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By VICTOR A. KOVNER*

Introduction

In the two years since *Gertz v. Robert Welch, Inc.*,[1] the press has suffered a series of judicial setbacks throughout the nation. Although no single decision constitutes a radical departure from the Warren Court expansion of press freedoms, to any attorney counseling publishers the recent trend away from the principles of *New York Times Co. v. Sullivan*[2] seems ominous indeed. The gravity of this trend was dramatically evidenced in March of this year by the conflicting opinions of a divided Supreme Court in *Time, Inc. v. Firestone*.[3] This commentary attempts to review the adverse implications of the principal defamation decisions affecting the press of the last two years.

The modern law of defamation began with *New York Times Co. v. Sullivan*,[4] which held that to recover for defamation a public official had to establish with "convincing clarity" that the allegedly defamatory material was published with "actual malice"; that is, with knowledge of its falsity, or with reckless disregard as to its truth. The definition of actual malice was further clarified in *St. Amant v. Thompson*[5] to require an "awareness of probable falsity," or evidence that the defendant actually "entertained serious doubts as to the truth" of the material

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1. 418 U.S. 323 (1974).
2. 376 U.S. 254 (1964).
3. 424 U.S. 448 (1976).
4. 376 U.S. 254 (1964).
5. 390 U.S. 727 (1968).

at the time of publication. In *Curtis Publishing Co. v. Butts*,[6] the Court extended the applicability of the *Times* standard to plaintiffs who were "public figures."

The Supreme Court in *Rosenbloom v. Metromedia, Inc.*[7] extended the *Times* standard to private plaintiffs who were involved in matters of public interest.[8] The law applicable to this category of claimants changed, however, in 1974 when *Gertz v. Robert Welch, Inc.*[9] was decided by a five to four vote. Justice Blackmun provided the swing vote, departing from the plurality opinion in *Rosenbloom*, and concurring in Justice Powell's majority opinion in *Gertz* because:

> [I]t is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity.[10]

In brief, the Supreme Court in *Gertz*: (a) excluded from the *Times* rule statements about private persons involved in matters of public interest, leaving the states to define the standards of liability in such defamation claims so long as liability is not imposed without fault; (b) limited recovery for defamation claims to actual damages (including pain and suffering, but not presumed or punitive damages) in the absence of a showing of "actual malice"; and (c) reviewed the "public figure" characterization, placing emphasis upon voluntary activities of the plaintiff, but recognizing the concept of an involuntary public figure for limited purposes.

Aftermath of Gertz

The Adoption of Varying Standards of Defamation Liability

Most representatives of the press have found *Gertz* disturbing because of the latitude granted to the states to fix their own standards of defamation liability (short of imposing strict liability) where private individuals are involved in matters of public interest. A preliminary review of the decisions of the states reveals a wide disparity in the standard selected. For instance, at least eight states have

6. 388 U.S. 130 (1967).

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

8. In *Rosenbloom*, the Court applied the *Times* standard of liability to a distributor of nudist magazines who had been arrested for distributing allegedly obscene material, and who had sued a radio station for failing to report that the material seized was only "allegedly" obscene. Though not a public figure, the plaintiff was found to have become involved in a matter of public interest. *Id.*

9. 418 U.S. 323 (1974).

10. *Id.* at 354 (Blackmun, J., concurring).

selected a negligence standard,[11] while three[12] have adopted the very standard of the plurality in *Rosenbloom v. Metromedia, Inc.*[13] Recently, the New York Court of Appeals adopted a test of "gross irresponsibility," which requires, in effect, a showing of a gross departure from ordinary journalistic standards where private individuals are involved in matters of public interest.[14]

While New York's apparent middle ground may not seem too burdensome for many publishers, what is most troubling is the inherent consequences of a multiplicity of standards imposed upon any publication circulated outside its state of origin.[15] The tendency of plaintiffs to sue in forums with the least protective standards will influence the legal advice given to publishers. Where the negligence standard is presumed applicable, the publisher at press deadline may often become unduly cautious.

