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Living with Gertz: A Practical Look at Constitutional Libel Standards

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LIVING WITH *GERTZ*: A PRACTICAL LOOK AT CONSTITUTIONAL LIBEL STANDARDS

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IN a series of libel cases that includes *New York Times Co. v. Sullivan*[1] and *Gertz v. Robert Welch, Inc.*,[2] the United States Supreme Court has emphasized the importance of the distinction between recklessness and negligence. As a result, the courts now confront a practical problem: the incorporation of the new constitutional standards into state tort law.

For public officials and other public figures, the Supreme Court cases require proof of recklessness before a newspaper can be held liable for a false story.[3] All classes of plaintiffs must demonstrate recklessness to recover punitive damages.[4] The Court, however, has not decided the standard of fault that the plaintiff who is not a public figure or public official must prove,[5] except to say that state courts cannot apply a standard of strict liability.[6] Although the difference between negligence and recklessness forms a neat doctrinal line, recent cases suggest that the distinction may be of limited practical significance in the common case in which the defendant's credibility is a central issue.

A recent diversity case, *Mills v. Kingsport Times-News*,[7] illustrates the practical problems of implementing the post-*Gertz* standards in a typical libel context.[8] Levita Mills was charged with the murder of her husband. A preliminary hearing was held in the

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1 376 U.S. 254 (1964).

2 418 U.S. 323 (1974).

3 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

4 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

5 *See id.* at 347.

6 *See id.*

7 475 F. Supp. 1005 (W.D. Va. 1979).

8 One such practical problem is the merging of constitutional standards with the vocabulary of state libel and slander law. For example, the defendant's motion for summary judgment in *Mills* used traditional common-law phrases such as "libel per se" and "libel per quod," which the recent line of Supreme Court libel cases may render moot. Use of such language may reflect lawyers' reluctance to change their terms of art. *See generally* Wydick, *Plain English for Lawyers*, 66 CALIF. L. REV. 727 (1978). The language may also represent a prudent decision to use the traditional terms until judges make it clear that they do not want to hear them.

Wise County General District Court, and a newspaper story about this preliminary hearing stated that Mrs. Mills had been committed for a psychiatric evaluation at the urging of the prosecutor.[9] The story was false, and Mrs. Mills sued. The defendant newspaper filed an affidavit signed by the reporter in which the reporter claimed that he had based the story upon information that the prosecutor had provided him after the preliminary hearing. The reporter conceded, however, that the prosecutor might have misunderstood some of the reporter's questions. Mrs. Mills filed a counteraffidavit signed by the prosecutor in which he denied giving such information to the reporter.[10] Based on these affidavits and on the premise that "the Virginia policy of accurately reporting public records is better served by a standard of negligence than actual malice,"[11] the United States District Court for the Western District of Virginia denied the newspaper's motion for summary judgment.[12]

Some might consider the significance of *Mills* to be the court's assumption that Virginia will allow a private plaintiff to recover in a libel action upon showing that the defendant acted negligently.[13]

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[9] 475 F. Supp. at 1006.

[10] *Id.* at 1007.

[11] *Id.* at 1011.

[12] *Id.* at 1011-12.

[13] The court also noted that "the apparent majority of jurisdictions facing the issue have accepted the negligence standard in private individual suits." *Id.* at 1012. For a summary of jurisdictions that have adopted the negligence standard, see Mathis v. Philadelphia Newspapers, Inc., 455 F. Supp. 406, 412 n.2 (E.D. Pa. 1978). *See also* Collins & Drushal, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. L. REV. 306, 313-14 n.51 (1978).

Although the rationales for adopting a standard of negligence vary from jurisdiction to jurisdiction, Collins and Drushal have pointed to several common themes. The most common rationale used by courts imposing a negligence standard is that "reputational interests command constitutional protection. This is raised in jurisdictions where the state constitution, unlike its federal counterpart, expressly refers to the protection of reputation." *Id.* at 316. *See, e.g.*, Troman v. Wood, 62 Ill. 2d 184, 194-95, 340 N.E.2d 292, 297 (1975). A second argument, "noted in a number of decisions, [is] that nothing in state policy or prior decisions *requires* the adoption of a standard stricter than the negligence standard permitted by *Gertz*." Collins & Drushal, *supra*, at 316 (emphasis added). *See, e.g.*, Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976). A third theme resembles the concerns expressed in *Gertz*, namely that the private plaintiff in modern society deserves a great deal of protection for his reputation, and, therefore, the standard should be as low as constitutionally permissible. Collins & Drushal, *supra*, at 317. *See* Gertz v. Robert Welch, Inc., 418 U.S. at 341-46. A fourth theme seems to be based on a general distaste for alternatives to a negligence standard because of the power that such alternatives give to the news media. *See*

Lawyers, however, are more likely to wonder how important this doctrinal determination was to the motion for summary judgment. Would the result have been different had the court selected a recklessness standard?

