant inquiries. Whether a defendant is part of the media should be a function of the circulation, regularity, and frequency with which he publishes news, information, opinion, or other expressions on matters of public importance. These factors should be considered collectively, since a publication which provides significant information but is not bound by a regular publication schedule is not subject to the risk incurred by deadline pressure, and thus the danger of self-censorship is not so prevalent. Similarly, a publication which deals in matters which are traditionally beyond first amendment protection[132] would not be within the media, as that term is used here, even though

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128. *Id.* at 933.

129. New York Times v. Sullivan, 376 U.S. at 270.

130. Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HAST. L.J. 639 *passim* (1975); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902, 933 (1974).

131. In *Branzburg v. Hayes* the Court expressly refused to accept an invitation to establish a media privilege with regard to the concealment of news sources because

> [s]ooner or later it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

408 U.S. 665, 704 (1972).

132. For example, a credit report has been held to be beyond the ambit of the constitutional privilege. Grove v. Dun & Bradstreet, Inc., 438 F.2d 433 (3d Cir. 1971), *cert. denied*, 404 U.S. 898 (1971). However, in California, credit reports are protected by the statutory conditional privilege, Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 119 Cal. Rptr. 82 (1975); CAL. CIV. CODE §1756.

such a publication might be subject to periodical or contractual deadline pressure.[138]

The importance of classifying a defendant as part of the media lies in the fact that a cause of action against such a defendant cannot be maintained without a showing of fault. Under traditional defamation law, liability has been imposed without fault for the defamatory nature of a statement and for the reference to the plaintiff.[134] *New York Times* and its progeny, including *Gertz*, have all dealt with the former element, the defamatory content. It is clear, then, that the holding on fault applies to this element, but it is not settled whether fault must also be shown when the defendant erred only in referring to the plaintiff.[135] It would seem, however, that the chilling effect of liability without fault would be the same for both the defamatory content and the reference to the plaintiff. The history of the constitutional privilege has evidenced the Court's concern for the deterrent effect created by the common law of defamation, which subjected a media defendant to possible litigation for an innocent mistake concerning the truth or falsity of his statements.[136] Holding a defendant strictly liable for the reference to the plaintiff creates the same danger that a publisher or broadcaster will be subject to litigation due to an innocent mistake. Thus, it appears that under the *Gertz* holding on fault, a private figure defamed by a media defendant should be required to allege that the defendant was at fault for the defamatory content or the reference to the plaintiff. The Court limited the application of the fault holding to actions based on statements whose content "makes substantial danger to reputation apparent" and expressly reserved the determination of what standard should apply to "a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential."[137] With respect to statements which are defamatory on their face, some evidence of the intended standard of fault is shown by the Court's references to "a reasonably prudent edi-

133. A problem related to the definition of media is whether the term should include those who, though not actually within the media themselves, disseminate their views through media channels. If Justice Stewart's statement, see text accompanying note 125 *supra*, that the Court has never applied the constitutional privilege to nonmedia remarks is valid, then it must be assumed that individuals who air their views through the media are within the Court's concept of media. St. Amant v. Thompson, 390 U.S. 727 (1968) (televised speech by a political candidate); Garrison v. Louisiana, 379 U.S. 64 (1964) (press conference by a district attorney); Abernathy v. Sullivan, 376 U.S. 254 (1964) (political advertisement placed in a newspaper by four clergymen).

134. See text accompanying notes 57-63 *supra*.

135. Imposing liability without fault for innocently referring to the plaintiff has, for example, forced a publisher to defend a $10,000 lawsuit when a typesetter's mistake resulted in a newspaper article referring to "J.W. Taylor" rather than the intended "J.N. Taylor." Taylor v. Hearst, 107 Cal. 262, 40 P. 392 (1895).

