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THE MARYLAND COURT OF APPEALS:
STATE DEFAMATION LAW IN THE WAKE OF
GERTZ v. ROBERT WELCH, INC.

It is of profound importance for the Court to come to rest in the defamation area . . . .

Justice Blackmun, concurring in Gertz v. Robert Welch, Inc.1

In New York Times Co. v. Sullivan,2 a landmark decision applying first amendment principles to state defamation law, the Supreme Court ruled that a public official could not recover damages in a libel action against a newspaper unless there were proof of actual malice.3 Although the Court has extended the New York Times constitutional privilege to other situations, it has never applied first amendment principles to purely private defamations.4 Instead, private defamations — actions involving a private plaintiff and a nonmedia defendant and defamatory statements of a nonpublic nature — traditionally have been governed by common law principles. In Gertz v. Robert Welch,

3. The Court held that in cases where the plaintiff was a public official, the first amendment conferred a qualified privilege upon a defamatory statement made by the defendant. This privilege could be overcome only by a showing that the statement had been made with "actual malice," that is, with knowledge that the statement was false or with reckless disregard as to its truth or falsity. See 376 U.S. at 279; notes 90 to 104 and accompanying text infra.
Inc., a defamation case with a private plaintiff and a media defendant, the Court attempted to strike conclusively the correct balance between the state's interest in compensating the private plaintiff for the injury to his reputation and the media defendant's constitutional right to free expression. On its face, the Gertz decision did not control cases in which the defendant was not a member of the media. In Jacron Sales Co. v. Sindorf and General Motors Corp. v. Piskor, however, the Maryland Court of Appeals confronted two cases of purely private defamation and decided to apply Gertz, rather than the common law principles that had previously governed defamation actions in Maryland.

During the period between the Supreme Court's decision in New York Times and the Court of Appeal's decision in Jacron, the law of defamation in Maryland had been divided into two branches. One branch flowed from the common law tradition and was based upon society's ancient concern with providing a remedy for injury to personal reputation. The second flowed directly from the New York Times case.

6. Id. at 351. The Court found that Gertz did not qualify as a public figure under either of its alternative bases:
   In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. Id. at 351. Prior to Gertz, the accepted statement of the constitutional standard regarding public figures was found in Chief Justice Warren's concurring opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967): "[M]any who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." Id. at 164. The Gertz decision narrowed Chief Justice Warren's definition, and the Gertz test in turn was narrowed in Time, Inc. v. Firestone, 424 U.S. 448 (1976), where the Court held that a prominent and wealthy socialite involved in a widely publicized divorce proceeding was not a public figure.
7. Id. at 342-48.
8. See notes 53, 132 & 133 and accompanying text infra.
11. 276 Md. at 592, 350 A.2d at 695; 277 Md. at 171, 352 A.2d at 814.
12. In the middle ages reputation was considered sacred, and men were prepared to duel to defend their honor and good name. It was in part to provide a remedy for injury to reputation and in part to prevent a resort to violence that the local feudal courts heard actions for defamation. See Developments in the Law — Defamation, 69 Harv. L. Rev. 875, 877 (1956). Early penalties ran the gamut from the violent to the absurd. In King Alfred's reign, a slanderer could have his tongue cut out. However, some penalties seemed designed merely to embarrass the culprit; for example, a slanderer could be made publicly to call himself a liar while holding his nose with his fingers. In addition, damage payments were available even in the earliest claims.
The divergence of defamation law into two branches was taken for
granted until the Gertz decision, which held that the New York Times
standard for determining the liability of media defendants in defama-
tion actions did not adequately protect the reputation of private plaintiffs.
The Court encouraged the states to formulate alternative standards
less stringent than strict liability, but it also limited the power of
the states to grant presumed and punitive damages in cases involving
private plaintiffs and media defendants. The Court’s holdings blurred
the distinctions between the common law and constitutional branches,
on the one hand, by expanding the states’ roles in defining constitu-
tionally acceptable standards of liability for media defendants and, on
the other, by limiting the traditional common law scheme of damages
in defamation cases. Because Gertz altered many of the common law
principles of libel and slander that had governed actions against media
defendants, the decision raised questions about the vitality of the com-
mon law approach in other kinds of defamation cases. Furthermore,
it was unclear whether Gertz should be limited to cases involving media
defendants or whether its holdings should apply to all cases where the
plaintiff is a private person.18 Maryland chose the latter view.

See Veeder, The History and Theory of the Law of Defamation, 3 COLUM. L. REV.
546, 548-49 (1903).

After the decline of the local feudal courts in England, jurisdiction over
defamation actions became fragmented. While the ecclesiastical courts punished the
"sin" of slander by imposing penance upon the guilty party, the common law courts
punished only those offenders whose actions had resulted in demonstrable “temporal
damages” to the plaintiff. See Ogden v. Turner, 87 Eng. Rep. 862 (1703). The crime
of political libel was the province of the Star Chamber, which eventually acquired
jurisdiction over civil libel as well. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS
738 (4th ed. 1971) [hereinafter cited as PROSSER].

418 U.S. 323 (1974); Letter Carriers v. Austin, 418 U.S. 264 (1974); Rosenbloom
v. Metromedia, 403 U.S. 29 (1971); Greenbelt Cooperative Publishing Ass’n v.
Bresler, 398 U.S. 6 (1970); St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley
Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Curtis Publishing Co. v. Butts,
388 U.S. 130 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Linn v. Plant Guard
Louisiana, 379 U.S. 64 (1964).

14. The first amendment to the United States Constitution provides in part that
“Congress shall make no law . . . abridging the freedom of speech, or of the press.”


16. 418 U.S. at 347.

17. Id. at 349.

18. For a description of the defamation landscape after Gertz, see Eaton, The
American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An
In Jacron and Piskor, the Court of Appeals unified the common law and constitutional doctrines of defamation by applying Gertz to cases of purely private defamation. The court decided that, as a matter of state law, in the absence of a privilege a negligence standard of liability should be applied in all private defamation cases, regardless of the nature of the statement or the identity of the defendant.20 In reaching this resolution, the court reshaped the common law of defamation in the Gertz constitutional mold. Although no other state court had adopted a unitary approach to defamation law,21 the two branches of the law were joined in Maryland under the principles of the Gertz decision.

This note will examine these Court of Appeals decisions in two contexts: first, the implications of the decisions for the future of common law defamation actions in Maryland and other jurisdictions, and second, the extent to which Gertz mandates such fundamental changes in state defamation law.

**Two "Purely Private" Defamations**

Both Jacron Sales Co. v. Sindorf22 and General Motors Corp. v. Piskor23 involved purely private defamations; neither plaintiff was a public figure, the defamatory statement did not relate to a matter of public interest, and neither defendant was a member of the media. In Jacron, the plaintiff, Jack Sindorf, resigned after working eighteen months as a construction tools salesman for the Jacron Sales Company. Sindorf notified his employer that he intended to retain company inventory until he received unpaid commissions and other expenses.24 Subsequently, the vice-president of Jacron gratuitously volunteered to Sindorf’s new employer that upon Sindorf’s departure there were “quite a few cash sales and quite a bit of merchandise uncounted [sic] for.”25 The trial court, ruling that Sindorf had established slander per se but that Jacron was protected by a common law

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19. See 276 Md. at 596, 350 A.2d at 697.
20. See, e.g., Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975); notes 140 to 172 and accompanying text infra.
23. 276 Md. at 582, 350 A.2d at 689-90.
24. Id. at 582-83, 350 A.2d at 690.
25. The general rule at common law was that slander was not actionable without proof of special damages. Slander per se was an exception to this general rule and did not condition a plaintiff’s recovery on proof of actual harm. Four kinds of slander
were labeled per se at common law and included words imputing crime, loathsome disease, unchastity to a woman, and words reflecting unfavorably upon a person's business, trade, profession or office. See Prosser, supra note 12, at 754-60. See generally Murnaghan, From Figment to Fiction to Philosophy — The Requirement of Proof of Damages in Libel Actions, 22 Cath. U.L. Rev. 1 (1972).