Inadvertent Error as a Basis for Liability

The adverse implications of *Gertz* were not eased when the Supreme Court denied certiorari in several libel cases in the fall of 1975, including *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.*[16] In *Maloney* the Ohio Court of Appeals reversed the trial court's grant of summary judgment for the defendant newspaper which had published an article about the inadvertent demolition of a building contiguous to one scheduled for demolition. The article quoted Thomas Maloney as saying, "I guess we got carried away." There was some doubt as to whether anyone made such a statement. Thomas Maloney had retired from the plaintiff construction company, and the business was run by his son, Timothy Maloney. Although the company and its principals

11. Cahill v. Hawaiian Paradise Park Corp., 543 P.2d 1356 (Hawaii 1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (Ct. App. 1976); Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 96 S. Ct. 151 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976).

12. Walker v. Colorado Springs Sun, Inc., 538 P.2d 450 (Colo.), *cert. denied*, 96 S. Ct. 469 (1975); Aafco Heating and Air Conditioning Co. v. Northwest Publishing, Inc., 321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1975); LeBoeuf v. Times Picayune Publishing Corp., 327 So. 2d 430 (La. Ct. App. 1976).

13. 403 U.S. 29 (1971).

14. Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

15. The existence of different standards in different jurisdictions inevitably will lead to forum shopping and conflict of laws questions.

16. 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975).

would appear to have become "vortex public figures,"[17] having been drawn into a matter of public interest by demolishing the wrong building, the Ohio court appears to have assumed they were private individuals and applied a negligence standard. The newspaper was forced to bear the expense of a full-fledged trial over what appears to have been at most an inadvertent error.

The potential exposure from inadvertent error was dramatized by *Time, Inc. v. Firestone*.[18] In *Firestone*, the following item in *Time* magazine was the subject of the libel action:

> DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a one-time Palm Beach schoolteacher; on grounds of extreme cruelty *and adultery*; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, "to make Dr. Freud's hair curl."[19]

The trial court in the divorce proceeding issued a confusing order granting the husband's counterclaim for divorce, which alleged extreme cruelty and adultery, and, in addition, awarding alimony to the plaintiff wife. The Florida appellate courts subsequently held that because no alimony could be granted as a matter of Florida law where there had been a finding of adultery, the divorce must have been granted on grounds of cruelty alone.

Mary Firestone contended that *Time* should have been aware of the applicable Florida law and that no finding of adultery was actually made by the trial court, notwithstanding its reference to "extra-marital adventures on both sides . . . [sufficient] to make Dr. Freud's hair curl."

At least six Supreme Court justices apparently assumed that the *Time* publication was substantially false, notwithstanding Justice Marshall's persuasive dissent in which he concluded that *Time* had accurately reported the trial court's erroneous action. Significantly, after conducting an investigation, *Time* had refused a request for retraction, insisting that the item was accurate. Although the concurrence of Justices Powell and Stewart made clear that insufficient evidence of fault on the part of *Time* had been offered to sustain liability under *Gertz*, their tacit agreement that the material was, in fact, false

17. In *Gertz*, Justice Powell wrote: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society." 418 U.S. at 345.

18. 424 U.S. 448 (1976).

19. *Id.* at 452 (emphasis added).

raises a serious question as to the extent to which liability may be imposed in the presence of substantial truth, as opposed to literal truth.[20]

The Supreme Court's open and acknowledged change in defamation standards governing publication of material about private individuals involved in matters of public interest, as well as the Court's more subtle shift to a requirement of literal truth, will have a practical effect on the daily workings of the press. New questions are now being asked: How much may a publisher rely on a reporter, even one who is known and trusted, when an inadvertent error may subject the publisher to liability? How much independent and corroborative investigation need be done? What constitutes the standard against which a charge of negligence will be measured? The lack of clear answers to these new questions will necessarily inhibit publication.