136. New York Times v. Sullivan, 376 U.S. at 271-72.

137. 418 U.S. at 348.

tor"[138] and a "negligence standard for private defamation actions."[139] In light of this language, it seems safe to say that when a statement is defamatory on its face, a media defendant may be held liable only if he is found to be at least ordinarily negligent in not discovering the falsity of his statements as to the persons to whom they refer.[140]

By refusing to consider a situation in which a statement is not defamatory on its face, the Court has suggested that even some standards of fault may not adequately protect the media in some situations.[141] This suggestion makes it difficult to accurately predict what standard will apply in an action against a publisher of such statements. One possibility is that since these statements, by the Court's definition, offer no notice of their potentially defamatory nature, only a more culpable standard, such as gross negligence or recklessness, will eliminate the threat of self-censorship. Another is that lack of notice is merely a factor to be considered in the determination of whether or not the defendant breached the duty of due care owed by a reasonably prudent publisher or broadcaster. This question, like the applicability of *Gertz* to nonmedia defendants, will require further clarification by the Court.

Applying the *Gertz* fault holding to the different causes of action only serves to compound the inherent confusion between libel and slander and actions per se and actions per quod. The Court's distinction between statements which make "substantial danger to reputation apparent" and those which do not "warn a reasonably prudent editor or broadcaster of their defamatory potential"[142] appears to be similiar to the distinction California draws between libel per se and libel per quod.[143] This simple analogy may not hold true in all situations, however, for it is possible that a statement, although libelous per quod, may be so scandalous that it would put a reasonably prudent editor on notice as to its defamatory potential.[144] In comparison, since slander per se is distinguished from slander per quod not by the completeness of the defamatory content, but rather by the character of the imputation,[145] California is left with four

138. *Id.* at 348.
139. *Id.* at 350.
140. The other opinions also indicate that negligence was intended. 418 U.S. at 353 (Blackmun, J., concurring), 355 (Burger, C.J., dissenting), 360 (Douglas, J., dissenting), 366-67 (Brennan, J., dissenting), 376 (White, J., dissenting).
141. For a discussion of the different standards of fault see PROSSER, *supra* note 1, §34.
142. *Id.* at 348.
143. See text accompanying notes 42-48 *supra.*
144. An example of such a statement might be "Billy Graham was seen at a bar consuming alcohol." Since this statement would not be libelous without proof that Billy Graham is a minister of a religious sect which eschews the consumption of alcohol, it would fall within the category of libel per quod. Nonetheless, since Billy Graham has attained such world wide recognition, it could be argued that this statement would put a reasonably prudent editor on notice of its defamatory potential.
145. See text accompanying notes 49-53 *supra.*

types of actions for slander against a media defendant: (1) that which is slanderous per se on its face; (2) that which requires allegation of special damages, but is defamatory on its face; (3) that which is slanderous per se only by allegation of extrinsic facts; and (4) that which requires pleading of both special damages and extrinsic fact. Thus, in an action for libel per se or for the first two types of slander, a private-figure plaintiff must allege that a media defendant was negligent in failing to discover the truth about the content of his statements and about the persons to whom those statements referred. When the action is for libel per quod, or for either of the latter two categories of slander, that same plaintiff may be required to plead that the media defendant acted with a more culpable degree of fault with regard to those elements.

As a general rule, the matter pleaded must also be proved, and *Gertz* must therefore be examined to determine the evidentiary standard by which the plaintiff must prove fault. *New York Times* required that constitutional malice be proved by clear and convincing evidence.[146] In contrast, *Gertz* fails to mention the standard of proof by which fault must be proved. This silence, coupled with the Court's desire to leave the law of defamation of a private individual to the states,[147] indicates that the traditional standard of proof by preponderance of the evidence[148] is appropriate.

B. The Cause of Action: the Damage Holding

The second holding of *Gertz* provides that when liability is not based on the *New York Times* standard of recklessness, the plaintiff is not entitled to the presumption of damages or to an award of exemplary damages.[149] Again it must be determined whether the holding applies to nonmedia as well as media defendants. This resolution cannot be made by parroting the analysis used in ascertaining that the fault holding does not apply to nonmedia defendants because the two holdings do not appear to be grounded upon identical rationales.