26. Common law privileges — immunities from liability for defamatory statements — are grounded in social policies that encourage and protect some communications. Absolute privileges, or complete immunity from liability, are limited to a few areas of expression including legislative and judicial proceedings, executive communications, political broadcasts, situations in which the plaintiff has consented to the publication of the statement, and where one spouse has made a statement about the other. See Prosser, supra note 12, at 766-85. Qualified or conditional privileges are available only where the communication is made "in a reasonable manner and for a proper purpose," see Prosser, supra note 12, at 785-92, and are defeasible upon a showing of malice or a showing that the defendant has otherwise abused the privilege. See note 27 infra. Generally some common interest or duty must exist between the publisher and the recipient, and the communication must be reasonably designed to protect or further that interest. See Hanrahan v. Kelly, 269 Md. 21, 28, 305 A.2d 151, 156 (1973). Qualified privileges are available to the publisher who makes a statement to protect his own interests, the interest of others, or an interest shared by the recipient. Further, communications to law enforcement officers or others acting in the public interest are conditionally privileged, as are fair comments on matters of public concern and reports of public proceedings. See Prosser, supra note 12, at 785-92. For example, in Jacron the common interest arose between former and present employers. Sindorf v. Jacron Sales Corp., 27 Md. App. 53, 69, 341 A.2d 856, 866 (1975). See also Hanrahan v. Kelly, supra, Deckelman v. Lake, 149 Md. 533, 131 A. 762 (1926); Bavington v. Robinson, 124 Md. 85, 91 A. 777 (1914); Fresh v. Cutter, 73 Md. 87, 20 A. 774 (1890). In Piskor, the privilege was based upon General Motors’ interest in protecting itself against theft. See General Motors Corp. v. Piskor, 27 Md. App. 95, 126-27, 340 A.2d 767, 787-88 (1975); Prosser, supra note 12, at 786. Where a defendant alleges that a qualified or conditional privilege insulates him from liability for a defamatory statement, the plaintiff may overcome this defense by showing that the statement was made maliciously or in an unreasonable manner. See generally Prosser, supra note 12, at 794-95. The concept of malice has gradually been narrowed. See note 27 infra.

27. In early cases, common law or “express” malice was defined by the courts in terms of “ill-will,” “malicious feeling,” and “evil intent,” although the same cases also indicated that malice involved elements of knowing falsity and gross negligence. See, e.g., Deckelman v. Lake, 149 Md. 533, 131 A. 762 (1926); Fresh v. Cutter, 73 Md. 87, 20 A. 774 (1890). Recent Maryland cases have emphasized the standard of actual malice, or reckless disregard for the truth. See Orrison v. Vance, 262 Md. 285, 277 A.2d 573 (1971); Stevenson v. Baltimore Baseball Club, Inc., 250 Md. 482, 243 A.2d 533 (1968). A finding of malice under Maryland law has not been limited to these characterizations, however. The court in Orrison v. Vance noted that

[i]n determining an abuse of privilege all relevant circumstances are admissible . . . , including the defendant's reasonable belief in the truth of his statements . . . , the excessive nature of the language used . . . , whether the disclosures were unsolicited . . . , and whether the communication was made in a proper manner and only to proper parties.

jury verdict in favor of the plaintiff. Piskor, a General Motors assembly line worker, had been stopped by General Motors plant security guards after his shift. Alerted by a suspicious foreman, the guards forced Piskor into a glass-walled security checkpoint to determine whether he was concealing parts taken from one of the assembly lines. His detainment occurred in full view of approximately 5000 employees who were changing shifts. The jury found that the guards' conduct amounted to slander per se and that the defendant had lost its conditional privilege by "excessive publication."

In both cases, traditional common law principles, applied without reference to the Supreme Court defamation decisions, provided the basis for decision at the trial level. On appeal, however, the Court of Special Appeals ordered both cases reargued in order to assess the effect of the Supreme Court's recent decision in Gertz. The court decided the Jacron case first and ruled that Gertz did not extend to "purely private" defamation but applied "only when a private individual is defamed as to a matter of public or general interest," a standard that echoed the Supreme Court's pre-Gertz plurality decision in Rosenbloom v. Metromedia, Inc. The court reasoned that, regardless of the status of the defamer, in defamation of a private nature, "no First Amendment values are at stake, the application of the constitutional privilege is unnecessary and unwarranted, and the states

28. 277 Md. at 167, 352 A.2d at 812. Piskor was awarded compensatory damages of $1000 for slander, $300 for assault and $200 for false imprisonment plus $25,000 punitive damages. The Court of Appeals reversed the punitive damage award on the ground that Piskor could not recover presumed or punitive damages on the slander count unless he met the New York Times actual malice standard. Because only one award of punitive damages was made, it was not possible to determine the extent to which the award reflected the slander. Id. at 175, 352 A.2d at 817.

29. Id. at 167-68, 352 A.2d at 812-15.

30. Id. at 168, 352 A.2d at 813.

31. Id. at 173, 352 A.2d at 816. See also notes 26 & 27 supra.


33. Sindorf v. Jacron Sales Co., 27 Md. App. 53, 90, 341 A.2d 856, 878. See Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975), which reached the same result through analysis similar to that used by the Court of Special Appeals. Calero is discussed at notes 158 to 166 and accompanying text infra.

34. 403 U.S. 29 (1971). See notes 99 & 100 and accompanying text infra. The Court of Special Appeals acknowledged that the Supreme Court in Gertz had rejected the Rosenbloom plurality opinion. 27 Md. App. at 85, 341 A.2d at 876. The court's reliance upon the Rosenbloom test is therefore somewhat inexplicable, even if one accepts the court's conclusion that "[a]s every decision on the subject from New York Times to Gertz shows, the 'speech that matters' is that relating to issues of general or public interest." Id. at 89, 341 A.2d at 878.
are free to define the limits of recovery.\(^3\)\(^3\)\(^5\) State common law therefore controlled.\(^8\)

In *Jacron*, the first of the companion cases to reach the Court of Appeals, the court agreed with the lower court's characterization of the case as one of purely private defamation but differed with the determination that *Gertz* was inapplicable.\(^8\)\(^7\) The Court of Appeals rejected the Court of Special Appeals' view that in cases where the plaintiff is a private person, the first amendment protected only speech relating to the "general or public interest." The court noted that *Gertz* had rejected the public interest test for applying the *New York Times* standard of actual malice because it afforded insufficient protection to the reputation of a private person injured by defamatory material.\(^8\)

Having dispensed with the public interest test advanced by the lower court, the Court of Appeals did not retreat to the familiar boundaries of the common law; instead, it held that *Gertz* applied to all cases of private defamation regardless of the status of the defendants\(^3\)\(^9\) and that negligence was the appropriate standard for determining liability.\(^4\)\(^0\) As a result, the plaintiffs in *Jacron* and *Piskor* could not merely establish defamation per se and recover on a theory of strict liability; proof of some fault on the part of the defamers would be necessary. In addition, the court retained the common law conditional privileges, which can be overcome only by meeting the more stringent

\(^{35}\) 27 Md. App. at 90, 341 A.2d at 878.

\(^{36}\) Id. at 93, 341 A.2d at 880. In *Piskor*, the Court of Special Appeals outlined the options available to it in *Jacron*:

> We saw three paths which could be followed in applying [the *Gertz* holdings]:
> (1) they applied to all defamations; (2) they applied only to defamations involving matters of public or general interest, thus excluding purely private defamations; [or] (3) they applied only to defamations in which the media were the means of the defamatory injury. We avoided the first path because we believed that it was not constitutionally required that we follow it. Its route led to a scuttling of much of the prevailing defamation law of Maryland as to matters which were of no concern to the First Amendment freedoms of speech and press. We chose the second path and rejected the third for reasons fully set out in *Jacron*.

\(^{37}\) 276 Md. at 584, 350 A.2d at 690-91.

\(^{38}\) Id. at 588-89, 350 A.2d at 693.

\(^{39}\) Id. at 592, 350 A.2d at 695. The Court of Special Appeals likewise rejected the notion that *Gertz* applied only in a media context, for the reason that "[n]on-media defendants . . . may also be an important source of public interest items [and to] leave them unprotected would defeat the whole purpose of the constitutional privilege."

\(^{40}\) 276 Md. at 596-97, 350 A.2d at 697-98.
standard of actual malice traditionally required in Maryland. Two months after *Jacron* the Court of Appeals, in *General Motors Corp. v. Piskor*, reaffirmed its application of the *Gertz* principles to state defamation law. In reviewing the award of punitive damages to Piskor, it adopted the *Gertz* holding on damages, which permits the award of presumed or punitive damages only where the *New York Times* standard for actual malice — knowing or reckless falsity — is satisfied.