Apart from the enhanced risk of liability,[21] the cost alone of defending defamation claims can have a chilling effect. At one time (but apparently no longer) this was recognized by the Supreme Court:

> Fear of large verdicts in damage suits for innocent or merely negligent misstatement, *even fear of the expense involved in their defense*, must inevitably cause publishers to "steer . . . wider of the unlawful zone," and thus "create the danger that the legitimate utterance will be penalized."[22]

The expenses begin at the very early stages of litigation. Discovery proceedings are time-consuming, costly, and often subject a reporter to various levels of intimidation. While these costs always have had a deterring effect, the costs—and hence the chill—are greatly enhanced when the claim is not dismissed by a motion for summary judgment and the publisher has to bear the expense of a trial.

Under the *New York Times* test, a case can be dismissed if, upon motion, the plaintiff does not come forward with "clear and convincing" evidence of "actual malice." Under a lesser standard a plaintiff frequently will be given the right to go to the jury for determination of a question of fact, e.g., did the reporter or publisher follow proper standards of care or did he act negligently?

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20. In contrast, the New York Court of Appeals in Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 200, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 65 (1975), found that a serious and acknowledged but inadvertant error should not give rise to liability since "a limited number of typographical errors . . . are inevitable."

21. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976) ($100,000); Montandon v. Triangle Publications, Inc., 45 Cal. App. 3d 938, 120 Cal. Rptr. 186, *cert. denied*, 44 U.S.L.W. 3225 (U.S. Oct. 14, 1975) ($150,000).

22. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (emphasis added). The claim was for invasion of privacy for casting the Hill family in a "false light"—a claim akin to defamation.

Both the negligence standard and any departure from the defense of substantial truth offer the unscrupulous claimant or his attorney leverage to force unreasonable settlements. Such demands are especially threatening when the publisher is too small to absorb the full costs of asserting the First Amendment interests. As a result of *Gertz* and *Firestone*, fear of litigation may force small newspapers and local radio stations to withhold newsworthy material. The sacrifices will be shared by their audiences in small communities throughout the country.

The Not-So-Private Lives of Elmer Gertz and Mary Alice Firestone

The stature of Elmer Gertz and his reputation in the Chicago metropolitan area, as well as his role in the litigation against the Chicago police, pose what many press representatives believe to be a potentially more serious problem—deciding who is a "public figure." Although Justice Powell said that he did not intend to alter the definition of "public figure," which had been developed in *Curtis Publishing Co. v. Butts*,[23] his opinion contained a footnote which cited the court of appeals' questionable assumption that *Gertz* was not a public figure.[24]

The fears generated by *Gertz* were borne out in *Time, Inc. v. Firestone*.[25] While Elmer Gertz was known in limited circles in Chicago, Mary Alice Firestone was widely known throughout Florida and elsewhere, even to the point of notoriety. Mrs. Firestone had been prominent in Palm Beach society for many years and her frequent appearances in the press prompted her to subscribe to a press clipping service. Her seventeen-month divorce trial elicited forty-three articles in the *Miami Herald* and forty-five articles in the Palm Beach newspapers. Clearly, she was involved in a controversy of interest to the public. Moreover, during the trial she held several press conferences. Because "access to the media" was considered a principal factor in *Gertz* in determining public figure status, many assumed Mary Firestone was a public figure and that her defamation claim would require evidence of "actual malice." Yet six justices of the Supreme Court concluded that she was not a public figure, because not all controversies of interest to the public were "public controversies" within the meaning of *Gertz*.[26]

The plurality opinion argued that dissolution of a marriage through judicial proceedings

23. 388 U.S. 130 (1967).

24. Gertz v. Robert Welch, Inc., 418 U.S. 323, 330 n.3 (1974). As Judge Brieant noted recently in Hotchner v. Castillo-Puche, 404 F. Supp. 1041 (S.D.N.Y. 1975), "[p]erhaps if attorney Gertz was not a public figure, nobody is." 404 F. Supp. at 1044.

25. 424 U.S. 448 (1976).

26. *Id.* at 454.

> is not the sort of "public controversy" referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.[27]

The Court downplayed her press conferences because they "should have had no effect upon the merits of the legal dispute" with her husband and there was "no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution."[28]

In his dissent, Justice Marshall argued that the plurality, by making the test for public figure status be its own subjective evaluation of the importance of the "public controversy," had placed itself in the very dilemma *Gertz* sought to avoid—deciding which matters constituted a "public controversy" and which did not.[29] The uncertainty left by *Firestone* will undoubtedly deter countless editors throughout the nation as they struggle to apply the latest interpretation of public figure or public controversy.