The holding on damages, unlike that on fault, was not expressly limited to publishers or broadcasters.[150] More significant, however, is the twofold rationale which led to the holding on damages. The Court paralleled the fault rationale when it recognized the threat of self-censorship posed by presumed and punitive damages, but it also determined that the only state interest which justifies an abridgment of freedom of ex-

146. 376 U.S. at 285-86.
147. 418 U.S. at 345, 347.
148. CAL. EVID. CODE §115.
149. 418 U.S. at 349.
150. *Compare* text accompanying note 30 *with* text accompanying note 36.

pression, at least when liability is based on a standard of fault less than recklessness, is compensation to the plaintiff for actual injury.[151] Moreover, presumed and punitive damages invite juries to punish unpopular speech with largely uncontrolled discretion,[152] an invitation which the Court indicated is at odds with the aims of the first amendment.[153] It follows, then, that any law which allows a defamation plaintiff to recover presumed or punitive damages without demonstrating that the defendant acted with knowing or reckless falsity is unconstitutionally overbroad.[154] Unlike strict liability which may chill the exercise of free speech, the allowance of presumed or punitive awards for the publication of a defamatory falsehood also punishes the speaker. While there may be reasons for distinguishing the impact of chill on different types of speakers, these reasons are not persuasive in analyzing the constitutionality of presumed or punitive damages which punish free speech. The constitutional infirmities inherent in the punishment of the spoken or written word apply with equal force to all defendants, and thus it would seem that the *Gertz* holding on damages would apply to both media and nonmedia speakers.

If liability is established under the standard of knowing or reckless falsity, *Gertz* permits an award of presumed and punitive damages, but under any less culpable standard, a successful plaintiff is limited to recovery for actual injury.[155] The Court was content to leave the definition of actual injury to the experience of trial courts, but it did state that actual injury includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering," as well as "out-of-pocket loss."[156] "Actual injury" thus encompasses both general and special damages as they are defined in California.[157] While the holding would seem to make allegation and proof of actual injury a necessary element in every defamation action based on a degree of fault

151. 418 U.S. at 349-50. Justices Brennan and White were critical of the Court's delimitation of the state interests served by the law of defamation. They indicated that the state also might have a legitimate interest in vindicating the plaintiff's reputation by a special judgment on the truth or falsity of the defendant's statement even though money damages could not be awarded. *Id.* at 368 n.3 (Brennan, J., dissenting), 393 (White, J., dissenting).

152. *Id.* at 349-50. Justice White pointed out that the trial judge or appellate court do in fact have control over jury awards by their powers of remittitur, reversal, order for a new trial, or judgment n.o.v. *Id.* at 394 n.31 (White, J., dissenting).

153. *Id.* at 349.

154. *Cf.* Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D. Cal. 1974) (exemplary awards held unconstitutionally overbroad as applied in a defamation case initiated by a public figure).

155. 418 U.S. at 349-50.

156. *Id.* Justice Brennan criticized this interpretation of actual injury because, in his opinion, it would still leave juries with considerable room to punish unpopular speech. *Id.* at 367 (Brennan, J., dissenting).

157. See text accompanying notes 64-67 *supra.*

less than recklessness, it apparently does not change California's requirement that special damages be alleged to state a case in an action other than libel per se or slander per se,[158] even when constitutional malice is present.

Other than the nebulous statement that actual injury must be supported by "competent" evidence,[159] there is nothing in *Gertz* to indicate a standard by which the plaintiff must prove the extent of his actual injury when liability is based upon a showing of culpability less stringent than constitutional malice. In addition to the Court's failure to articulate this issue, the entrustment of the definition of actual injury to the experience of trial courts[160] suggests the propriety of the traditional measure of preponderance of the evidence. In order to recover presumed or punitive damages, *Gertz* indicates that the private defamation plaintiff must establish liability under the standard announced in *New York Times*[161]—proof by clear and convincing evidence.[162]

C. *The Cause of Action: the Correction Statute*

Whatever the scope of *Gertz* with regard to nonmedia defendants, it clearly has qualified actions against the media and, in so doing, affected California's correction statute.[163] The plaintiff's burden to state a cause of action under the statute is made more rigorous by *Gertz*: to recover general damages not only must he plead notice, demand, and failure to correct, as required by the statute,[164] but also fault and the extent of his actual injury.[165] Even when the plaintifff is only entitled to special damages because he failed to comply with the statute or a correction was properly made,[166] he apparently must still plead that the defendant was at fault for the defamatory error. Moreover, to be entitled to exemplary damages he must plead that the defendant published with knowing or reckless falsity.[167]