It is a curious historical fact that none of the United States Supreme Court's libel cases have involved the dispute exemplified by *Mills*—a dispute where issues of credibility are at the heart of the case. For example, in the leading case on the content of the reckless-disregard standard, *St. Amant v. Thompson*,[14] Thompson, a deputy sheriff, sued St. Amant, a political candidate, for quoting on television false statements made about him by a member of the local Teamsters Union, J. D. Albin. Thompson could prove that the television statements were defamatory and false, but he could not prove that St. Amant knew that the statements were false. Consequently, the theory of his case was that St. Amant made his speech with reckless disregard of the truth.[15]

In his opinion for the Court, Justice White emphasized that the issue was not whether a reasonably prudent man would have made the statement or even whether a reasonably prudent man would have investigated prior to making the statement. Rather, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his

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Collins & Drushal, *supra*, at 318. *See, e.g.*, Troman v. Wood, 62 Ill. 2d at 195-96, 340 N.E. 2d at 297-98.

Some jurisdictions, however, have adopted more stringent standards than negligence, relying primarily upon the standard enunciated by the Court in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Courts in Indiana and Colorado have held that the standard of *New York Times Co. v. Sullivan* applies in cases where private plaintiffs are involved in matters of public concern. Collins & Drushal, *supra*, at 321. *See, e.g.*, Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 98-99, 538 P.2d 450, 457, *cert. denied*, 423 U.S. 1025 (1975); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580, 585 (Ind. App. 1975), *cert. denied*, 424 U.S. 913 (1976). New York has adopted a similar standard, using a reckless-disregard test in matters that are " 'arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition.' " Collins & Drushal, *supra*, at 324-25 (quoting Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975)).

Additionally, no jurisdiction has yet accepted an intermediate standard between negligence and recklessness. Collins & Drushal, *supra*, at 319. *See* Troman v. Wood, 62 Ill. 2d at 197, 340 N.E.2d at 298. The Second Restatement of Torts provides for a negligence standard. *See* RESTATEMENT (SECOND) OF TORTS § 580B(c) (1977). For the rationale of the drafters, see *id.*, Comments g, h.

[14] 390 U.S. 727 (1968).

[15] *See id.* at 729-30.

publication."[16] Justice White thought that St. Amant's reliance upon Albin was not reckless under the circumstances of the case. The record showed that St. Amant had known Albin for about a year and that Albin put his statement in writing, swore to it, and said that he was prepared to substantiate the charges. Moreover, Albin had made other statements to St. Amant that had been verified. Consequently, although St. Amant did not investigate the facts or attempt to corroborate the particular charge that Albin had made about Thompson, Justice White thought that St. Amant's dealings with Albin were enough to give him some grounds for confidence in Albin.[17] Given these indicia of reliability, publishing Albin's statements by repeating them did not constitute reckless disregard of the truth.

For present purposes, the significance of *St. Amant* is that the plaintiff did not attempt to test the defendant's credibility with respect to what Albin said. Moreover, there was no evidence that Albin attempted to repudiate the statement attributed to him by St. Amant. Thus, credibility—the key issue raised in *Mills*—was not before the Court. Where credibility is an issue, future litigation may focus upon one paragraph of Justice White's opinion:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[18]

Justice White's statement implies that, even under a recklessness standard, the good faith of the defendant is an issue that the "finder of fact must determine." In a case such as *Mills*, the good

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[16] *Id.* at 731.
[17] *Id.* at 733.
[18] *Id.* at 732.

faith of the reporter will in large part be determined by whether the jury believes his version of his interview with the news source. Only if the jury accepts this part of the reporter's story will it then examine the informant to see if there are "obvious reasons to doubt [his] veracity."

What does this analysis imply for a defendant seeking to resolve a "credibility" case on a motion for summary judgment? Will it make any difference if the standard of fault is recklessness rather than negligence? Suppose we define negligence as the failure by a reporter to discover what a reasonable reporter would have discovered. We would then define recklessness as requiring something more: not only did this reporter not find out what a reasonable reporter would have found, but he did not even care. As English courts have sometimes stated, he knew that he did not know whether the statement was true or false.[19] Given conflicting affidavits or a similar conflict in testimony at trial, how should a court decide on a motion for summary judgment or a directed verdict? First, the court should ask whether the jury would have to believe a reporter who stated, as in *Mills*, that the source told him certain matters on which he relied in writing the story. The answer would be no. Second, the court should inquire whether the jury could believe a source who said that he did not make the alleged statement. The answer probably would be yes. If the jury believed the source's denial, then it would have to find that the reporter wrote a story flatly at odds with what he was told, indicating that he did not care about the truth. Thus, even under a recklessness standard, there could be neither a summary judgment nor a directed verdict for the defendant.

