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Police and Firemen's Disability Benefits

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CASENOTES

POLICE AND FIREMEN'S DISABILITY BENEFITS—Policeman's Psychological Disability Ruled Non-Service Connected, Even Though "Triggered" by On-Duty Accident, When Extrinsic Causes Predominate. *Morgan v. District of Columbia Police and Firemen's Retirement and Relief Board*, 370 A.2d 1322 (D.C. 1977).

The primary duty of the District of Columbia Police and Firemen's Retirement and Relief Board is to determine the eligibility for disability benefits[1] of public employees engaged in traditionally dangerous lines of work.[2] A critical prerequisite to any award of pension based on a work-related disability[3] is the establishment of a causal connection between the injury or disease creating the disability and specific on-the-job incidents. While it is well established in the District of Columbia that the concept of an "injury or disease" incurred or aggravated in the line of duty may embrace impairments which are wholly psychological and nonorganic in nature,[4] such impairments are often the products of myriad causes, stemming from events both within and apart from the employee's scope of employment. Unfortunately, there is no statutory

1. Such benefits are in the form of an annuity or pension based on a certain percentage of the retired employee's "average pay." *See* D.C. Code §§ 4-526, 4-527 (Supp. IV 1977). In most cases, "average pay" is defined as the employee's highest average salary for any period of twelve consecutive months during his employment. When an officer has worked for less than one year and his disability is job-related, "average pay" means his basic salary at the time of his retirement. *See* D.C. Code § 4-521 (17) (Supp. IV 1977).

2. D.C. Code § 4-521(1) (1973) includes within the Board's jurisdiction matters involving members of the Metropolitan Police force, the Fire Department of the District of Columbia, the United States Park Police force, the Executive Protective Service, and certain members or officers of the United States Secret Service Division.

3. In the District, as in virtually all jurisdictions having a statutory scheme for disability benefits, a significantly higher pension is paid to those police and firemen disabled by work-related causes than is paid to those disabled by extrinsic factors. *Compare* D.C. Code § 4-526 *with* § 4-527 (Supp. IV 1977).

4. Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 528 (D.C. 1977). *See also* Crider v. D.C. Bd. of Appeals & Review, 299 A.2d 134 (D.C. 1973); Johnson v. Board of Appeals & Review, 282 A.2d 566 (D.C. 1971), *cert. denied*, 405 U.S. 955 (1972); Lynch v. Tobriner, 237 F. Supp. 313, 316 (D.D.C. 1965).

formula for appraising the relative causal significance of the different factors contributing to a psychological disability. The District of Columbia Court of Appeals has recently been confronted with two similar but independent challenges to Retirement Board orders finding police officers' psychological disabilities to be non-service connected. In each case the officer's disability had been "triggered" by an on-duty accident, but in each case the Board found that the officer had a preexisting personality disorder. In its first opinion, the Court of Appeals overturned the Retirement Board's order, holding that the mere fact of an officer's preexisting psychological vulnerability would not automatically preclude his subsequent disability from being deemed "service connected" if the ultimate disability were precipitated by an on-duty incident.[5] Shortly thereafter, however, in *Morgan v. District of Columbia Police and Firemen's Retirement and Relief Board*,[6] the court restricted its earlier ruling by holding that the mere showing of an on-duty accident which "triggered" the officer's disability does not conclusively establish entitlement to service connected disability benefits.[7] The *Morgan* decision makes it clear that in the absence of further guidance from the legislature, the Retirement Board is obligated to engage in a balancing test in cases involving nebulous or mixed causation. Under such a test, all credible evidence must be weighed in determining the "relative causative significance" of both the job-related and the extrinsic factors.[8]

Eugene Morgan became a member of the Metropolitan Police Department in May of 1969. During his first year of service he sustained two on-duty injuries. First, he was struck on his head, shoulders and back when a garage door fell on him. Then, several months later, he reinjured his back when he fell down a flight of stairs.[9] Following three hearings in

5. Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 529 (D.C. 1977). *Stoner* is discussed at length at notes 33-44 *infra*.

6. 370 A.2d 1322 (D.C. 1977).

7. *Id.* at 1325.

8. *Id.* The court stated:

> Where there is credible expert evidence establishing that both internal and external circumstances medically contributed to the ultimately disabling condition, the Retirement Board is obligated to consider all the relevant factors, determine their relationship to each other, and, if possible, evaluate their relative causative significance. . . . [T]he Board must go beyond the language of the statute and apply a balancing test in resolving those claims for annuities which are based upon conditions involving mixed causation.

9. *Id.* at 1324. Morgan received medical treatment following his first injury until he returned to work about three weeks later. Shortly thereafter he suffered a recurrence of lower back pain, was hospitalized and placed in traction for seven days. He then returned to duty. Several months later, his second accident occurred which caused him to undergo medical evaluation and treatment in orthopedics, neurosurgery, psychiatry, and psychology. Morgan took considerable sick leave but continued working on the force out of

1971, the Retirement Board concluded that those injuries had not rendered Morgan disabled for further service.[10] His complaints of pain and discomfort persisted, however, and he never returned to full duty. At Morgan's request, in 1974 the case was resubmitted to the Board which, after having received considerable testimony, including the results of a psychiatric evaluation by the Board of Police and Fire Surgeons, found that the officer was suffering from a psychoneurosis[11] which permanently disabled him from further service. The Retirement Board further concluded that his disability was "a direct manifestation of personality characteristics which predated and were unrelated to his employment."[12]

On the basis of its findings, the Board ordered Morgan retired on an annuity of forty percent of his "average pay,"[13] pursuant to District of Columbia Code section 4-526[14] pertaining to non-service connected disabilities. Morgan challenged that order in the Court of Appeals,[15] con-

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uniform and without a weapon. *See* Morgan v. D.C. Bd. of Appeals & Review, 305 A.2d 243, 243-44 & n.2 (D.C. 1973).

10. 370 A.2d at 1324. That finding was sustained by the Court of Appeals as being supported by "substantial evidence" in Morgan v. D.C. Bd. of Appeals & Review, 305 A.2d 243 (D.C. 1973). While the evidence before the Retirement Board had been conflicting in some respects, it was generally agreed that the X-rays showed no fractures or bone damage, the myelogram was negative, and there appeared to be "no limp, no anatomical injury, no atrophy or wasting of muscles, no apparent nerve root damage and nothing pressing on a nerve." *Id.* at 244. There was some evidence that Officer Morgan was suffering from "emotional overlay," which can result in actual physical pain; however, the Board of Appeals and Review adopted in its findings of fact and conclusions of law the testimony of a psychiatrist that "this case had the appearance of a conscious effort to promote a secondary gain, that is for money or a pension . . . ." *Id.* at 244-45.

11. The disease was more specifically termed a "conversion reaction." *See* 370 A.2d at 1324. This impairment has been defined as "the displacement of emotional conflicts into physical symptoms. The physical symptoms, although undeniably real, thus are of psychological rather than physical origin." Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 526-27 n.3 (D.C. 1977).

12. 370 A.2d at 1324.

13. *See* note 1 *supra*.

14. D.C. Code § 4-526 (Supp. IV 1977) provides in part:

> Whenever any member . . . completes five years of police or fire service and is found . . . to have become disabled due to injury received or disease contracted other than in the performance of duty, which disability precludes further service with his department, such member shall be retired on an annuity computed at the rate of 2 per centum of his average pay for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his average pay: *Provided further*, That the annuity of a member retiring under this section shall be at least 40 per centum of his average pay.