**Practical Effects**

On a practical level, the Court of Appeals' decisions in *Jacron* and *Piskor* changed the complexion of defamation actions in Maryland. A brief summary of the impact of the decisions upon various aspects of the typical cause of action indicates the scope of these changes.

**Plaintiffs**

*Jacron* was the first decision that applied the Supreme Court's defamation decisions to a private plaintiff in a suit arising from private defamation. After *Jacron* the principles of *Gertz* govern all private defamation plaintiffs without regard to the subject matter of the defamatory statement. In order to satisfy *Gertz*, private plaintiffs must show some fault on the part of the defendant and prove actual damages. If they seek to recover presumed and punitive damages, they must meet the *New York Times* standard for actual malice. These requirements apply regardless of whether a plaintiff has been defamed by a newspaper story or by an oral statement of a neighbor. Plaintiffs who are public figures or officials will continue to be governed by the Supreme Court’s decision in *New York Times*. In

41. *Id.* at 597–601, 350 A.2d at 698–700. See note 27 *infra*; notes 83 to 85 and accompanying text *infra*.
42. 277 Md. 165, 352 A.2d 810 (1976).
43. *Id.* at 171–72, 352 A.2d at 814–15.
44. *Id.* at 174–75, 352 A.2d at 816–17.
46. *See* notes 140 to 172 and accompanying text *infra*.
47. 276 Md. at 590, 350 A.2d at 694.
48. *See* 418 U.S. at 347; 276 Md. at 596–97, 350 A.2d at 696; notes 71 to 76 and accompanying text *infra*.
49. *See* 418 U.S. at 349–50; notes 86 to 89 and accompanying text *infra*.
50. *See* 276 Md. at 592–93, 350 A.2d at 695; notes 53 to 55 and accompanying text *infra*.
51. *See also* cases cited in note 13 *supra*. 
order to recover any damages, they must prove actual malice on the part of the defendant.\textsuperscript{52}

**Defendants**

The Court of Appeals refused to confine \textit{Gertz} to cases involving media defendants, though it acknowledged that “[i]t is plain that the holding in \textit{Gertz} was limited to media expression.”\textsuperscript{53} Rather, the court predicted that the Supreme Court was likely to extend the \textit{Gertz} decision to nonmedia defendants, as it had with \textit{New York Times}.\textsuperscript{54} Furthermore, the court observed that it would be illogical and improper to apply one standard of fault to media defendants and a different standard to nonmedia defendants.\textsuperscript{55} The consequence of this reasoning is that strict liability for defamatory statements will no longer be imposed upon any defendant in Maryland; some degree of fault must be shown.\textsuperscript{56} In practice, moreover, few private defendants will be held to a negligence standard because most “private” defamations, as in \textit{Jacron} and \textit{Piskor}, arise in the context of one or more of the common law conditional privileges,\textsuperscript{57} which continue to be available under the Court of Appeals decisions.\textsuperscript{58} If a defendant is protected by a common law privilege, he will be liable only on a showing

\textsuperscript{52} See 418 U.S. at 342-43.

\textsuperscript{53} 276 Md. at 590, 350 A.2d at 694. It should be noted that the Supreme Court established a balancing scheme in \textit{Gertz}: “[t]he need to avoid self-censorship by the news media” was weighed against “[t]he legitimate state interest [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood.” 418 U.S. at 341. See notes 130 & 137 and accompanying text infra.


\textsuperscript{55} The court noted that “[i]ssues of public interest may equally be discussed in media and non-media contexts, and the need for a constitutional privilege, therefore, obtains in either case.” 276 Md. at 592, 350 A.2d at 695. See notes 134 to 137 and accompanying text infra.

\textsuperscript{56} 276 Md. at 596-97, 350 A.2d at 697-98.


\textsuperscript{58} See notes 83 to 85 and accompanying text infra.
of malice, either New York Times malice or one of the alternative standards still available in Maryland.\(^{59}\)

**Pleading**

Citing the "compelling need for consistency and simplicity in the law of defamation," the Court of Appeals ended the ancient common law dichotomy between libel and slander.\(^{60}\) It seems clear that a plaintiff will no longer suffer any penalty for incorrectly labelling his cause of action;\(^{61}\) indeed, the characterization of a defamatory statement as libel or slander after Jacron will have little practical significance.\(^{62}\) Furthermore, it seems apparent that the common law per se per quod distinction\(^{63}\) retains little meaning. Under the common law, a finding that a defamatory statement was libel or slander per se raised a conclusive presumption that the plaintiff had suffered injury to his reputation, and damages, both compensatory and punitive, could be awarded without further proof of extrinsic facts.\(^{64}\) In contrast, libel or slander per quod required a showing of injury to the plaintiff from the defamatory statement.\(^{65}\) Under the Jacron negligence standard, even a statement that is labeled defamation per se must be shown to

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59. The court in Jacron gave no guidelines for determining when the New York Times standard of malice should be applied. Instead, the court merely noted that "the reckless disregard standard now appears to be firmly established in Maryland as a test, albeit not the exclusive test, for abuse of a conditional privilege." 276 Md. at 600, 350 A.2d at 699. See note 27 supra.

60. 276 Md. at 593, 350 A.2d at 696. The different rules applying to libel and slander evolved largely as a historical accident. See Prosser, supra note 12, at 751-52. See generally authorities collected in note 12 supra.

61. For an example of the difficulties presented by the libel-slander distinction, particularly where the defamatory "statement" is an act or a gesture, see General Motors Corp. v. Piskor, 27 Md. App. 95, 115, 340 A.2d 767, 781 (1975). If the count alleging slander had referred to tortious acts which were in fact libel, the plaintiff could not have prevailed. See generally cases cited in 71 A.L.R.2d 808; M & S Furniture Sales Co., Inc. v. De Bartolo Corp., 249 Md. 540, 241 A.2d 126 (1968); American Stores Co. v. Byrd, 229 Md. 5, 181 A.2d 333 (1962); Thompson v. Upton, 218 Md. 433, 146 A.2d 880 (1958); Negley v. Farrow, 60 Md. 158 (1883).


64. See Prosser, supra note 12, at 762-63.

65. Id. at 762.
have been made negligently and to have injured the plaintiff.  

It should be noted that the Gertz holding was specifically limited to cases in which "the substance of the defamatory statement 'makes substantial danger to reputation apparent.' " But the Court in Gertz did not indicate how the standard of liability would change if the defamatory meaning of a statement were not clear enough on its face to warn the reasonably prudent editor of its potentially damaging character. Nevertheless, the negligence standard would seem to be an adequate safeguard to ensure that a publisher is not held liable for a statement that gives no hint on its face of its defamatory meaning. Presumably, negligence could not be shown if the statement gave the publisher no reason to investigate further the truth or falsity of the statement in relation to the plaintiff.

Standard of Liability

The Court of Appeals noted in Jacron that Gertz left the states free to choose any standard except strict liability in cases involving private plaintiffs. The court concluded, however, that the Supreme Court had expressed a clear preference for a negligence standard.

66. See Piskor, 277 Md. at 175, 352 A.2d at 817; note 88 and accompanying text infra.

67. For an argument that Gertz does not eliminate the per se — per quod distinction, see Note, Gertz v. Robert Welch, Inc.: Constitutional Privilege and the Defamed Private Individual, 8 J. MAR. J. PRAC. & PROC. 531, 554 (1975).

68. 418 U.S. at 348.

69. Id. However, the Court cited Time, Inc. v. Hill, 385 U.S. 374 (1967). In that case, the plaintiffs brought an action under a New York right of privacy statute for an article which appeared in Life magazine about a play allegedly based on the Hill family's ordeal at the hands of three escaped convicts. The Court held that the magazine could be found liable only upon a showing of knowing or reckless falsehood, the New York Times actual malice standard. 385 U.S. at 390. The Court called negligence a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.

Id. at 389.

It is possible that the Court would require the plaintiff to show actual malice in cases where the defamatory meaning is not clear on its face. It is more likely, however, that the Court would accept a negligence standard as adequate protection of the rights of a media defendant in such cases. See note 70 and accompanying text infra.

70. See Defamation Through Gertz, supra note 18, at 1427-28.

71. 276 Md. at 595, 350 A.2d at 697.