Since fault is a necessary element of actions against the media after *Gertz*, it must be determined whether a failure to publish or broadcast a correction may be indicative of fault. Failure to retract was not evidence of malice under the circumstances of *New York Times*, and that case and its progeny have pointed out that the Court's concept of fault is based

158. See text accompanying notes 42 and 68 *supra.*
159. 418 U.S. at 350.
160. *Id.*
161. *Id.*
162. 376 U.S. at 285-86.
163. CAL. CIV. CODE §48a. See text accompanying notes 81-84 *supra.*
164. CAL. CIV. CODE §48a(2).
165. See text accompanying notes 30-36 *supra.*
166. CAL. CIV. CODE §48a(1).
167. See text accompanying note 155 *supra.*

more upon an objective knowledge or lack of knowledge of certain facts at the time of publication than upon a subjective determination of the defendant's motive.[168] Failure to issue a correction, for whatever purpose, cannot fairly be said to relate back to the speaker's knowledge at the time of publication, and it would seem, therefore, that a failure to retract should not be used as evidence of fault with regard to the original publication.[169]

D. *Defenses*

Though it dealt primarily with the plaintiff's case, *Gertz* is not without effect on the defenses to defamation. By requiring the plaintiff to prove that a media defendant was at least negligent, *Gertz* has rendered the broadcaster's defense of due care superfluous.[170] More significantly, however, in reshaping the constitutional privilege, it has revived some of the statutory conditional privileges. Because the rigorous *New York Times* standard was so broadly applicable, particularly after *Rosenbloom*, the constitutional privilege supplanted many of the conditional privileges which would otherwise have applied to a media report of events of public interest.[171] By rolling back the constitutional privilege to a point where it protects only those statements made about public officials and public figures and no longer extends to discussion of public events, *Gertz* revives the fair comment privilege,[172] at least to the extent that it protects discussion of events of public concern. Since it is not clear that California ever had a public event privilege separate from the *New York Times* privilege,[173] the courts and legislature are free to pursue at least two possibilities in this area.

One possibility is that California will adopt a public event privilege, apart from the fair comment privilege, which will be lost only where the plaintiff proves that the defendant published with knowing or reckless

168. St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 286 (1964); *cf.* Cantrell v. Forest City Publishing Co., 95 S. Ct. 465, 469-71 (1974).

169. *But see* Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 344, 160 N.W.2d 1, 11 (1968), stating that a refusal to retract is indicative of reckless indifference under the *New York Times* privilege. Cases in other jurisdictions, however, have held that failure to retract is evidence of malice in fact with regard to the abuse of a conditional privilege. Metropolis Co. v. Croasdell, 145 Fla. 455, 458, 199 So. 568, 570 (1941); Augusta Chronicle Publishing Co. v. Arrington, 42 Ga. App. 746, 750, 157 S.E. 394, 396 (1931); Vigil v. Rice, 74 N.M. 693, 699, 397 P.2d 719, 723 (1964); Stevenson v. Morris, 288 Pa. 405, 410-11, 136 A. 234, 235-36 (1927).

170. See text accompanying notes 107-109 *supra.*

171. RESTATEMENT (SECOND) OF TORTS §606, comment *a* (Tent. Draft No. 20, 1974).

172. CAL. CIV. CODE §47(3).

173. See text accompanying notes 96-100 *supra.*

falsity.[174] If such a course were taken it would offer a media defendant more protection than the *Gertz* holding: a negligent publisher or broadcaster would still be protected by a state privilege which required at least reckless error. A second possibility is the incorporation of a public event privilege as part of the common law conditional privilege of fair comment. California has codified this privilege in Civil Code Section 47(3) which provides that the privilege is vitiated if the communication is made maliciously.[175] It is possible that a media defendant who is not negligent in his failure to discover the falsity of his statement will publish or broadcast the remark for an improper purpose, or for an interest beyond that for which the privilege is recognized. It is also possible that a similar defendant who is negligent in failing to discover the falsity of his statements will publish or broadcast for a proper purpose within the interests protected by the privilege. In neither instance could the defendant be held liable, but the reasons in each situation differ: in the former he would be protected by the *Gertz* holding on fault, and in the latter his statement would be within the conditional privilege.