Although Morgan's accidents had occurred within his first year on the force, and even though a minimum of five years' service is required for eligibility under this section, Morgan apparently qualified because of his service in a limited capacity following the accidents and before his eventual retirement.

15. Prior to June 1, 1974, appeals from the Police and Firemen's Retirement and Relief

ceding that he was suffering from the psychoneurosis, but alleging that the Board erred in finding that the disability was neither caused nor aggravated by his job-related accidents.[16] His position was that he should have been retired under District of Columbia Code section 4-527,[17] which provides a substantially higher annuity for those disabled by a service connected injury or disease.

The Court of Appeals affirmed the Retirement Board's Order.[18] The court first acknowledged the humane purpose of the legislation, stating that a denial of benefits under section 4-527 should occur only when it is clear that the causative significance of the preexisting or extrinsic circumstances contributing to the disability outweighs that of the on-duty events or conditions.[19] The court also noted its earlier tenet that in cases involving a medically significant on-duty trauma, the claimant may not be denied relief under section 4-527 upon a mere finding that he had a preexisting potential for psychological disability.[20] The court clarified that ruling, however, by holding the converse principle to be equally

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Board were taken first to the District of Columbia Board of Appeals and Review. Pursuant to Commissioner's Order No. 73-724 of December 12, 1973, 20 D.C. Reg. 525, 528 (1974), decisions of the Retirement Board after June 1, 1974 constitute final administrative actions and are appealable directly to the Court of Appeals under D.C. Code §§ 1-1510 (Supp. IV 1977), 11-722 (1973). *See* 20 D.C. Reg. 1128 (1974). *See also* Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 526 & n.2 (D.C. 1977).

16. 370 A.2d at 1325.

17. D.C. Code § 4-527 (Supp. IV 1977) provides in part:

> (1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 1/2 per centum of his average pay for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his average pay, nor shall it be less than 66 2/3 per centum of his average pay.
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> (2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 1/2 per centum of his average pay for each year or portion thereof of his service: *Provided*, That such annuity shall not exceed 70 per centum of his average pay, nor shall it be less than 66 2/3 per centum of his average pay.

18. 370 A.2d 1322 (D.C. 1977).

19. *Id.* at 1325-26, *citing* Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524 (D.C. 1977); Hyde v. Tobriner, 329 F.2d 879, 881 (D.C. Cir. 1964); Lynch v. Tobriner, 237 F. Supp. 313, 316 (D.D.C. 1965).

20. 370 A.2d at 1325-26, *citing* Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 529 (D.C. 1977).

true: the mere occurrence of an on-duty incident "triggering" the disability does not terminate the Retirement Board's analytical responsibilities or conclusively establish entitlement to benefits under section 4-527.[21] The unanimous court found that the Board's factual determinations had been supported by "substantial evidence."[22] The record, the court found, reflected a claimant who, for reasons directly related to his unusual emotional vulnerability,[23] developed a disproportionately severe psychological reaction to his relatively minor on-duty injuries. It concluded that the evidence on the whole indicated that any causative significance which might be attached to the catalytic effect of the on-duty accidents was clearly outweighed by the significance of Morgan's preexisting psychological deficiencies.[24]

I. Burden of Proof in Claims for Disability Benefits

Because the establishment of causation is such a major element in proceedings involving eligibility for disability benefits, the issue of which party bears the burden of demonstrating the existence (or absence) of the causal link is of great significance. In order to retire an employee for a non-service connected disability under section 4-526,[25] the government has the burden of proving that the disability is not job related, assuming that the retiree has adduced some evidence indicating that the original causation of the impairment is attributable to duty connected factors.[26] In such cases a presumption is raised that the disability is job related, and if the government cannot rebut that presumption, the employee is retired under section 4-527(1).[27]

If, however, the original causation is obscure or is admittedly due to

21. 370 A.2d at 1325.

22. "We are mindful of the well-established principle that the Retirement Board's factual determinations are not to be set aside unless unsupported by substantial evidence." *Id.* at 1326, *citing* D.C. Code § 1-1510(3)(E) (Supp. IV 1977). *See* note 32 & accompanying text *infra*.

23. The expert testimony portrayed "a claimant who, as a result of significant emotional difficulties predating and unrelated to his employment as a police officer, perhaps never should have been appointed to the force." 370 A.2d at 1326.

24. *Id.*

25. For the text of § 4-526, see note 14 *supra*. The same principles regarding burden of proof apply as well to § 4-529, which deals with retirement for a non-service connected disability of any employee who has not completed at least five years of service.

26. The Court of Appeals has stated that "[i]t is agreed that substantial and persuasive evidence is required to support a finding of non-service connected disability." Fisher v. Police & Firemen's Retirement & Relief Bd., 351 A.2d 502, 503 (D.C. 1976).

27. *See* note 17 *supra*. The minimum annuity for those retired under § 4-527 is 66 2/3% of the employee's "average pay," whereas the minimum for those retired under § 4-526 is only 40%. For those who suffer a non-service connected disability within their first five years of service, there is no pension at all provided under § 4-529.

factors which are not service related, the burden is on the employee to prove either that job-related factors override extrinsic ones in causative significance, or that his preexisting condition was subsequently aggravated to the point of disability by events occurring in the line of duty.[28] Section 4-527 was amended in 1962,[29] when Congress added subsection (2), which specifically deals with situations involving mixed or obscure causation and aggravation of preexisting, non-service connected maladies. The Court of Appeals has found that this subsection "strongly suggests" that the disabled employee should have the burden of proof in such cases.[30] Because of the inherent imprecision encountered in attempting to assign causation to a psychological impairment, the claimant in cases involving these disabilities is usually burdened with the task of producing expert testimony linking the condition with specific on-the-job experiences. The claimant must also rebut any testimony offered by the government tending to show that the claimant's personality problems were significantly manifested prior to those job-related incidents.[31] Finally, once the Retirement Board has reached a conclusion as to whether the employee's disability is service connected, and has

28. Morgan v. D.C. Police & Firemen's Retirement & Relief Bd., 370 A.2d 1322, 1326 (D.C. 1977); Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 528 (D.C. 1977); Lewis v. D.C. Bd. of Appeals & Review, 330 A.2d 253, 255-56 (D.C. 1974). *Compare* Johnson v. Board of Appeals & Review, 282 A.2d 566, 570 (D.C. 1971), *cert. denied*, 405 U.S. 955 (1972) *with* Crider v. D.C. Bd. of Appeals & Review, 299 A.2d 134, 135 (D.C. 1973).

29. Pub. L. No. 87-857, § 1, 76 Stat. 1133 (1962). *See* note 17 *supra*.

30. Johnson v. Board of Appeals & Review, 282 A.2d 566, 570 (D.C. 1971), *cert. denied*, 405 U.S. 955 (1972). *See also* Morgan v. D.C. Police & Firemen's Retirement & Relief Bd., 370 A.2d at 1326 & n.5.