72. Id. at 594-95, 350 A.2d at 696-97. See also Defamation Through Gertz, supra note 18, at 1426-27. It should be noted that the majority opinion in Gertz left the
and it adopted the formulation set forth in Restatement (Second) of Torts § 580B.:

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a [purely] private matter [not affecting his conduct, fitness or role in his public capacity], is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other,

(b) acts in reckless disregard of these matters, or

(c) acts negligently in failing to ascertain them.

The Jacron court also established the quantum of proof necessary to establish fault as a preponderance of the evidence, the same standard applied in other negligence actions. Although the court predicted that trial courts and juries would encounter few problems in applying the new negligence standard in private defamation cases, the concept of reasonable conduct in relation to defamatory statements lacks controlling precedents; a definition must be developed on a case by case basis.

choice of standard to the states, and it is possible for them to establish a standard other than negligence. See notes 123 to 130 and accompanying text infra.

73. Tentative Draft No. 21, 1975. See generally Wade, Defamation, the First Amendment and the Torts Restatement, 11 THE FORUM 3 (1975) [hereinafter cited as Wade]. This standard also covers public figures or officials when the defamatory statement relates to a private matter. The Supreme Court defamation decisions have left open the question of defendant's liability in such cases. See Defamation Through Gertz, supra note 18, at 1443-48. With the adoption of § 580B, however, Maryland appears to have chosen the negligence standard. It should be noted that the court adopted a proposed version of § 580B, Tentative Draft No. 21, which was subsequently not adopted by the American Law Institute. The language omitted from the official text of § 580B appears in brackets. See note 135 infra.

74. 276 Md. at 596-97, 350 A.2d at 697-98. The court specifically rejected the "clear and convincing" standard which some courts have incorporated into their defamation decisions, see, e.g., Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975), apparently because the Supreme Court used such language in New York Times, 376 U.S. at 285-86. The Maryland court declined to adopt the standard because it felt that nothing in Gertz mandated its use and because the preponderance of the evidence standard was required in other forms of action for negligent conduct. 276 Md. at 597, 350 A.2d at 698.

75. 276 Md. at 596, 350 A.2d at 697.

76. The court pointed out, however, that "the negligence standard is not unknown to common law defamation." Id. at 596, 350 A.2d at 697. For example, in some jurisdictions a showing of negligence defeats a conditional privilege. See 1 F. HARPER & F. JAMES, LAW OF TORTS § 5.27 n.16 (1956); RESTATEMENT OF TORTS § 601 (1938). A negligence standard has also been applied in connection with the issue of
Proof

Jacron held that "truth is no longer an affirmative defense,"\textsuperscript{77} and shifted the traditional burden of proving truth or falsity from the defendant to the plaintiff.\textsuperscript{78} The court reasoned that because the plaintiff is required to prove negligence with respect to the falsity of the statement, he should also be expected to prove falsity.\textsuperscript{79} The notion that the burden should shift can be traced to the New York Times decision, which cautioned that the common law defense of truth, with the burden of proof on the defendant, fostered media self-censorship.\textsuperscript{80} Nevertheless, the Supreme Court in New York Times did not place the burden of proof upon the plaintiff but instead formulated the constitutional privilege to shield speech protected by the first amendment.\textsuperscript{81} The Gertz opinion likewise did not address the question which party should bear the burden of proving falsity.

Whatever the source of its inspiration, the Court of Appeals' decision to shift the burden may substantially complicate prosecution of a plaintiff's case. When the burden of proof was on the defendant, the defamatory statement was presumed to be false, and truth was an issue only if the defendant specially pleaded the defense.\textsuperscript{82} It is unclear how the shift will affect this presumption of falsity. Under Jacron proof of falsity apparently has become an essential element of each plaintiff's case. In Piskor, where the guards' suspicions that Piskor was carrying out stolen parts proved to be unfounded, the plaintiff's burden of showing falsehood was easily satisfied. In contrast, if the defamatory statement were that the plaintiff habitually stole parts from the assembly line, proving the statement's falsity would be more difficult, and the burden would seem to lie more properly with the defendant. The practical difficulties of proving some plaintiffs' cases may be so great that the abolition of the affirmative defense will be given little effect by the courts beyond the form of the pleadings.

\textsuperscript{77} 276 Md. at 597, 350 A.2d at 698. See Md. R.P. 342, § c(2)(h).
\textsuperscript{78} 276 Md. at 597, 350 A.2d at 698.
\textsuperscript{79} Id. See Orrison v. Vance, 262 Md. 285, 294, 277 A.2d 573, 577 (1971), in which the Court of Appeals noted that the plaintiff had "the burden of proving not only actual malice but also that the statements [were] false." \textsuperscript{80} See 376 U.S. 279; Defamation Through Gertz, \textit{supra} note 18, at 1381-86.
\textsuperscript{81} Id.
\textsuperscript{82} See PROSSER, \textit{supra} note 12, at 798.
Conditional Privilege

The Jacron court refused to abandon the common law conditional privileges which attach to most cases of private defamation and rejected the suggestion that the negligence standard precluded their use, even though unreasonable conduct on the part of the defendant traditionally had been one basis for defeating a conditional privilege.

The court retained the malice standard as a basis for overcoming a conditional privilege and it adopted the New York Times standard of knowing falsity or reckless disregard for the truth as one of the tests of malice, though not the exclusive one. Thus the court preserved the common law doctrine of conditional privilege but related it to the Supreme Court decisions by incorporating the New York Times definition of actual malice.

Damages

In Piskor the Court of Appeals held that a plaintiff can recover only actual damages as defined by the Supreme Court in Gertz unless he satisfies the New York Times standard of actual malice in connection with the publication of falsity. Damages may compensate not only for measurable pecuniary loss but also for injury to reputation and infliction of mental distress. Given the obvious difficulties in

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83. 276 Md. at 598-99, 350 A.2d at 699. But see Wade, supra note 73, at 10.

84. See note 27 supra.

85. The court noted that the thrust of recent defamation cases in Maryland has been to emphasize the reckless disregard of truth standard. See Orrison v. Vance, 262 Md. 285, 277 A.2d 573 (1971); Stevenson v. Baltimore Baseball Club, Inc., 250 Md. 482, 243 A.2d 533 (1968); notes 27 & 59 supra.

86. 418 U.S. at 349-50. The Supreme Court's enumeration of the harms encompassed in the term "actual injury" was by way of example rather than limitation. The Court left a certain amount of discretion to the trial court's "wide experience in framing appropriate jury instructions in tort actions." Id. at 350.

87. See 418 U.S. at 349-50. One critic saw real mischief here. Negligent infliction of mental distress by publishing falsehood may well be a tort, but it is not the tort of defamation. If the essence of the law of defamation is to be preserved in the wake of the [Supreme] Court's destruction of the conclusive presumption of injury, a defamation plaintiff must first prove impairment of reputation before he is entitled to recover for personal humiliation and mental anguish or suffering.

proving compensable harm to reputation, the elimination of presumed damages will make the recovery of damages more difficult.88

On the other hand, by retaining the availability of the conditional privilege and its accompanying actual malice standard, the court has assured any plaintiff who is able to defeat a conditional privilege of the possibility of recovering punitive damages. Therefore, most private plaintiffs will not be denied the traditional remedy of punitive damages.89

DEFAMATION AND THE FIRST AMENDMENT

The constitutional branch of defamation law that provided the basis for the Court of Appeals decisions in Jacron and Piskor is of relatively recent origin. Prior to the Supreme Court's decision in New York Times Co. v. Sullivan,90 libelous statements were considered undeserving of first amendment protection.91 Thus, at common law,

88. See Developments in the Law — Defamation, 69 HARV. L. REV. 875, 934-40 (1956). The limitation of damages holding also affects the per se — per quod distinction. With presumed damages no longer permissible merely because the statement is defamatory on its face, the per se label has no practical meaning. See note 67 and accompanying text supra.

89. Most private defamation arises in the context of a conditional privilege; any plaintiff who overcomes this privilege by a showing of actual malice is entitled to receive punitive damages under Gertz. It should be noted that the plaintiff may be allowed to recover punitive damages without proving actual damages in cases where he has satisfied the burden of showing New York Times actual malice. See Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976); Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976). However, in no case under Jacron will the plaintiff be allowed punitive damages merely by showing that the defendant had made a statement defamatory on its face.


91. See Bogen, The Supreme Court's Interpretation of the Guarantee of Freedom of Speech, 35 Md. L. Rev. 555, 573-74, 604 (1976). In Near v. Minnesota ex rel. Olson, 283 U.S. 697, 715 (1931), the Court, in articulating the constitutional prohibition of prior restraints, made clear that it was not disturbing the laws relating to defamation. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnote omitted) reiterated this view:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.