Both *Gertz* and *Firestone* will infringe upon the publisher's decision-making process, since a higher standard of care must be applied to private individuals. Inevitably, the names of some private individuals will be stricken from newsworthy stories, leaving the public figures and public officials as the only persons identified. Often these deletions will tend to distort the news or the role of the public persons named.

The Use of Defamation Claims to Compel Disclosure of Confidential Sources: Choice of Law and Preclusion Problems

Most publishers' counsel will acknowledge that many defamation

27. *Id.*

28. *Id.* at n.3.

29. *Id.* at 484 (Marshall, J., dissenting). In addition to curtailing the characterization of a "public figure," the *Firestone* opinion also rejected the publisher's argument that reports of judicial proceedings were per se protected by the *Times* standard. Justice Brennan's persuasive dissent in *Firestone* is addressed primarily to this issue. Also troublesome is the fact that the Court held that damages for mental anguish and suffering could be sustained even in the absence of a claim for damages or for an injury to reputation.

On a more positive note, the remand to the Florida courts for a determination of the existence of fault must be seriously considered. Notwithstanding Justice Rehnquist's suggestion that fault may be found in the first instance at the appellate level, all of the justices, with the exception of Justice White, who voted to affirm liability, implied that there was inadequate evidence of fault. Justice Powell's concurring opinion warned that unless there existed some basis for a finding of fault other than that given by the Supreme Court of Florida, there could be no liability. In view of the non-participation of Justice Stevens, it appears that *Firestone* will not constitute the final chapter in the law of defamation for this Court.

claimants are not seeking monetary damages. Claims are typically asserted for some sort of vindication, such as retraction or the publication of an appropriate reply by the aggrieved party or his designee. Another large portion of claimants simply serve a summons and complaint (sometimes merely a summons) and leave the action unpursued so that they may say publicly that they are "suing the liars."

In recent years, however, some publishers have been confronted with the defamation suit designed to force disclosure of confidential sources. Such a suit is often brought by a public official or other person who feels damaged by leaks, or "not-for-attribution" statements made by persons with knowledge of the facts. Their objective is often neither damages nor vindication, for the underlying material may well be substantially true, but rather disclosure and punishment of the confidential source who may have performed a substantial public service at risk to his employment or career.

The First Amendment protection available to a journalist accused of defamation was thoroughly discussed in the 1958 case of *Garland v. Torre*,[30] in an opinion written by then Circuit Judge Potter Stewart. Marie Torre, a *New York Herald Tribune* correspondent, had described Judy Garland as overweight and attributed the description to an unnamed CBS executive. During discovery, defendant Torre declined to identify her source. The court decided that the reporter would have to answer if (a) the question was relevant, (b) alternative sources had been exhausted, and (c) the inquiry went to the heart of the litigation. Because the Court found that the plaintiff's questions satisfied these tests, the defendant was directed to answer, and upon her continued refusal, was jailed for contempt.

Recently in *Carey v. Hume*,[31] the Court of Appeals for the District of Columbia required disclosure of a source used by Jack Anderson in a column which had stated that the plaintiff, an attorney, and his client, the United Mine Workers, had improperly taken records from the UMW office. The court found that the identity of the appellant's source was critical to the plaintiff's claim and compelled disclosure. A contrary conclusion by the Eighth Circuit in *Cervantes v. Time, Inc.*[32] was distinguished on the ground that in *Cervantes* the court found that there was no probability that the plaintiff would succeed in the defamation action in view of the extensive research conducted by the defendant publisher prior to the publication of the alleged defamatory

30. 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).
31. 492 F.2d 631 (D.C. Cir.), *petition for cert. dismissed*, 417 U.S. 938 (1974).
32. 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

material. While *Cervantes* offers comfort to a defamation defendant where the applicable standard of care has been satisfied, the Eighth Circuit unfortunately found the question of privilege to be procedural and thus declined to apply the New York "newsman's shield" statute,[33] which had presumably been relied upon by the New York reporter who prepared the article while in New York.