31. In Johnson v. Board of Appeals & Review, 282 A.2d 566 (D.C. 1971), the Court of Appeals affirmed the Retirement Board's decision to retire the claimants under section 4-526 for non-service related disabilities. The claimants, both park policemen, suffered from psychological disorders, and each contended that his disease was "aggravated" by the performance of duty so as to disable him, thus entitling him to the higher pension under § 4-527(2). The Retirement Board found one claimant to be suffering from "a personality trait disturbance in passive aggressive personality, with paranoid overtones," such disorder having been precipitated by a disturbance in early childhood which had lifetime consequences. *Id.* at 568-69. The other claimant was found by the Board to be suffering from a "severe neurosis with features of tensions, anxiety and depression," his condition also having its origin in childhood incidents and having been exacerbated in later life by traumatic off-duty experiences. *Id.* at 569. Among the service-related incidents which either one or both of the claimants insisted had "aggravated" their disorders to the point of disablement were their duties during the 1968 riots and demonstrations, having to drop an assault charge against a diplomat, being told in a "gruff" manner by a superior officer to go out and correct some forty parking citations which the officer had misdated earlier in the day, and general harassment by superior officers. *Id.* at 568-69. The Retirement Board concluded, and both the Board of Appeals and Review and the Court of Appeals affirmed, that the claimants had failed to meet their burden of connecting their ultimate disabilities with their official duties in the Park Police. *Id.* at 570-71.

determined the rate of annuity, if any, he will receive, its findings will not be overturned on review unless it is shown that they are unsupported by "substantial evidence."[32]

II. THE *STONER* CASE

One relevant case in which the court found a decision by the Retirement Board denying section 4-527 benefits to be unsupported by substantial evidence is *Stoner v. Police and Firemen's Retirement and Relief Board*.[33] The facts of *Stoner* closely resemble those in *Morgan*. The petitioner, Larry Stoner, was a Metropolitan Police officer who was struck by a recreational vehicle while patrolling on a motor scooter.[34] He sustained multiple injuries and, despite extensive medical treatment, never again returned to police duty.[35] Hearings were held before the Retirement Board two years after the accident, during which considerable medical testimony was received. Included among the witnesses was a psychiatrist for the Board of Police and Fire Surgeons who classified Stoner's psychological profile as "passive dependent," rendering him more vulnerable than the average person to develop serious psychological reactions following a traumatic experience on the job.[36] Moreover, the experts could give no physiological or neurological explanation for Stoner's continuing symptoms, but concluded that they comported with a diagnosis of "post-traumatic neurosis and hysterical conversion reaction, the displacement of emotional conflicts into physical symptoms."[37] On the basis of this testimony, the Board found that Stoner was permanently disabled for further police service, that his disability was

32. D.C. Code § 1-1510(3)(E) (Supp. IV 1977). *See* Stoner v. D.C. Police & Firemen's Retirement & Relief Bd., 368 A.2d 524, 529 (D.C. 1977); Fisher v. Police & Firemen's Retirement & Relief Bd., 351 A.2d 502, 503 (D.C. 1976); Morgan v. D.C. Bd. of Appeals & Review, 305 A.2d 243, 245 (D.C. 1973); Johnson v. Bd. of Appeals & Review, 282 A.2d 566, 571 (D.C. 1971), *cert. denied*, 405 U.S. 955 (1972).

33. 368 A.2d 524 (D.C. 1977).

34. *Id.* at 526.

35. *Id.* Stoner was unable to return to even light duty status. As the court noted, there remained "complaints of weakness in his ankle and wrist, as well as intermittent pain and numbness. On several occasions he was observed suffering uncontrolled shaking when subjected to stress." *Id.* at 526 n.3.

36. *Id.* at 528-29 & n.8. The psychiatrist explained that a "passive dependent" personality is not atypical among police officers:

> The very personality of people tending to come into the police department are people who are vulnerable in the sense that, if they do have an injury and they feel they can't do a good job and, therefore, don't have the respect of their superiors or their peers any more, this tends to throw them in a kind of backward spiral, and they become more defensive and feeling more helpless . . . and they lose their courage.

Id. at 527 n.5.

37. *Id.* at 526 n.3.

psychological in nature, and that such disability was the manifestation of a preexisting condition.[38] Accordingly, the Board concluded that the disability was neither caused nor aggravated by the accident or any other service connected factors within the language of section 4-527.[39]

In overturning the Board's order, the court first ruled that Stoner's special vulnerability did not per se preclude a determination that his psychological disability fell within the provisions of section 4-527.[40] The crux of the analysis, the court offered, should be "whether the circumstances which caused the vulnerability to ripen into disability were a part of or external to the officer's service activities."[41] Under this analysis, the court found that all of the medical testimony on the record pointed to the accident as precipitating the officer's disabling condition.[42] The court found significant the Board's own categorization of the officer's impairments as "post-traumatic neurosis" and "hysterical conversion reaction." In the court's view, such labels in themselves suggested a relationship with the on-duty accident.[43] The court did not quarrel with the Board's conclusion that Stoner's basic personality profile was relevant to the ultimate disability. It noted, however, that the record demonstrated that it was not the officer's general psychological weakness which disabled him, but rather "the accident-induced realization of the apparently underlying potential."[44]

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38. *Id.* at 527.

39. *Id.* Accordingly, the Board ordered that Stoner be separated from police service without pension, pursuant to D.C. Code § 4-529 (1973). He did not qualify for the 40% annuity under § 4-526 because he had not completed five years of service.

40. *Id.* at 529. The court stated:

> Section 4-527 requires only that the disabling condition be caused or aggravated by the performance of duty, and makes no distinction as to the individual officer's particular characteristics or vulnerabilities. The mere fact that one officer may be more susceptible to disabling injury than another cannot be treated as dispositive without careful analysis of the circumstances or events which caused the asserted propensity to manifest itself in a disabling condition.

41. *Id.*

42. *Id.* There was uncontradicted testimony that Stoner had been competent to perform his duties prior to the accident.

43. *Id.* at 529-30 & n.9.

44. 368 A.2d at 530. The court tempered this disposition, however, when it added:

> [W]e do not wish to leave the impression that the requisite causation of a psychological disability necessarily is established by a showing of no more than a service-related trauma acting upon a particular personality type. On the central issue of "aggravation", the appropriate inquiry includes consideration of (1) the nature and degree of abnormality of the underlying psychological characteristics, (2) the likelihood that the disabling manifestation of such characteristics would have appeared despite the particular trauma or circumstances under consideration, and (3) whether there had been any previous indication that the disability (as distinct from the mere potential therefor) had begun to manifest itself as a result of circumstances external to the officer's service.

III. DISTINGUISHING *MORGAN* FROM *STONER*

Given the factual similarities between *Stoner* and *Morgan*, and given the vagueness of the statutory standard for determining causation when there are multiple factors influencing the disability,[45] it is somewhat puzzling that Judge Harris, who wrote both opinions, did not go to any greater lengths in *Morgan* to distinguish the two cases. In *Morgan*, he concluded that the record supported a finding that the officer's preexisting emotional difficulties were of such magnitude that perhaps he never should have been appointed to the force.[46] The only evidentiary support cited for that conclusion, however, was a footnote reference to expert testimony portraying the officer as somewhat of a hypochondriac and as an individual who was unable to adjust to his role as police officer.[47] Significantly, Judge Harris failed to refer to any evidence indicating that the officer had performed his duties inadequately before his accidents, although admittedly Morgan had been on the job only a short while before sustaining the injuries. Thus, it is not readily apparent from the two decisions why, if at all, Stoner's "passive dependent"[48] personality made him any less unfit to assume the duties of a policeman than did Morgan's hypochrondriasis and inability to adjust to his role.[49] Perhaps the fact that Stoner's particular vulnerability was described by one psychiatrist as being not uncommon among police officers[50] influenced the court as much as did any attempts to differentiate technically between the different preexisting disorders.[51]

A more convincing distinction between *Stoner* and *Morgan* lies in the relative severity of the different on-duty accidents involved. Stoner's

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Id. at 531.