Again in Beauharnais v. Illinois, 343 U.S. 250, 266 (1952), the Court found libelous statements "not . . . within the area of constitutionally protected speech," and this statement was quoted with approval by the Court in Roth v. United States, 354 U.S. 476, 486-87 (1957). See Konigsberg v. State Bar, 366 U.S. 36, 49-50 & n.10 (1961). See also Times Film Corp. v. Chicago, 365 U.S. 43, 48 (1961); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 517-62 (1970). The Court in New York Times, however, found that its previous statements on the subject did not close the door to its application of constitutional
publishers of allegedly defamatory statements could avoid liability only through asserting the defenses of truth or privilege. The *New York Times* decision arose from an Alabama public official's claim that he had been libeled by a newspaper advertisement that sought support for the civil rights movement in the South. The Court concluded that the traditional defenses did not offer sufficient protection to freedom of expression, and it articulated a new privilege derived from first amendment principles. As a consequence of this privilege, the plaintiff could recover damages against the newspaper only by showing that the defamatory statement had been made with "actual malice," defined by the Court as knowledge that the statement was false, or recklessness regarding its truth or falsity. Three years later, in *Curtis Publishing Co. v. Butts*, the Court reiterated its concern for protecting free and unfettered public debate, extending the first amendment privilege and the accompanying actual malice standard to defamatory statements concerning "public figures." The willingness of a

92. See 276 Md. at 584, 350 A.2d at 691.
93. 376 U.S. at 279-80. The Court reasoned that critics of public officials should be allowed freedom of comment similar to that afforded the officials themselves. Id. at 282. See Barr v. Matteo, 360 U.S. 564 (1959) (publications made by public officials in the line of duty are absolutely privileged).
94. In effect, the Court in *New York Times* expanded the common law privilege of fair comment and gave it a constitutional basis. See Defamation Through Gertz, supra note 18, at 1366-67.
95. 376 U.S. at 279-80. Knowledge of falsity in this context is equivalent to the element of scienter required in actions for misrepresentation. See Prosser, supra note 12, at 821.
96. 388 U.S. 130 (1967). In *Curtis*, the Court considered two cases of libel. One involved an action by Wallace Butts, the well-known coach of the University of Georgia football team, against the *Saturday Evening Post* for an article which charged that he had "fixed" the game between Georgia and the University of Alabama. The second action was brought by Edwin Walker, a private citizen well-known for his political views, against the Associated Press for a misleading account of his role in riots on the campus of the University of Mississippi. Trial juries in both cases awarded large sums in compensatory and punitive damages. The Supreme Court reversed the judgment against Walker but found that both plaintiffs were "public figures." Id. at 154. See note 97 infra.
97. Id. at 163-64 (Warren, C.J., concurring). Justice Warren's concurring opinion became the accepted statement of the constitutional standard regarding defamation of public figures. See note 6 supra. Justice Harlan, who announced the Court's result, would have allowed recovery if the plaintiff were able to show, not actual malice, but "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 155. It should be noted that Justices Black and Douglas in this case, id. at 170 (Black & Douglas, JJ., dissenting and concurring), as in New York
majority of the Court to extend the application of the actual malice standard ended with *Rosenbloom v. Metromedia, Inc.* Although the plaintiff in *Rosenbloom* was neither a public official nor a public figure, a three-justice plurality favored the extension of the constitutional privilege to defamers of private individuals where the allegedly defamatory statements concerned matters of general or public interest. Statements regarding public issues were considered deserving of the same first amendment protection as the statements in *New York Times* and *Butts*.

This view shifted the focus of judicial inquiry from the status of the person defamed to the subject matter of the defamation, and it divided the Court. Because the *Rosenbloom* doctrine rested on the unstable foundation of a plurality opinion, the law was left in a state of uncertainty as to whom and under what circumstances the constitutional privilege should apply. In *Gertz v. Robert Welch, Inc.* the Court returned to the issue raised by *Rosenbloom*. The *Gertz*
case provided the Court with an opportunity to retreat to a "common
ground" from which a majority standard might be constructed.\(^{104}\)

The plaintiff in *Gertz* was an attorney in a civil suit brought
by the family of a young man who had been shot by a Chicago police-
man. An article published by *American Opinion*, the organ of the John
Birch Society, on the subject of the policeman's criminal trial labeled
the plaintiff a "Leninist" and a "Communist-fronter."\(^{105}\) The article
contained serious inaccuracies, yet the managing editor had not at-
ttempted to verify these statements.\(^{106}\) Having first determined that
Gertz was not a public figure,\(^{107}\) the Court, speaking through Justice
Powell, held that the *New York Times* actual malice standard did not
apply to defamatory statements concerning private plaintiffs.\(^{108}\) Fur-
ther, the Court ruled that so long as states did not impose liability
without fault, they were free to define "the appropriate standard of
liability for a publisher or broadcaster of defamatory falsehood in-
jurious to a private individual."\(^{109}\) Although it left formulation of
the standard of conduct to the states, the Court indicated that a negli-
gence standard was preferable.\(^{110}\) The Court rejected the "public or
general interest" test of the plurality in *Rosenbloom*, finding that test
inadequate either to secure free expression or to protect private reput-
ation.\(^{111}\) Instead, the Court adopted a different approach to balancing
the state interest in protecting the reputations of private plaintiffs
against defamatory falsehoods and the constitutional interest in free
and uninhibited press. It prohibited the recovery of presumed or punit-
tive damages except where the plaintiff met the more demanding

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104. *Id.* at 339. Justice Blackmun, who had joined the plurality opinion in *Rosenbloom*, concurred separately in *Gertz* to provide the vote that made the decision a majority holding. *Id.* at 353-54.

105. *Id.* at 325-26.

106. *Id.* at 327.

107. See note 6 *supra*. The Court reasoned that those who put themselves in the public limelight would by virtue of their status have easier access to the media to rebut false statements than would a private person. 418 U.S. at 344.

108. *Id.* at 343.

109. *Id.* at 347.

110. *Id.* at 347-48. The implication is even clearer in Justice Blackmun's con-
curring opinion. *Id.* at 353; Chief Justice Burger's dissenting opinion, *id.* at 355; Justice Brennan's dissenting opinion, *id.* at 366. However, the Court limited its holding to those cases in which "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Id.* at 348 (citing Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (Harlan, J.)). See notes 68 to 76, 97 and accompanying text *supra*.

111. *Id.* at 346. The Court reasoned:

On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times* . . . . On the
burden of showing *New York Times* actual malice. Absent a showing of knowledge of falsity or reckless disregard for the truth, the plaintiff could recover only actual damages.

In a lengthy and forceful dissent, Justice White predicted that the *Gertz* decision would produce fundamental changes in state defamation law far beyond the factual confines of the decision. Justice White contended that the law governing the defamation of private citizens had always been the province of the states, but that the Court had "federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States." He disagreed with the Court's abolition of strict liability and argued that presumed damages serve a useful function where damage to reputation defies precise proof. He noted further that

the new rule with respect to general damage appears to apply to all libels or slanders, whether defamatory on their face or not,

other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to insure the accuracy of its assertions.


112. 418 U.S. at 349. The permissibility under *Gertz* of recovering punitive damages upon a showing of actual malice leads to an interesting practical result in Maryland under the *Jacron* and *Piskor* opinions. Because a private plaintiff must show actual malice to overcome a conditional privilege, see 276 Md. at 598–600, 350 A.2d 698–700, he is automatically entitled to recover punitive damages under the *Gertz* guidelines. Therefore, in cases where the defendant claims a privilege, successful private plaintiffs satisfy the burdens for showing both liability and damages by proving actual malice. This virtually automatic award of punitive damages may be justified on the theory that the state's interest in protecting the reputation of individuals includes punishing those who defame by knowing falsehoods or recklessly, without regard to the statement's truth or falsity.

113. This limitation of recovery to actual injury was a major point of criticism in Justice White's dissent. "The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim." *Id.* at 376. See notes 117 & 118 and accompanying text infra. It has also been argued that the *Gertz* holding on actual injury would deny compensation to the plaintiff who has suffered grave damage as a result of a defamatory statement to his good name but who incurred no pecuniary loss yet, at the same time, would permit recovery by another plaintiff whose reputation might already have been tarnished but who is able to prove pecuniary loss or mental anguish. See note 87 and accompanying text supra. Cf. *Time, Inc. v. Firestone*, 424 U.S. 448, 460–61 (1976) (plaintiff withdrew claim for damages to reputation but sought compensation for "personal humiliation, and mental anguish and suffering").