Mills is not the only case that demonstrates this point. For ex-

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[19] *See, e.g.*, Derry v. Peek, 14 App. Cas. 337, 376 (1889) ("[I]f I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.") *See also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS (4th ed. 1971):

> A defendant who asserts a fact as of his own knowledge, or so positively as to imply that he has knowledge, under circumstances where he is aware that he will be so understood when he knows that he does not in fact know whether what he says is true, is found to have the intent to deceive, not so much as to the fact itself, but rather as to the extent of his information.

Id. § 107, at 701 (footnotes omitted).

ample, in *American Beneficial Life Insurance Co. v. McIntyre*,[20] an insurance company sued a reporter for libel. The trial judge granted a motion for summary judgment in favor of the reporter. The Alabama Supreme Court reversed. The issue was whether a jury could find that the defendant had acted in reckless disregard of the truth in reporting that American Beneficial was insolvent.[21] The reporter based his story upon a report prepared by staff members of the state insurance commission.[22] There was some information in the report supporting the defendant's story. The insurance company, however, alleged that the reporter, either recklessly or knowingly, had taken this information out of context so as to present a false impression.

The crucial evidence favoring the plaintiff seems to have been that the defendant met with the deputy commissioner to review the report. The deputy commissioner's version of this interview was that he told McIntyre that the insurance company was solvent. The court's opinion did not give the reporter's version of this interview, but held that, given the deputy commissioner's version, there was enough evidence to go to the jury.[23] If the reporter's version of the interview were different, as seems likely,[24] credibility would be an issue going to the heart of the case, and the result—the denial of the summary judgment motion—would be the same as the result in *Mills* despite the different standard of fault applied.

Thus far, we have examined the recklessness/negligence issue as

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[20] 375 So. 2d 239 (Ala. 1979).

[21] The court held that the insurance company was a "limited-purpose public figure" and that the reporter's story was defamatory. *See id.* at 242, 250.

[22] *See id.* at 240-41.

[23] *Id.* at 246. In reversing the lower court, the Alabama Supreme Court invoked Alabama's "scintilla rule," under which even a "glimmer, spark or scintilla of evidence" is enough to defeat a motion for summary judgment. *Id.* The court also discussed the more general proposition that an issue concerning a party's credibility is not appropriate for summary disposition because "[t]he resolution of such an issue will generally depend upon observation of the demeanor of the defendant." *Id.* at 243. *See* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2726, at 520 (1973) ("Doubts as to the credibility of the movant's affiants or witnesses may lead the court to conclude that a genuine issue exists.").

[24] Because the case was before the Alabama Supreme Court on the propriety of the trial judge's order granting summary judgment, the appellate court discussed only the plaintiff's evidence; therefore, the defendant's side of the case is unavailable. The posture of the case, however, indicates that the reperter's version of the interview differed from that of the deputy commissioner.

it relates to summary judgments and directed verdicts. The argument has been that recklessness, as it is commonly understood, makes the factual issue turn upon the state of mind of the reporter, which in turn raises questions of credibility. If there is a conflict in the testimony, the credibility issue must be sent to a jury just as it would if the standard were negligence.

There is no guarantee, however, that a jury will successfully distinguish between recklessness and negligence. Indeed, there is a high probability that a jury will confuse the standards in a way that would be difficult, if not impossible, for a judge to detect for purposes of a judgment notwithstanding the verdict. Suppose that the case were sent to the jury to resolve the crucial questions of credibility under a recklessness standard. Unfortunately, the judge will probably give instructions that cover all of the issues in the case. Rarely will the parties agree to send the case to the jury with a single instruction that the only issue in the case is credibility. Given only general instructions on recklessness, the jury may reason somewhat like this: the reporter did not do what a reasonable reporter would have done; therefore he did not care whether the story was true. Of course, that is not what lawyers have in mind by the notion of recklessness, but it would not be illogical for a jury to reason in that way. Furthermore, if the trial judge were seriously to attempt instructing the jury so as to prevent this line of reasoning, the instructions might well make the inference more attractive to the jurors by drawing their attention to it.[25]

The dispute illustrated by *Mills* is a common one. Reporters regularly base their stories on sources. When questioned directly, sources deny that they said to the reporter what the reporter stated. The truth in these matters lies sometimes one way, sometimes the other, and sometimes in between. Where credibility is a central issue in a libel case, the distinction between recklessness and negligence provides little help in deciding cases short of a full trial. Nor is there any certainty, as we have seen, that juries will use the terms correctly or that judges will be able to tell when juries have misused the terms. If this is true, and if it is applicable to any reasonably large percentage of defamation cases (it would not

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[25] *Cf.* Lakeside v. Oregon, 435 U.S. 333, 345-47 (1978) (Stevens, J., dissenting) (instruction not to draw inference from defendant's failure to testify may tempt jury to draw just that inference).

be applicable to all of them), then the much-vaunted distinction between negligence and recklessness, and thus the importance of characterizing the plaintiff as a public or private figure, appears evanescent.