The traditional law of the forum approach, when applied to defamation cases, poses the same kind of problems for the national press as those posed by the Supreme Court's abandonment of *Rosenbloom*, i.e., the claimant may choose the forum least protective of the journalist, however small the circulation in that state. Thus a private plaintiff involved in a matter of public interest might well seek to assert his claim in a state such as Kansas and presumably would avoid Indiana or Colorado. Similarly, a defamation plaintiff whose objective is the disclosure of confidential sources would make every effort to avoid instituting the action in New York where the "newsman's shield" statute is the broadest, or in any other state that has adopted a strong "newsman's shield" statute.

The choice of law alternatives were discussed recently in *Apicella v. McNeil Laboratories, Inc.*,[34] a medical malpractice action in which the plaintiff sought the sources of a medical newsletter article which had concluded that the drug "Innovar" was extremely dangerous. The court indicated that the "center of gravity" approach for the choice of law problem was appropriate, since all the contacts in *Apicella* were in New York and the application of New York law was not contested.

Significantly, Judge Weinstein in *Apicella* decided that the First Amendment interest in protecting the source outweighed the state's interest in that information for the purposes of the malpractice litigation. In view of his decision not to compel disclosure, the judge precluded the use by either party during the course of the litigation of the entire newsletter which had been published some two years after the alleged malpractice.

A similar question of preclusion also arose in two defamation lawsuits instituted by Brooklyn's Judge Rinaldi against *The Village Voice, Inc.* and other defendants. The first suit[35] was based on an

33. N.Y. CIV. RIGHTS LAW § 79-h (McKinney Supp. 1975).

34. 66 F.R.D. 78 (E.D.N.Y. 1975). *See also* Kaminsky, *State Evidentiary Privileges in Federal Civil Litigation*, 43 FORDHAM L. REV. 923 (1975).

35. Rinaldi v. Village Voice, Inc., No. 8824/73 (Sup. Ct., New York County, N.Y., filed April 13, 1973).

advertisement by *The Village Voice* in the *New York Times*, and the second[36] was based upon the republication of certain articles that originally appeared in *The Village Voice* by Holt, Rinehart and Winston, Inc. During the course of discovery in both proceedings, the plaintiff sought to obtain the names of the reporter's informants. The reporter refused to disclose his sources, citing the New York "newsman's shield" statute. In both actions the plaintiff moved to preclude the defendants from introducing not only the names of witnesses whose identities were kept confidential during discovery proceedings, but also any evidence obtained from informants, notwithstanding the fact that much of the material in question referred to interviews with unnamed judges, prosecutors, and lawyers critical of the plaintiff. Significantly, both motions were, in effect, denied, except that the defendant was barred from calling the unidentified confidential sources as witnesses or introducing their names at trial.[37] Both courts explicitly declined to preclude the introduction of evidence obtained from those confidential sources.

Conclusion

While one is reluctant to reach dire conclusions from one or two surprising decisions, the press must recognize the unfortunate trend of increased hostility. Occasional judicial hostility to the press is apparent in related areas, such as the increasing issuance of gag orders, the rigorous enforcement of subpoenas in criminal proceedings, and even in the ever broader recognition of privacy claims. As a matter of economics, however, it is the law of defamation that is most critical to the survival of numerous newspapers and radio stations. The defamation questions of the next few years will test the very essence of the First Amendment.

36. Rinaldi v. Holt, Rinehart and Winston, Inc., No. 12477/74 (Sup. Ct., New York County, N.Y., filed Aug. 14, 1974).

37. Rinaldi v. Holt, Rinehart and Winston, Inc., No. 12477/74 (Sup. Ct., New York County, N.Y.) (Preclusion Order, filed July 31, 1975); Rinaldi v. Village Voice, Inc., No. 8824/73 (Sup. Ct., New York County, N.Y.) (Preclusion Order, filed Oct. 31, 1975).