114. 418 U.S. at 369–404.
116. *Id.* at 370.
117. *Id.* at 373. See note 113 supra.
except . . . when the plaintiff proves intentional falsehood or reckless disregard . . . . Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, I fail to understand.118

The majority did not agree that the decision unduly limited the states' capacity to protect their own citizens against defamatory falsehoods.119 Rather, Justice Powell insisted that the decision allowed the states wide latitude to fashion the law of defamation with only the minimal restraints necessary to protect freedom of the press.120 Despite Justice White's predictions of the "scuttling [of] the libel laws of the States in . . . wholesale fashion,"121 the Court discounted the possibility that the decision would exact such sweeping changes.122

Read narrowly, the Supreme Court's decision in Gertz can be viewed as simply an attempt to clarify the confusion engendered by the Court's plurality decision in Rosenbloom and to define more precisely the scope of the New York Times constitutional privilege.123 The Court's conclusion that application of the New York Times actual malice standard was appropriate only in the "context of libel actions brought by public persons"124 marked a retrenchment to its pre-Rosenbloom position.125 Because the Court rejected the guidelines formulated by the Rosenbloom plurality, however, it had to develop a new set of guidelines for cases in which the plaintiff is a private

118. 418 U.S. at 395.
119. See id. at 347 n.10.
120. See id. at 347-49.
121. Id. at 370 (White, J., dissenting).
122. The Court dismissed Justice White's dissent in a footnote to the opinion which stated in part that "one might have viewed today's decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords." 418 U.S. at 348 n.10.
123. See 418 U.S. at 332-33. The fifth vote necessary to make Gertz a majority opinion was cast by Justice Blackmun, and he emphasized that his reason for concurring in the decision was to end the uncertainties left by Rosenbloom:
   The Court was sadly fractionated in Rosenbloom. A result of that kind inevitably leads to uncertainty. I feel that it 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. If my vote were not needed to create a majority, I would adhere to my prior view.
   A definitive ruling, however, is paramount. 418 U.S. at 354 (Blackmun, J., concurring). One commentator called Justice Blackmun's claim that the Court had come to rest "more hope than reality." The Supreme Court, 1973 Term, 88 HARV. L. REV. 13, 148 (1974).
124. 418 U.S. at 343.
125. Id. at 353 (Blackmun, J., concurring).
person and the defendant a member of the media.\textsuperscript{126} The Court formulated these guidelines through the same process of balancing the rights of the respective parties that it had used in its previous defamation decisions.\textsuperscript{127} In \textit{Gertz} the Court weighed the interests of the state in protecting private persons from injuries inflicted by defamatory falsehoods against the constitutional interest in protecting the media's first amendment rights; on balance, it considered the reputation of a private individual worthier of protection than that of a public figure in the same situation.\textsuperscript{128}

The majority opinion contains little support for the view that the Court intended its holding to control all cases involving a private plaintiff and a nonmedia defendant. Indeed, cases of private, non-media defamation of a private person involve a balancing scheme of a different nature from the one considered by the Court in \textit{Gertz}.\textsuperscript{129} In defamation cases involving neither the media nor a public figure, the long-standing constitutional commitment to freedom of the press and "robust discussion" is not a factor in the equation. Instead, the courts must balance one private person's right to compensation for injury to his reputation against another private person's right to free expression. The Court has never performed this balancing analysis nor has it extended the same measure of first amendment protection to statements made in a private context as it has provided those made in a public context.\textsuperscript{130} In fact, \textit{Gertz} reiterated the Court's traditional view that some utterances are not worthy of constitutional protection because they "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."\textsuperscript{131} Furthermore, the majority opinion frequently referred to the media,\textsuperscript{132} and it framed the issue in terms of the need both to compensate the injured person and to avoid media self-censorship.\textsuperscript{133} On its face, then, the \textit{Gertz} decision expressed

\begin{itemize}
\item \textsuperscript{126} See id. at 343-44.
\item \textsuperscript{128} 418 U.S. at 345.
\item \textsuperscript{129} See id. at 342-43; note 53 supra.
\item \textsuperscript{130} See \textit{Defamation Through Gertz}, supra note 18, at 1403-05 & n.228.
\item \textsuperscript{131} 418 U.S. at 240 (quoting \textit{Chaplinsky v. New Hampshire}, 315 U.S. 568, 572 (1942)).
\item \textsuperscript{132} See, e.g., 418 U.S. at 342-43.
\item \textsuperscript{133} Id. at 340-41.
\end{itemize}
no constitutional mandate that the states apply its holdings on fault and damages to purely private defamations.

Viewed broadly, however, *Gertz* contained elements that might encourage fundamental change in traditional law. By permitting the states to adopt a less stringent standard of liability for some media defendants than the *New York Times* standard of actual malice and by prohibiting the award of presumed or punitive damages unless actual malice were shown, the Court created the potential for anomalies in defamation law that would require eventual resolution. For example, the Court of Appeals in *Jacron* concluded that it would be unwise and logically inconsistent to hold nonmedia defendants strictly liable while exposing the media to liability only upon a showing of negligence or other level of fault. The court quoted Comment [d] of Restatement (Second) of Torts § 580B:

> It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

Nor could the Maryland court find any persuasive reason to afford media defendants greater first amendment protection than that granted to private persons, whose right to free and unfettered expression was considered equally deserving of protection. Since *Gertz* prescribed a negligence standard for media defendants, symmetry dictated that the conduct of nonmedia defendants be measured by the same standard. The decision to extend the *Gertz* holding on standard of liability to all cases of private defamation led to the application of the *Gertz* prin-

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134. See 276 Md. at 593-94, 350 A.2d at 695-96. The court recognized that the *Gertz* holding was "limited to media expression." *Id.* at 590, 350 A.2d at 694. Nevertheless the court felt obliged to "make an informed prediction as to whether . . . the Supreme Court will extend the *Gertz* holding to . . . non-media defendants. Even if we were to decide here that the Court will not so extend *Gertz*, we would consider whether, in any event, we should do so as a matter of state law." *Id.* at 590-91, 350 A.2d at 694.

135. *Id.* at 594, 350 A.2d at 696. It should be noted that this Comment is labeled Comment e in the court's opinion. The court used as its source a proposed revision of § 580B. *See* note 73 *supra*.


137. *Id.* at 592, 350 A.2d at 695. This view should be compared with the Supreme Court's apparent willingness to extend a somewhat greater latitude to statements published in the media. *See* note 130 and accompanying text *supra*. 
principles on damages. The Jacron court determined that a narrow application of the Gertz decision would produce undue confusion:

To limit the Gertz principles to media defendants and to cases of libel would mean one test, that of New York Times, for defamation of public officials and figures; another, which imposes a greater degree of proof than strict liability, and bans presumed and punitive damages, for cases brought by private plaintiffs against media defendants; and at least one more based on existing common law principles for all other defamation, an area of tort law which, wholly apart from the advent of constitutional considerations, has traditionally been noted for its complexity.\textsuperscript{138}

This prospect of chaos in the law persuaded the court that there was a "compelling need for consistency and simplicity in the law of defamation."\textsuperscript{139}

\textbf{APPLICATION OF GERTZ IN STATE COURTS}

Decisions in other state courts have not followed a uniform pattern in their application of Gertz. Even where the plaintiff is a private person and the defendant is a media member, the courts have split. Some have adopted the negligence standard,\textsuperscript{140} while others have retained the New York Times actual malice standard where the content of the statement meets the Rosenbloom public or general interest test.\textsuperscript{141} Some courts have refused to decide at all.\textsuperscript{142} In one case,\textsuperscript{143} the Colo-

\begin{footnotesize}
\begin{itemize}
\item[138.] 276 Md. at 593, 350 A.2d at 696.
\item[139.] Id.
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rado Supreme Court declined to adopt a negligence standard on the ground that such a rule would exert a chilling effect on the news media. Instead, the court held that when the defamatory statement concerned a matter of public or general interest, the media defendant would be liable only upon a showing of *New York Times* actual malice. Similarly, an Indiana appellate court chose the *Rosenbloom* rather than the *Gertz* standard because it feared that a negligence standard would foster media self-censorship. Nevertheless, the majority of state courts faced with the *Gertz* issue have accepted the Supreme Court's invitation to adopt negligence as a basis for determining liability. In *Stone v. Essex County Newspapers, Inc.*, the defendant newspaper published an article that mistakenly identified the plaintiff as the possessor of a harmful drug. Although the editor