45. In *Stoner*, Judge Harris had lamented the fact that the Retirement Board "is burdened with a statutory standard which unquestionably is ill-suited to the resolution of the difficult issues inherent in a claim of non-organic disability." *Id.* at 530-31. In both *Stoner* and *Morgan*, the judge pleaded for more meaningful guidance from the legislature. *Id.* at 531; Morgan v. D.C. Police & Firemen's Retirement & Relief Bd., 370 A.2d at 1325.

46. 370 A.2d at 1326. It is significant that in *Stoner*, Judge Harris suggested that "it would appear prudent to increase the attention given to the initial psychological screening of all police candidates." 368 A.2d at 531 n.11.

47. 370 A.2d at 1326 n.6. The testimony indicated that Morgan "was unusually preoccupied with his health and, for reasons of secondary emotional gain, had adopted a 'sick or patient' role." *Id.*

48. *See* text accompanying note 36 *supra*.

49. *See* text accompanying note 47 *supra*.

50. *See* 368 A.2d 527 n.5, reproduced in part at note 36 *supra*.

51. *Compare* notes 23 & 47 *supra, with* note 42 *supra*. The fact that Morgan vigorously pursued his claim for benefits for more than five years may also have suggested to the court that he was somewhat of a malingerer.

motor scooter accident left him seriously injured for some time. In contrast, Morgan's injuries were relatively minor and healed more quickly, leaving no organic residual.[52] The court in *Morgan* held that whatever catalytic effect these minor injuries might have had in precipitating the officer's ultimately disabling condition several years later, such effect could not reasonably outweigh the significance of the preexisting psychological deficiencies.[53] In *Stoner*, on the other hand, the court apparently concluded that the possibility was slim that the officer would have become psychologically disabled were it not for the on-duty trauma. In light of these considerations, and despite the similarities between the two cases, the different rulings of the court seem justified, if only on principles of fairness. Although the *Morgan* decision does not relate in detail the examining expert's findings, a reader of the court's opinion is given the impression that Morgan was attempting to take undue advantage of the statutory scheme.[54] The severity of the officer's injuries in *Stoner* supports the conclusion that the Retirement Board may indeed have been unjustified in finding the accident to have been an insignificant cause of Stoner's psychological disability.

Unfortunately, *Morgan* provides no more concrete standards to apply in cases involving the contribution of multiple causative factors to a nonorganic disability than were developed previously. The court in *Stoner* indicated that the mere fact of a preexisting personality weakness is not dispositive of an employee's claim for benefits under section 4-527(2).[55] Rather, the crucial factor in determining eligibility is whether the circumstances which ripened the vulnerability into a disability were connected with or external to the employee's service activities.[56] Additionally, however, *Morgan* requires that even when an officer's ultimate disability is "triggered" by an on-duty accident, the Retirement Board must determine the degree to which extrinsic factors, including the officer's vulnerability, also contributed to the disabling condition.[57] These seemingly circular arguments are perhaps necessitated by the problems which are encountered when section 4-527(2) is applied to nonorganic disabilities. Judge Harris appealed to the legislature in both *Stoner* and *Morgan* for more meaningful guidance in dealing with such cases.[58] It remains to be seen whether the lawmakers will accommodate

52. *See* Morgan v. D.C. Bd. of Appeals & Review, 305 A.2d 243, 244-45 (D.C. 1973).
53. 370 A.2d at 1326.
54. *See* notes 10, 11, & 23 *supra*.
55. 368 A.2d at 528-29.
56. *Id.* at 529.
57. 370 A.2d at 1325.
58. *See* note 45 *supra*.

the court's pleas.[59] Perhaps the imprecision inherent in the psychological sciences will defy the establishment of any more concrete standards.

IV. CONCLUSION

Morgan provides a balancing test which the Retirement Board must apply generally in cases involving mixed causation, and particularly in cases of nonorganic disabilities. The Board must scrutinize the evidence, determine the relative causative significance of each of the apparent contributing factors, and decide whether the job-related factors outweigh the extrinsic ones. The *Stoner* and *Morgan* decisions demonstrate that an employee's preexisting vulnerability to psychological stress, weighed against the severity of the on-duty mishap precipitating his disability, are both important factors to be considered, although neither alone is dispositive of the inquiry.

Even though there is as yet no suitable standard for determining relative causative significance, by reaching opposite decisions in *Stoner* and *Morgan*, the Court of Appeals has given the Board a crude "zone" in which to operate when confronted with similar types of fact situations. By taking two cases with similar but distinguishable fact patterns, and explaining why one of these fact patterns does and the other does not qualify the employee for benefits under section 4-527(2), at least the court has made more definite what it perceives to be the boundaries of adequate job-related causation.

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59. At the time of this writing, Congress has three bills under consideration which would comprehensively reform the retirement system in the District of Columbia. *See* H.R. 6536, S. 1813 and S. 2316, 95th Cong., 1st Sess. (1977); H.R. REP. NO. 335, 95th Cong. 1st Sess. (1977) (to accompany H.R. 6536). The provisions for reforming the disability retirement system for police and firemen are identical in all three bills. The proposed Reform Act would amend D.C. Code § 4-527 to remove the aggravation of a preexisting injury or disease not incurred in the line of duty as a basis of disability retirement for members of the Metropolitan Police and Fire Departments, but not for members of the Park Police, Executive Protective Service, or Secret Service. The proposed Act would also require that in order for a policeman or fireman to receive disability benefits based on an aggravation of a disease or injury incurred in the performance of duty, the original disease must have been reported within thirty days of its diagnosis; or, in the case of an injury, within seven days after it was incurred. *See* H.R. REP. NO. 335, *supra* at 22.

For all policemen and firemen retired under § 4-526 or § 4-527, the Reform Act would also establish a percentage disability system. Under this scheme the claimant's base pension is computed as it would have been under existing law, but will be reduced by a percentage disability factor if there is less than a total disability. The Retirement Board will determine this factor by considering the degree of impairment, the nature of the injury or disease, and other factors affecting the claimant's ability to earn future income. *See* H.R. REP. NO. 335 at 22-23. If the law is enacted, the percentage system could significantly affect the amount which a psychologically disabled policeman or fireman could receive in benefits, assuming most of these employees were fit for other lines of employment.

DEFAMATION LAW—Media Defendant Held to Negligence Standard in Action by Private Individual Plaintiff. *Phillips v. Evening Star Newspaper Co.*, 105 DAILY WASH. L. REP. 1425 (D.C. Super. Ct. 1977).