A public event privilege, as part of the common law privilege of fair comment, is only one of the many conditional privileges which might be asserted by a media defendant.[176] Whether any of these privileges will offer greater protection than *Gertz* will depend upon the applicability of such privileges to media reports other than discussions of public officials

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174. In Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (1974), an Indiana appellate court adopted the *Rosenbloom* standard of knowing or reckless falsity in a discussion of public events, though the plaintiff was a private figure. In light of *Gertz*, the Indiana courts would still be barred from imposing liability without fault where the event was of only private concern. Justice Brennan, who wrote the *Rosenbloom* opinion, would possibly have allowed strict liability where the event giving rise to the article was of only private concern. *Gertz v. Robert Welch*, Inc.,418 U.S. at 368 n.3 (Brennan, J., dissenting).

175. Exactly what constitutes malice sufficient to establish abuse of this privilege is subject to some confusion. One California Supreme Court decision, *Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 154-55, 143 P.2d 20, 25 (1943), stated in dictum that abuse of the privilege is shown

> by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the [privileged] interest.

Witkin notes that this is consistent with the Restatement. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §302 (8th ed. 1974). However, a recent appellate decision, *Tendler v. Dun & Bradstreet, Inc.*, 43 Cal. App. 3d 788, 791, 118 Cal. Rptr. 274, 276 (1974), held that "Mere negligence cannot constitute evidence of malice in fact."

176. In Brewer v. Second Baptist Church, 32 Cal. 2d 791, 197 P.2d 713 (1948), a privilege of common interest was asserted in a libel action between church members arising from press releases issued by the defendants. The privilege was found to be abused because the defendant was improperly motivated, *id.* at 798, 197 P.2d at 718, yet had the defendant been able to invoke *Gertz* on the basis that through the press releases he was acting as media, see note 134 *supra*, his motivation would not have been a conclusive determinant of liability. In *Brewer*, however, the court also indicated that the jury could infer that the defendant lacked even reasonable grounds to believe in the truth of the publication. 32 Cal. 2d at 800, 197 P.2d at 719.

or public figures and on the means by which such privileges are abused.

Gertz may also portend a change in the burden of pleading and proving the issue of truth or falsity. Traditionally the defendant has been required to prove, by a preponderance of the evidence, that the statement was true,[177] but in introducing the fault holding the Court stated that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."[178] This statement recalls the opinion in *Speiser v. Randall*,[179] in which the Court indicated that a speaker should not be required to bear the burden of proving that his remarks are within the protection of the first amendment in order to obtain a benefit from the state. In reaching this conclusion the *Speiser* Court explained that

> where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens.[180]

Three factors which are involved in the proof of truth suggest that the *Speiser* argument is equally applicable to a civil action for defamation against a media defendant.[181] The first consideration is the very elusive nature of the concept of truth. As Justice Harlan once stated, "Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity."[182] What Justice Harlan noted about a jury finding should apply with equal force to a presumption of falsity which requires that a defendant prove by a preponderance of the evidence that his statement is true. Secondly, requiring a media defendant to prove the truth may force him to choose between yielding to a judgment or revealing a confidential source.[183]

177. See text accompanying notes 101-106 *supra.*
178. 418 U.S. at 340 (dictum).
179. 357 U.S. 513, 525-26 (1958).
180. *Id.* at 526.
181. The presumption of falsity is clearly not applicable when liability must be established by the standard developed in *New York Times.* Garrison v. Louisiana, 379 U.S. 64, 74 (1964). If in the future the Court does address the constitutionality of the presumption of falsity in private figure defamation cases, it will also have to decide whether the presumption impacts on media and nonmedia speakers similarly. Since the argument in *Speiser* suggested that the chill on speech is indirect, it would seem to be analogous to the effect of strict liability, and therefore the Court might limit any opinion to actions against media defendants. See text accompanying notes 122-130 *supra.*
182. Time, Inc. v. Hill, 385 U.S. 374, 406 (1967).
183. For a general discussion of the newsman's privilege see Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen,* 26 HAST. L.J. 709 (1975); Comment, *Newsman's Privilege: A Survey of the Law in California,* 4 PAC. L.J. 880 (1973).