144. 538 P.2d at 458.
145. *Id.* A dissenting opinion criticized the majority's reliance upon the *Rosenbloom* standard which, it said, "had little vitality when it was announced and even less today" and noted that *Rosenbloom* was a plurality decision that had been rejected by the Court in *Gertz*. The dissent would have adopted a negligence standard. *Id.* at 460 (Erickson, J., concurring and dissenting).
147. *Id.* at 586. The stubborn adherence in the wake of *Gertz* to the *Rosenbloom* plurality's public or general interest test suggests that in some cases society's interest in robust discussion may not adequately be protected unless the courts examine the content of the speech as well as the status of the plaintiff. *See id.* at 588-89; *Walker v. Colorado Springs Sun, Inc.*, 538 P.2d 450, 457-58 (Colo. 1975), *cert. denied*, 423 U.S. 1025 (1975).
148. *See cases cited at note 140 supra.*
150. Under traditional defamation law, the plaintiff would have alleged libel per se, because the defamatory meaning of the article was clear on its face. The article also met the criterion of the *Gertz* decision that the substance "[makes] substantial danger to reputation apparent." 418 U.S. at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (Harlan, J.). If the content of the article had not been sufficient to put the editor on notice of its potentially defamatory character, under the *Gertz* decision, the Massachusetts court presumably might have declined to apply the negligence standard. *See notes 68 to 70 and accompanying text supra.* To date, however, no court has applied a negligence standard where the defamatory meaning of the statement has not been obvious. *See Lawlor v. Gallagher Presidents Report, Inc.*, 394 F. Supp. 721, 724-25 (S.D.N.Y. 1975) (statement that plaintiff was guilty of conflict of interest and had "extracted fees for placement of executives"); *Troman v. Wood*, 62 Ill. 2d 184, 188, 340 N.E.2d 292, 294 (1975) (newspaper picture and caption implied plaintiff's home was headquarters for burglary gang); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 224, 531 P.2d 76, 77 (1975) (newspaper article stated plaintiff had pled guilty to charge of animal cruelty); *Stone v. Essex County Newspapers, Inc.*, 330 N.E.2d 161, 165 (Mass. 1975) (newspaper article wrongfully identified plaintiff as possessor of "harmful drug"); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 87 (Okla. 1976) (television "Call for Action" program broadcast complaints about conditions at plaintiff's pet store).
knew that the plaintiff was an upstanding citizen, he failed to check the reporter’s notes. The Massachusetts court decided that the defendant could be held liable on a showing of negligence, even where the defamatory statement occurred in the reporting of a matter of general or public interest. The court found persuasive the rationale advanced in *Gertz* that private persons deserve greater protection against defamatory falsehoods than public figures or officials because the latter have easier access to the media for rebuttal. It is noteworthy in light of the *Gertz* holding on damages that the Massachusetts court declined to allow the award of punitive damages under any circumstances, including cases in which actual malice has been shown; it reasoned that punitive damages would impermissibly interfere with the state’s interest in protecting freedom of speech and the press.

Among the courts that have confronted cases of purely private defamation, only the Maryland Court of Appeals has applied the *Gertz* holdings. Indeed, several cases in other jurisdictions did not even cite *Gertz*. One case, *Calero v. Del Chemical Corp.*, presented a factual situation similar to that in *Jacron*. The plaintiff brought an action for defamation against his former employer, alleging that the defendant had falsely informed potential employers that he had taken confidential company papers and attempted to lure away key personnel in order to organize a competing company. At trial the plaintiff was awarded actual damages, presumed damages, and punitive dam-

152. *Id.* at 164.
153. *Id.* at 168–69. See 418 U.S. at 344.
154. The *Gertz* decision allowed the recovery of presumed or punitive damages on a showing of knowledge of falsity or reckless disregard for the truth. See 418 U.S. at 349. For a discussion of the recovery of damages in Maryland after the *Jacron* and *Piskor* decisions, see notes 86 to 89 and accompanying text supra.
155. 330 N.E.2d at 164. The court also required that the plaintiff establish his case by “clear and convincing proof” rather than merely by a preponderance of the evidence. *Id.* See note 74 and accompanying text supra.
158. 68 Wis. 2d 487, 228 N.W.2d 737 (1975).
159. *Id.* at 489–95, 228 N.W.2d at 739–42.
ages. The Supreme Court of Wisconsin held that *Gertz* did not apply because the case involved no media defendants, no matters of public concern and no public officials or figures. As a consequence, the relevant policy considerations did not flow from the first amendment but instead were based upon the "encouragement of a free exchange of information . . . [in the course of] the inquiry by a prospective employer of a former employer." The court upheld all damage awards, including the one for punitive damages. The court affirmed the availability of a conditional privilege and held that a showing of *express* malice was required to overcome the privilege. It defined express malice as ill will, envy, spite or revenge, and distinguished this standard of conduct from *actual* malice, which it defined as knowledge of falsity or reckless disregard with respect to truth or falsity. The court determined that the actual malice standard applied only in the presence of a constitutional privilege. In effect, the *Calero* court dismissed the *Gertz* decision as inapplicable; it determined that traditional common law principles continued to govern cases in which a private plaintiff is defamed by a nonmedia defendant.

The California courts likewise declined to apply *Gertz* in two cases involving conditional privileges, though in a different factual setting than that present in *Jacron* and *Calero*. In *Tendler v. Dun & Bradstreet, Inc.* and *Roemer v. Retail Credit Corp.*, the plaintiffs filed defamation suits against credit reporting services that had supplied factually inaccurate reports about plaintiffs' credit standing.

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160. The trial court awarded $3000 for damages to plaintiff's feelings, general reputation and good name, $7000 for loss of income, and $9000 punitive damages. *Id.* at 495, 228 N.W.2d at 742. *See also* General Motors Corp. v. Piskor, 27 Md. App. 95, 340 A.2d 767 (1975).

161. 68 Wis. 2d 487, 506, 228 N.W.2d 737, 748 (1975). It is noteworthy that the Maryland court, faced with similar policy considerations in *Jacron*, retained the conditional privilege and adopted the *New York Times* actual malice test as a standard for defeating the privilege. *See* notes 83 to 85 and accompanying text *supra*.

162. 68 Wis. 2d at 510-12, 228 N.W.2d at 750-51.

163. *Id.* at 506, 228 N.W.2d at 748. This is the common law definition of express malice in Maryland as well. *See* Deckelman v. Lake, 149 Md. 533, 536, 131 A. 762, 764 (1926); Fresh v. Cutter, 73 Md. 87, 96, 20 A. 774, 775 (1890). *See* note 27 *supra*.


165. 68 Wis. 2d 487, 507, 228 N.W.2d 737, 748 (1975).

166. The Court of Appeals in *Jacron* noted *Calero*'s rejection of *Gertz* as inapplicable to cases of private defamation but "decline[d] to follow that authority, since the court there simply limited its examination to the question of whether it was bound by *Gertz*." 276 Md. at 596, 350 A.2d at 697.


169. 44 Cal. App. 3d at 930-31, 119 Cal. Rptr. at 84 (1975); 118 Cal. Rptr. at 276 (1974). The California Court of Appeal had held in an earlier case that a qualified
Both cases required a showing of malice in order to overcome the privilege. The court in Roemer held that "the libelous communication presented in a credit report falls outside the protective umbrella of the First Amendment" because the speech was commercial in nature and the reports were provided to a relatively limited audience.

CONCLUSION

Nothing within the factual or legal confines of the Jacron or Piskor cases mandated the Court of Appeals' complete revision of the state's common law of defamation. For example, it would have been acceptable for the court to construe the Gertz holdings narrowly and limit their application to media defendants. Furthermore, like the other private defamation cases decided after Gertz, both Maryland cases turned upon the presence of a conditional privilege. Since the Court of Appeals did not want to disturb the common law governing privilege, it might have restricted its decision to the narrow question of privilege, leaving the broader questions raised by Gertz to be resolved when they arose in other cases. Nevertheless, the court in Jacron rejected this piecemeal approach to changes in defamation law, choosing in-privilege was present in dealings between a mercantile credit report agency and the companies which requested their reports. See Roemer v. Retail Credit Co., 3 Cal. App. 3d 368, 83 Cal. Rptr. 540, 542 (1970).