For over a decade the Supreme Court has attempted to strike a proper balance between an individual's common law right to seek redress for defamation and the constitutional right of the press to investigate and discuss public issues freely.[1] At the heart of this controversy is the fact that journalists will eventually publish erroneous and potentially damaging statements concerning individuals; at the same time, however, subjecting the press to liability for all inaccurate reporting ultimately discourages discussion of public issues.[2] To resolve this tension, the Supreme Court has classified defamation cases according to the status of the particular plaintiff. Public figures and public officials can recover for defamation only upon proof that the publisher acted with knowledge of the falsity or with reckless disregard of the truth,[3] while individuals who are not the subject of media attention must show only that the defendant made the statement and that it was defamatory.[4] When a private individual is involved in a matter of public interest, however, the two standards conflict.[5] In such a situation, states are free to establish their own standard of liability for a media defendant.[6] Recently, in *Phillips v. Evening Star Newspaper Co.*,[7] the Superior Court of the District of

1. In 1964 the Supreme Court first developed a constitutional privilege in defamation cases but did not agree to whom that privilege should apply until 1974. *See generally* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 RUT.-CAM. L.J. 471 (1975).

2. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270-71, 279 (1964).

3. *Id.* at 279-80. This standard differs from the common law standard which required the plaintiff to prove only that the defendant made the statement and that it was defamatory. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.5, at 364 (1956).

4. Defamation may take the form of slander (oral defamation) or libel (written defamation transmitted to a third party). Libel is a statement that tends to injure the plaintiff in his trade or profession or lower his standing in the community. The cause of action is for injury to reputation. De Savitsch v. Patterson, 159 F.2d 15, 17 (D.C. Cir. 1946); *see* 1 HARPER & JAMES, *supra* note 3, § 5.1, at 349-50.

5. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (actual malice required) *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (negligence is enough).

6. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

7. 46 U.S.L.W. 2056 (D.C. Super. Ct. 1977); 105 DAILY WASH. L. REP. 1425 (D.C. Super. Ct. June 30, 1977).

Columbia decided that the standard of liability in the District of Columbia is negligence: that is, the failure of the media to exercise due care under the circumstances.[8]

In November, 1974, Fanny Lou Phillips was killed when her husband's gun fell from its holster and discharged.[9] Mr. Phillips was arrested and charged with homicide, a charge which was later dropped when the incident was reclassified as accidental. That same evening, a report of the shooting based on information obtained from the Homicide Division was transmitted to the *Washington Star* over a police hotline.[10] The report inaccurately stated that Phillips shot his wife during a quarrel,[11] and the *Star* ran an article which included the inaccurate statement.[12] On the basis of that false statement, Phillips filed suit alleging negligent and malicious publication.[13]

The *Star* moved for summary judgment, arguing that because the reporting of police activities was a matter of public interest, Phillips must prove that the *Star* published the story with "actual malice," that is, with knowledge that the statement was false or with reckless disregard of its truth or falsity.[14] The trial court denied the *Star*'s motion, holding that

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8. 2 HARPER & JAMES, *supra* note 3, § 16.2, at 902.

9. The couple was working on church business and because they were handling church money, Phillips carried a gun. On this occasion, he bent down to pick up something for his wife when the gun fell from its holster and discharged, the bullet striking his wife in the throat. Affidavit of John Phillips dated July 6, 1976 at 1.

10. The hot line is a telephone communication system established by the D.C. Police Public Information Office in 1971. Eighteen media concerns subscribe to the free service. When an event occurs that the public information officer deems newsworthy, a report is prepared and is orally transmitted to the subscriber. Reports are logged by the Police Department and made available to the press. 105 DAILY WASH. L. REP. at 1430 n.3.

11. The pertinent text of the article read:

> Fannie Lou Phillips of the 2600 Block of Randolph Street NE was shot once in the head with an automatic pistol during a quarrel in her home, police said. She was pronounced dead at 1:45 a.m. at the Washington Hospital Center, according to police.
>
> Mrs. Phillips' husband, John, 56, who called the police, has been arrested and charged with homicide, police said.

105 DAILY WASH. L. REP. at 1430.

12. It was not disputed that the *Star*'s story was an accurate report of the hot line account and properly attributed to the police. The *Washington Post*, another hot line subscriber, also carried an article based on the hot line account which contained the phrase "during an argument." 105 DAILY WASH. L. REP. at 1430.

13. Phillips sought $500,000 compensatory and $500,000 punitive damages for humiliation, embarrassment, and a disabling stroke. *Id.* at 1431.

14. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). Alternatively, the *Star* asserted that if its report was not entitled to receive the constitutional privilege adhering to the higher standard of actual malice, it was entitled to the common law privilege protecting accurate reports of official proceedings. *See* note 86 *infra*. Additionally, it argued that inaccurate statements of official proceedings are constitutionally privileged under the *New York Times* rule. This latter argument was rejected because of the Supreme Court

the Supreme Court had rejected the public interest standard.[15] It noted that the Supreme Court gave each state the option to choose the fault standard to apply in defamation actions involving private plaintiffs.[16] Because the court believed that the District of Columbia has a strong policy of protecting the reputation of private individuals,[17] it held that negligence should be the standard applied in such cases. Thus, at trial, Phillips was required to prove only that the *Star* was negligent in publishing the article.[18]

This casenote will discuss the negligence standard applied in *Phillips* in light of recent developments in defamation law both in the District and in other jurisdictions.

I. COMMON LAW DEFAMATION AND CONSTITUTIONAL PRIVILEGE

At common law, a defamed individual was required to prove neither injury to reputation[19] nor fault[20] and could recover damages without proving that the statement caused any harm.[21] In defamation actions, this strict liability standard provided the maximum protection to the individu-

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decision in Time, Inc. v. Firestone, 424 U.S. 448, 455-57 (1976), in which the Court held that no constitutional privilege attaches to inaccurate reports of judicial proceedings. Thus, the privilege would not attach to the police report at issue in this case. 105 DAILY WASH. L. REP. at 1432 n.8.

15. The court granted the *Star* a partial summary judgment on the issue of punitive damages because there was no evidence of actual malice. *Id.* at 143.

16. *Id.* (citing Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974)).

17. Although the court offered no authority for the strong protection policy to which it believed the District adheres, 105 DAILY WASH. L. REP. at 1432, this is the traditional view. *See* subsection III & note 70 *infra*.

18. The *Star* attempted to appeal this decision, but the judge refused to certify an interlocutory order. The *Star* then filed a writ of mandamus with the D.C. Court of Appeals to compel the trial judge to certify the issues for consideration or alternatively for the court to consider the certification order itself. The D.C. Court of Appeals denied the motion. Evening Star Newspaper Co. v. Revercomb, No. 12591 (D.C. App. Nov. 2, 1977).

19. Once it was shown that the words were defamatory either on their face (libel per se) or in the factual context (libel per quod), damage to reputation was presumed and the plaintiff was not required to show that the defamatory statement caused any harm to reputation by pleading special damages. *See* 1 HARPER & JAMES, *supra* note 3, § 5.9, at 372-73.

20. A defendant's unintentional defamation, innocent on its face, which the defendant could not have discovered was still subject to liability. The motive or intent of the defendant was irrelevant. *See* Russell v. Washington Post Co., 31 App. D.C. 277, 284 (1908); 1 HARPER & JAMES, *supra* note 3, § 5.5, at 363-64.