Rather than make such a choice, he may well abstain from publishing significant information which he acquires from such sources. The third factor is that the plaintiff will often have superior access to the evidence necessary to prove the truth or falsity of the allegedly defamatory statement.[184]

Paraphrasing the argument in *Speiser*, the media defendant who knows that he must bring forth proof and persuade another of the truthfulness of his statement must steer far wider of unprotected speech than if the plaintiff must bear these burdens. If the defendant is required to prove that his published remarks are true, then an ambiguous case may result in liability for truthful criticism. On the other hand, when the burden is placed upon the plaintiff to show that the statement is false, a similar case may allow defamatory falsehoods to circulate without sanction. The history of the *New York Times* privilege suggests that the latter alternative is to be preferred.

CONCLUSION

There is an inherent conflict between the law of defamation and the constitutional command that the freedoms of speech and press be unabridged. Beginning with *New York Times* in 1964, the Supreme Court's efforts to resolve this conflict resulted in a broad privilege conditioned on the absence of knowing or reckless falsity. This privilege reached its broadest scope in *Rosenbloom*, when a plurality opinion indicated that all discussion of events of public concern was constitutionally protected. Then in *Gertz* a majority of the Court rejected this public event test and limited the *New York Times* privilege to statements about public officials and public figures. *Gertz* was not a product of total insensitivity to the first amendment, but of a new approach to balancing the competing interests of protecting reputation and assuring freedom of expression. Instead of expanding the defendant's privilege, the *Gertz* Court studied specific areas of the plaintiff's cause of action and concluded that first amendment interests would be adequately safeguarded by modifying those areas. After *Gertz*, a private defamation plaintiff will be required to plead and prove that a media defendant was at least negligent in failing to discover the falsity of his statements or to whom they referred. Furthermore, unless the private plaintiff can establish liability in accordance with the rigorous *New York Times* standard of clear and convincing proof of knowing or reckless falsity, he will be barred from re-

184. The superior access doctrine is not a steadfast rule of evidence, but the presumption of falsity in the traditional law of defamation is a notable exception. 9 J. WIGMORE, WIGMORE IN EVIDENCE §2486, at 275 (3d ed. 1940).

covering either presumed or punitive damages from a media defendant and perhaps from a nonmedia defendant as well.

Justice Blackmun, in his concurring opinion in *Gertz*, expressed the hope that the proscription of liabilty without fault and the limitation on damages would permit the Court to come to rest in its efforts to deal with the law of defamation.[185] Unfortunately, several questions left unresolved by *Gertz* render that hope somewhat ephemeral. The majority admittedly refused to consider the standard of fault for a publisher of statements which are not defamatory on their face and this, of course, remains to be determined. More difficult issues are those only implied in *Gertz*. By its continuous references to publishers and broadcasters *Gertz* suggests that media and nonmedia speakers have different first amendment interests, that the boundaries of freedom of the press and freedom of speech are not necessarily coterminous. The Court must sooner or later decide whether *Gertz* is limited to the media or if either or both of its holdings can be applied to defamation actions against other speakers as well. If in fact the holdings are to be limited, then it will be imperative to define "media," a difficult task in light of the romantic concept of the press in American history. In the future the Court may also be required to examine other facets of the law of defamation, just as it analyzed liability without fault and the availability of presumed and punitive damages. One area particularly in need of such study is the presumption that a defamatory statement is false.

In whatever way the Supreme Court chooses to resolve these problems, it seems certain that the broader parameters of the federalization of the law of defamation have been drawn and the prospects for that law now lie with the states. The legislature and courts of California must now re-examine the area of defamation in light of the arguments developed over the last decade. One important determination which must be made is whether a public event privilege in California is viable after *Gertz* and if so, by what standard of conduct that privilege may be lost. It is significant to note that *Gertz* does not prohibit the states from developing on their own a more rigorous standard of fault than negligence in media cases, or for that matter, from extending the *Gertz* holdings to all defendants. Most importantly, by finally presenting a majority opinion, *Gertz* has removed much of the speculation engendered by the prior plurality opinions and should provide some much needed stability in the law of defamation.

Douglas C. Hamilton

185. 418 U.S. at 354.