171. 44 Cal. App. 3d at 933, 119 Cal. Rptr. at 86.

172. Id. at 934, 119 Cal. Rptr. at 87. The court pointed out, however, that "the precise question here raised [whether credit reports are protected by the New York Times actual malice standard] has not, as yet, been definitively decided by the United States Supreme Court. On the contrary, Rosenbloom . . . explicitly leaves this issue open." Id. at 933, 119 Cal. Rptr. at 86. It should be noted that credit report cases have presented problems for the courts, resulting in varying standards of fault adopted by different states. See Frakt, The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond, 6 Rutgers-Camden L.J. 471, 491-95 (1975).

173. See notes 130 & 131 and accompanying text supra.


175. See Jacron Sales Co. v. Sindorf, 276 Md. at 597-601, 350 A.2d at 698-700.

176. This approach was taken by the court in Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975), see notes 158 to 166 and accompanying text supra, although it is not clear how the court would have held in the absence of the privilege.

177. See 276 Md. at 593-94, 350 A.2d at 696; notes 134 to 139 and accompanying text supra.
stead to construct a unified theory of state defamation law based upon the Supreme Court's decision.\textsuperscript{178}

The prospect of a unified law of defamation — stripped of archaic or illogical\textsuperscript{179} distinctions between libel and slander, actions per se and per quod, express and actual malice — is an appealing one. Nevertheless, the simplicity and clarity which the \textit{Jacron} court sought to impose on the law of defamation exists in theory only. Justice Blackmun's hope that, with \textit{Gertz}, the Court had "come to rest in the defamation area"\textsuperscript{180} has proved premature, and the Court of Appeals' attempt in \textit{Jacron} to restructure the state common law in the \textit{Gertz} mold has raised new problems. The law of defamation, both in the Supreme Court and in Maryland, remains uncertain.

In its most recent defamation decision, \textit{Time, Inc. v. Firestone},\textsuperscript{181} the Supreme Court considered the defamation action of a wealthy socialite against \textit{Time} magazine, which had falsely reported that her husband had been granted a divorce on the ground of adultery.\textsuperscript{182} Because the record of the state appellate proceedings failed to disclose whether the plaintiff had proved fault on the part of the defendant, the Court remanded the case to the Florida court.\textsuperscript{183} Under the \textit{Gertz} rationale, proof of the defendant's fault in publishing the defamatory statement is a necessary predicate to liability. Although five members of the Court joined in the majority opinion,\textsuperscript{184} Justice Powell noted in a concurring opinion that while "[a] clear majority of the Court adheres to the principles of \textit{Gertz v. Robert Welch, Inc.}, . . . it is evident from the variety of views expressed that perceptions differ as to the proper application of such principles to this bizarre [\textit{Firestone}] case."\textsuperscript{185} A recent decision by the United States Court of Appeals...
for the Fourth Circuit, *Sauerhoff v. Hearst Corp.*, 188 further illustrates the confusion that continues to plague the law of defamation. Sauerhoff brought a defamation action in federal court against the Baltimore *News-American* based on an article in the paper which implied that he had engaged in extramarital affairs. Because the case arose before *Jacron*, the district court judge applied the Maryland common law of defamation and dismissed the action on that basis without reaching the constitutional issues. Although the defendant in *Sauerhoff* was a member of the media, the Fourth Circuit's opinion did not emphasize first amendment considerations or the *Gertz* decision. 187 Instead, the court’s discussion focused entirely on the common law doctrines of libel per se and per quod. 188 The court ignored *Jacron*, which had been decided in the interim between the district court’s action and the appellate decision, even though the decision was theoretically based on Maryland law. 189 The case was remanded for reconsideration of the judgment in view of the *Gertz* holding on damages, which the court noted had been adopted by Maryland in *Jacron*. 190

Maryland appellate courts faced with defamation cases after *Jacron* have avoided much of this confusion by deferring the difficult task of refining the new doctrine; they have merely remanded the cases for new trials under the *Jacron* and *Piskor* guidelines. 191 Until the new standards are applied by trial courts and juries, the potential problems raised by *Gertz* and the Maryland decisions remain conjectural. The most likely source of contention, however, will be the in-

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186. 538 F.2d 588 (4th Cir. 1976).
187. *Id.*
188. *Id.* at 590-91. It should be noted that the court acknowledged without applying the statement that “*Gertz* possibly discourages use of a per quod premise.” *Id.* at 590.
189. The Fourth Circuit’s failure to apply *Jacron* to the *Sauerhoff* case is puzzling. The Supreme Court has held that a federal appellate court reviewing a decision in a diversity action should apply the existing state law, even if it has been altered subsequent to the district court decision. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); C. Wright, *Law of Federal Courts* 238 & n.12 (2d ed. 1970). In *Vandenbark*, the Court stated that “the dominant principle is that nisi prius and appellate tribunals alike should conform their orders to the state law as of the time of entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.” 311 U.S. at 543. Since the Fourth Circuit was aware of *Jacron*, it should have applied the the Maryland Court of Appeals’ new approach to defamation. Application of *Jacron* would have obviated the need to grapple with the confusing and outdated doctrines of libel per se and per quod.
190. 538 F.2d at 591-92.
creased burden that the new scheme places upon private plaintiffs to prove falsity, negligence, and actual damages.192

That Jacron may eventually place an increased burden on private plaintiffs is anomalous. The Gertz decision was grounded in the Supreme Court's support of the state's interest in protecting the reputations of private plaintiffs,193 and the Maryland Court of Appeals explained its comprehensive alteration of defamation law by reference to Gertz. Ironically, application of Gertz to all cases of defamation involving private plaintiffs may subvert the underlying rationale of Gertz. Recovery may become more difficult for those private plaintiffs who are defamed by nonmedia defendants and whose injury to reputation has not been manifested in a loss of income or other measurable damages.194 The amount of protection afforded the reputation of private plaintiffs thus will be eroded.

It is impossible to predict the Supreme Court's reaction to the application of the Gertz principles to cases of private defamation, although Firestone indicates that the Court still adheres to the view that the private plaintiff is especially deserving of the state's protection195 and that the states retain wide discretion in setting the standards of liability.196 The Supreme Court may allow state defamation law to develop in its own direction with only minimal constitutional restraints.197 If it does, other states eventually will be faced with the same theoretical conflicts that the Maryland court considered in Jacron.198 It is likely, however, that some courts will not depart so readily from their traditional law as did the Maryland court. Defamation decisions involve a balancing of interests,199 and other courts may decide for reasons of policy that some plaintiffs should be given favored treatment200 or that media defendants deserve special treatment because their first amendment rights are more critical than those of private defendants.201 Whether Jacron is an attractive solution to the ques-

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192. See notes 82, 88 and accompanying text supra.
193. 418 U.S. at 344-46.
194. See id. at 371-77 (White, J., dissenting); note 88 and accompanying text supra.
195. See 424 U.S. at 453-57; note 16 and accompanying text supra.
196. See 424 U.S. at 461-64; note 109 and accompanying text supra.
198. See notes 134 to 139 and accompanying text supra.
199. See notes 127 to 129 and accompanying text supra.
200. For example, the Supreme Court in Gertz determined that private plaintiffs are deserving of greater protection against media defendants than are public plaintiffs because the latter have easier access to the media for rebuttal. See 418 U.S. at 344.
201. The Court of Appeals rejected this view in Jacron. See notes 127 to 129 and accompanying text supra.
tions raised by *Gertz* will depend on whether the logic of equal treat-
ment of all plaintiffs and all defendants seems compelling when con-
sidered in conjunction with other policy factors.202 *Gertz* itself pro-
vides no constitutional mandate for this symmetry.203 If the problems
inherent in distinguishing between the constitutional and common
law branches of defamation prove to be overly burdensome and arti-
ficial,204 however, most jurisdictions are likely to adopt unified schemes
that parallel the Maryland Court of Appeals' decision in *Jacron*.

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202. See notes 138 & 139 and accompanying text *supra*. For a discussion of the
use of symmetry as a ground for altering the course of a legal doctrine see H. Hart
203. See notes 129 to 133 and accompanying text *supra*.
204. See notes 138 & 139 and accompanying text *supra*. 