21. Nominal damages for defamation were presumed and served a vindicatory function, but general damages could be awarded by the factfinder if it found a reasonable inference that actual harm to reputation had been suffered. Once damage to reputation was inferred the plaintiff could often recover for emotional distress and humiliation as well. Special damages were awarded if the plaintiff had suffered a pecuniary loss as a result of the defamation, while punitive damages were awarded if the statement was published with malice. 1 HARPER & JAMES, *supra* note 3, § 5.30, at 468-71.

al's interest in his reputation.[22] Thus a defendant in a libel action could avoid liability only if he could prove that the statement was true[23] or that it was privileged. Privilege protected certain communications when a legally recognized competing interest justified application of a higher standard.[24] Such privileges were usually accorded to persons participating in judicial proceedings, to official reports, and to good faith statements of opinion on matters of public interest.[25]

Recognizing that the strict liability standard was often unduly harsh, some courts sought to expand the scope of the privileges to better protect the public's interest in frank and open debate on public issues. One such decision is *Coleman v. MacLennan*,[26] in which a state attorney general sued a newspaper for false statements made regarding his official conduct. The Kansas Supreme Court extended a privilege to false statements made in good faith concerning the official conduct of public officials. The court stated that recognition of the privilege was necessary to hold "the balance fair between public need and private right . . . ."[27]

The common law privilege developed in *Coleman* provided the groundwork for the Supreme Court's formulation of a constitutional privilege in the landmark decision of *New York Times Co. v. Sullivan*.[28] Sullivan, an Alabama public official, alleged he was defamed in an advertisement placed in the *New York Times* by a civil rights group

22. The reason for such a liberal standard was the difficulty of proving the harm and damage caused by an injury to reputation. *See* Eaton, *supra* note 1, at 1357; 1 HARPER & JAMES, *supra* note 3, § 5.30, at 468.

23. Truth is an absolute defense. Curtis Pub. Co. v. Vaughan, 278 F.2d 23 (D.C. Cir.), *cert. denied*, 364 U.S. 822 (1960). Truth is not established by showing that the source made the statement; the statement itself must be true. Olinger v. American Sav. & Loan Ass'n, 409 F.2d 142 (D.C. Cir. 1969) (per curiam).

24. Privilege was of two kinds, absolute and qualified. Judicial and legislative proceedings are accorded absolute immunity for statements made during the course of the proceedings. *See* Mohler v. Houston, 356 A.2d 646 (D.C. 1976); Roper v. Risher, 106 DAILY WASH. L. REP. 365 (D.C. Super. Ct. Feb. 27, 1978) (administrative proceedings). 1 HARPER & JAMES, *supra* note 3, § 5.22, at 420-21. Qualified privileges, see note 25 *infra*, could be defeated upon a showing that they were published with an improper purpose or ill will, commonly called malice. Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); 1 HARPER & JAMES, *supra* note 3, § 5.21, at 420.

25. The privileges accorded to accurate statements made in official reports and accorded to good faith opinions made on matters of public interest (fair comment) were qualified privileges developed to protect the right to report and comment on events of public interest. *See* note 86 *infra*.

26. 78 Kan. 711, 98 P. 281 (1908).

27. *Id.* at 742, 98 P. at 292. "Social progress is best facilitated, the social welfare is best preserved and social justice is best promoted in the presence of the least necessary restraint." *Id.* Kansas applied the privilege to all officers and agents of the state, to the conduct of corporate enterprises affected with a public interest, and to many other subjects involving the public welfare. *Id.* at 734-35, 98 P. at 289.

28. *See* 376 U.S. 254, 280-82 (1964).

appealing for support in the South.[29] Rejecting its prior statements that libel was not protected by the Constitution,[30] the Court held that the first amendment would not permit libel actions by public officials absent a showing that the defamatory statements were made with "actual malice."[31] The Court asserted that discussion of public issues and governmental affairs should be "uninhibited" and that errors "inevitable in free debate" must be protected to give freedom of expression "the breathing space" it needs to survive.[32] Limiting the freedom of the press to report and discuss actions of government officials, the Court reasoned, would lead inevitably to suppression of truth as well as falsehood.[33] Thus, a new privilege based upon the constitutional guarantee of freedom of expression limited the scope of the common law standard of strict liability by removing a substantial area of defamation law from its coverage.

The application of the new standard quickly created problems. Courts applied the *New York Times* rule to a myriad of lower public officials and government workers with little regard to the context or scope of their authority.[34] The rule was also extended to cover "public figures,"[35] persons who were not involved in government at all, but who, "by reason of their fame, shape events in areas of concern to society at large."[36] These decisions reflect the increasing scope of activities in which the public's interest in free debate was considered sufficient to

29. The advertisement described several confrontations between Montgomery police and the civil rights group. Although Sullivan was not mentioned by name, he claimed that the advertisement referred to him because he was the public official who supervised the Montgomery Police Department. *Id.* at 257-58.

30. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) in which the Supreme Court concluded that libel was not protected by the first amendment because it is "of such slight social value as a step to truth that any benefit . . . derived . . . is clearly outweighed by the social interest in order and morality." *Id.* at 572. *Accord*, Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

31. 376 U.S. at 279-80. Actual malice was defined as either knowledge of the statement's falsity or reckless disregard of its truth or falsity. This exception to first amendment protection was deemed necessary because of the public's interest in the official conduct of its officers. *Id.* at 279.

32. *Id.* at 270-72.

33. *Id.* at 279.

34. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971) (mayor and candidate for county tax assessor); Rosenblatt v. Baer, 383 U.S. 75 (1966) (supervisor of county recreation area); Ross v. News-Journal Co., 228 A.2d 531 (Del. 1967) (justice of the peace); Driscoll v. Block, 3 Ohio App. 2d 351, 210 N.E.2d 899 (1965) (municipal judge).

35. Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidate for elective office); Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (prominent real estate developer and state legislator); Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967) (football coach at the University of Georgia).

36. 388 U.S. at 164 (Warren, C.J., concurring).

override the individual's interest in protecting his reputation. The common law standard of strict liability, however, still protected the private individual regardless of his involvement in a matter of public concern.[37]

Application of the *New York Times* rule to a private individual involved in a matter of public interest sharply divided the Court in *Rosenbloom v. Metromedia, Inc.*[38] Rosenbloom, a distributor of nudist magazines, was arrested but later acquitted for possession of obscene literature. He filed suit against a radio station that had broadcast a report of his arrest characterizing him as a "girlie book peddler."[39] The Third Circuit held that his involvement in a matter of public interest required the application of the *New York Times* rule.[40] The Supreme Court agreed and modified the application of the "actual malice" standard, ruling that the subject matter of the event rather than the status of the person would trigger the test.

In articulating this rule, Justice Brennan reasoned that the activities of public persons are not automatically more deserving of public attention. Instead, he believed that the public's concern is with the conduct of the participant in a matter of general or public interest.[41] Therefore, he asserted, the participant's prior anonymity or notoriety is not determinative. Furthermore, a rule allowing unlimited inspection of the lives of public persons solely because they have voluntarily exposed themselves to the public cannot be reconciled with a rule permitting limited inspection of private individuals. Such a double standard would result in the dampening of discussion of legitimate public issues based solely on the status of the participant.[42] Accordingly, Justice Brennan concluded that the Constitution protects "all discussion and communication involving

37. Many lower courts, anticipating the Supreme Court's *Rosenbloom* decision, see text accompanying note 38 *infra*, applied the *New York Times* standard to private individuals defamed in matters of public interest. *E.g.*, Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970); Wasserman v. Time, Inc., 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970); United Medical Labs., Inc. v. Columbia Broadcasting Sys., Inc., 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969).

38. 403 U.S. 29 (1971). Justice Brennan wrote the opinion for the plurality, joined by Chief Justice Burger and Justice Blackmun. Justices Black and White concurred in the judgment, each writing separate opinions. Justice Black argued that the first amendment protects all news media from libel. *Id.* at 57. Justice White asserted that this case involved a report of official actions and thus was privileged under the first amendment. *Id.* at 62. Justices Harlan, Marshall, and Stewart dissented, advocating a negligence standard. *Id.* at 62, 64, 78, 86. *See generally* Eaton, *supra* note 1, at 1394-98.

39. 403 U.S. at 34.

40. 415 F.2d 892, 896-97 (3d Cir. 1969).

41. 403 U.S. at 43.

42. *Id.* at 48.

matters of public or general concern."[43] The dissenting opinions criticized the public interest test because it would require the courts to determine on an ad hoc basis what is and is not a matter of public interest.[44] Justices Harlan and Marshall argued that when the plaintiff is a private individual, the media defendant should be required to exercise reasonable care in publishing potentially defamatory statements.[45]

The dissenting opinions in *Rosenbloom* became the basis for the majority opinion in *Gertz v. Robert Welch, Inc.*[46] Gertz, a Chicago attorney, was hired to litigate a civil suit for the family of a youth who was killed by a policeman. In an article discussing the policeman's criminal trial, the defendant magazine, an outlet for the John Birch Society, accused Gertz of Communist activity. Gertz sued, alleging damage to his personal and professional reputation. The district court and the court of appeals held that because he was involved in a public issue, the *New York Times* rule applied;[47] thus, Gertz was denied recovery.The Supreme Court reversed, abandoning the *Rosenbloom* test and reinstating the distinction between the public and private defamation plaintiff.[48] Justice Powell, writing for the majority, reasoned that the state has a greater interest in compensating injury to the reputation of private individuals than in protecting public officials for two reasons: private individuals have less access to the media to rebut defamatory falsehoods, and they do not voluntarily expose themselves to public

43. *Id.* at 44.

44. *Id.* at 63, 81 (Harlan & Marshall, J.J., dissenting).

45. *Id.* at 68, 86.

46. 418 U.S. 323 (1974). The majority opinion written by Justice Powell was joined by Justices Stewart, Marshall, and Rehnquist. Blackmun concurred to form a majority and so that the Court might "come to rest in the defamation area." *Id.* at 354. Justices Douglas, Brennan, White, and Chief Justice Burger dissented separately. Justices Douglas and Brennan argued that this standard provides insufficient protection for the press. *Id.* at 355, 361. Justice Brennan would retain the public interest standard, while Chief Justice Burger and Justice White contended that the negligence standard provides insufficient protection to the individual. *Id.* at 354, 369. They would have retained the common law strict liability standard with regard to private individual plaintiffs.

47. 322 F. Supp. 997 (N.D. Ill. 1970), *aff'd*, 471 F.2d 801 (7th Cir. 1972). Gertz also argued that he was not involved in the policeman's criminal trial and, therefore, even if the article was protected, statements about him were not. The court of appeals rejected this argument, stating that the falsity of all statements is protected under the *New York Times* rule unless actual malice exists. To distinguish among the inaccuracies would undermine that rule. *Id.* at 806. The Supreme Court agreed with this portion of the lower court's opinion. 418 U.S. at 331-32 & n.4.

48. The *Gertz* decision has been the subject of much commentary. *See, e.g.*, Anderson, *A Response to Professor Robertson: The Issue is Control of Press Power*, 54 TEX. L. REV. 271 (1976); Christie, *Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Frakt, *supra* note 1, at 484; Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

scrutiny.[49] The majority abandoned the public interest standard developed in *Rosenbloom* on the ground that it abridged this state interest to an unacceptable degree. The Court stated, however, that the state's interest extended no further than the actual injury the plaintiff suffered;[50] thus, a plaintiff must prove injury in order to recover from a media defendant.[51] The Court concluded that each state should develop its own standard of liability and suggested that a negligence standard be adopted for private defamation plaintiffs. Under this standard, the content of the statement must "warn a reasonably prudent editor or broadcaster of its defamatory potential."[52] The states could not impose liability without fault, however, or award damages without proof of actual injury.[53]

Thus, *Gertz* considerably altered both the scope of constitutionally

49. 418 U.S. at 345-46. Justice Brennan rejected this argument in both *Rosenbloom* and in his *Gertz* dissent. "The *New York Times* standard was applied to libel of a public official or public figure to give effect to the [First] Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation . . . ." *Id.* at 363 (citing *Rosenbloom*, 403 U.S. at 46-47). He also reasserted his opposition to the majority's position on the access of public figures to the media by stating that whether a public figure is able "to respond through the media [to rebut defamatory statements] will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story." *Id.*

50. 418 U.S. at 349. The Court did not define actual injury but, stated that it is not limited to out-of-pocket loss and could include impairment to reputation, standing in the community, personal humiliation, mental anguish, and suffering. *Id.* at 350. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976) ($100,000 award for plaintiff's mental suffering upheld although damage to reputation not alleged). Eaton, however, points out that to permit recovery for injuries other than harm to reputation is not the tort of defamation. Eaton, *supra* note 1, at 1438-39. *See* Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977). Ashdown argues that by allowing damages to be awarded for injuries other than harm to reputation, the Court is further increasing the likelihood and the potential magnitude of liability for media defendants. Further, the refusal to limit actual injuries to monetary loss retains the common law per se rule "essentially intact." *Id.* at 670.

51. 418 U.S. at 349.

52. *Id.* at 348. The statement must also make "substantial injury to reputation apparent." *Id.*

53. *Id.* at 347, 349-50. In a strong dissent, Justice White criticized the negligence standard as a severe invasion of the state's prerogative not required by the first amendment. He stated that the standard forces the private individual to bear the brunt of the cost of press freedom which benefits the public at large. *Id.* at 392. In contrast, Justice Brennan argued that the negligence standard will lead to self-censorship because it will force publishers to make prepublication judgments about how reasonable their actions will appear to a jury. *Id.* at 366. Further, he argued that the actual damages requirement will be converted into an instrument to suppress unpopular ideas. *Id.* at 367.

protected speech and the state common law.[54] After *Gertz*, it was clear that the first amendment protects all publicly disseminated defamatory speech to some extent; the degree of protection, however, depends upon the status of the plaintiff. Similarly, imposition of constitutional limitations on the state common law eliminates the strict liability rule and requires each state to reformulate its defamation law to comply with constitutional requirements.

II. STATE COURTS' RESPONSE TO *GERTZ*: VARYING STANDARDS

State courts which have reviewed their defamation law in light of *Gertz* have not agreed on the standard of fault to apply.[55] The majority of states which have addressed the issue, however, have chosen the negligence standard for reasons similar to those articulated in *Gertz*.[56] In *Troman v. Wood*,[57] a woman sued a newspaper for publishing a picture of her house as part of an article on street gangs in Chicago. Reiterating the reasoning of *Gertz*, the Illinois Supreme Court concluded that the first amendment does not require a standard higher than negligence. The court stated that to treat both public and private plaintiffs equally gives inadequate protection to the private plaintiff.[58] Rejecting a public interest test, the court observed that what is a matter of public interest

54. The *Gertz* Court did not decide whether a private plaintiff injured by a nonmedia defendant would receive the same constitutional protection. At least one state has applied *Gertz* to such situations. *See* Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Comment, *The Maryland Court of Appeals: State Defamation Law in the Wake of Gertz v. Robert Welch, Inc.*, 36 MD. L. REV. 622 (1977). *Contra*, Harley-Davidson Motorsports, Inc. v. Markley, 279 Ore. 361, 568 P.2d 1359 (1977).

55. *See* Comment, *The Defamation Action for Private Individuals: The New Fault Standards*, 22 S.D.L. REV. 163, 175-76 (1977); *see generally* Note, *State Court Reactions to Gertz v. Robert Welch, Inc.*, 29 VAND. L. REV. 1431, 1437-47 (1976).

56. The highest courts of at least eight states have chosen negligence as their standard. All have stated that they were persuaded by the *Gertz* rationale that private plaintiffs have less access to the media and thus need more protection from defamation. *See, e.g.*, Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977); Gobin v. Globe Pub. Co., 216 Kan. 223, 531 P.2d 76 (1975); Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., — Mass. —, 330 N.E.2d 161 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Foster v. Laredo Newspapers, Inc. 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); Taskett v. King Broadcasting Co., 86 Wash. 2d 439, 546 P.2d 81 (1976). In addition, appellate courts in several other states have applied a negligence standard without adopting it as a uniform standard for their state. Corbett v. Register Pub. Co., 33 Conn. Supp. 4, 356 A.2d 472 (Super. Ct 1975); Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975); Le Boeuf v. Times Picayne Pub. Corp., 327 So. 2d 430 (La. App. 1976); Thomas H. Maloney & Sons v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975).

57. 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

58. *Id.* at 195, 340 N.E.2d at 297.

depends upon the degree of media attention given an issue.[59] Fearful that an actual malice standard would dissuade a publisher from fully investigating the truth of a statement because he might establish the awareness of a falsity which could expose him to liability,[60] the court concluded that a negligence standard best balances the interests of the individual and those of the press.

In contrast, the decision in *AAFCO Heating & Air Conditioning Co. v. Northwestern Publications, Inc.*[61] rejected the distinction based upon the status of the individual plaintiff. In *AAFCO*, the defendant's article on a local fire included a statement by a fire official that it may have been caused by a furnace installed by the plaintiffs two weeks earlier. The plaintiffs alleged that this was false and defamatory. The Indiana appellate court noted that society is equally interested in protecting the reputations of public and private persons and that as a necessary part of living in a civilized society, each person assumes the risk of media attention when he becomes involved in a public issue.[62] According to the court's analysis, the negligence standard creates uncertainty by forcing the publisher to guess how a jury might assess the reasonableness of its actions.[63] Moreover, the expansive definition given actual injury by *Gertz* does not materially reduce the uncertainty of capricious jury verdicts.[64]

The New York Court of Appeals attempted to find a middle ground between these two extremes by formulating a standard based on gross irresponsibility. In *Chapadeau v. Utica Observer-Dispatch, Inc.*,[65] a public school teacher sued a newspaper for inaccurately reporting the circumstances surrounding his arrest on drug charges. The appellate division reversed the trial court's denial of defendant's motion for sum-

59. *Id.* at 196, 340 N.E.2d at 297. An additional difficulty, according to the court, was whether the defamatory statement could be separated from the main thrust of the article. *Id.*, 340 N.E.2d at 298.

60. *Id.*

61. — Ind. App. —, 321 N.E.2d 580, 586-87 (1974), *cert. denied*, 424 U.S. 913 (1976).

62. *Id.* at —, 321 N.E.2d at 588. The court also rebutted the *Gertz* assumption that public officials have greater access to the media.

> Only rarely will a public official or public figure have attained sufficient prominence to command media attention which will provide a meaningful chance to rebut and defend against defamatory falsehood [and even then], it is unlikely that the rebuttal statements will receive the same degree of public attention as the published defamation.

Id. at —, 321 N.E.2d at 587.

63. *Id.* at —, 321 N.E.2d at 588.

64. *Id.* at —, 321 N.E.2d at 589. One other state has embraced the public interest standard. *See* Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

65. 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

mary judgment, holding that in light of the plaintiff's occupation, his arrest was a matter of public interest and, therefore, the reporting of it was privileged under *Rosenbloom*.[66] The Court of Appeals reversed, holding that a fault standard for defamation was proper, but that in a matter of public interest, a plaintiff must establish gross irresponsibility by a preponderance of the evidence.[67] Gross irresponsibility apparently means acting "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."[68] Unfortunately the court did not elaborate on the standard.[69]

III. Initial Response in the District of Columbia: Press Protection

Historically in the District, a private individual bringing a defamation action against a media defendant was allowed to recover based upon the common law's liability standard.[70] Nevertheless, even before the *New York Times* rule, courts in the District recognized that consideration should be given to the interests of free public debate. In *Sweeney v. Patterson*,[71] an Ohio congressman sued the *Washington Times-Herald* for publishing an allegedly defamatory article about his political conduct. The United States Court of Appeals for the District of Columbia Circuit held that absent special damages, erroneous statements of fact regarding political conduct were not actionable. The majority reasoned that the public interest in obtaining knowledge of important facts would be poorly served if error subjected its author to liability for defamation without proof of economic loss. The court also recognized the trade-off between libel and free speech, stating that "Whatever is added to the field of libel is taken away from the field of free debate."[72] Thus, even when strict

66. 45 App. Div. 2d 913, 357 N.Y.S.2d 296, 297 (1974).

67. The court held that "where the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed . . . must establish, by a preponderence of the evidence, that the publisher acted in a grossly irresponsible manner . . . ." 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

68. *Id.*

69. This deficiency has subjected the standard to criticism in other jurisdictions. *See, e.g.*, Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 819 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977).

70. *See, e.g.*, Thompson v. Evening Star Newspaper Co., 394 F.2d 774 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968); Afro-American Pub. Co v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); Chaloner v. Washington Post Co., 36 App. D.C. 231 (1911), *rev'd on other grounds*, 250 U.S. 290 (1919). The D.C. courts have not changed the common law standard in cases in which a private individual is defamed by a non-media defendant. *Cf.* Ford Motor Credit Co. v. Holland, 367 A.2d 1311 (D.C. 1977) (common law privilege attaches absent malice); Riggs Nat'l Bank v. Price, 359 A.2d 25 (D.C. 1976) (slander).

71. 128 F.2d 457 (D.C. Cir.), *cert. denied*, 317 U.S. 678 (1942).

72. *Id.* at 458.

liability was the standard, courts in the District sometimes deviated from the rule with media defendants because competing interests were present.[73]

Since the strict liability standard has been held constitutionally impermissible, however, the proper standard to be applied to defamation actions by a media defendant is unclear. Thus far only one court decision other than *Phillips* has dealt directly with the issue.[74] In *Hatter v. Evening Star Newspaper Co.*,[75] a superior court judge followed an approach similar to that used in *Rosenbloom* and applied a public interest test.

In *Hatter*, an article published by the *Washington Star* discussed the eviction of a black woman following a speculator's purchase of the property. The story was part of a series of articles accompanying the District of Columbia City Council's hearings on problems faced by poor, black families who were being displaced by the influx of whites renovating the Capitol Hill area.[76] The purchaser of the house sued the *Star* for labeling him a speculator. The *Star* moved for summary judgment arguing that the statements were true, did not refer to the plaintiff, and were not defamatory in any case. It also urged that a public interest standard be adopted when a plaintiff is involved in a substantial public controversy.[77] Although superior court Judge Newman found that no defamation action could be maintained because the article was not about the plaintiff, he did not dismiss the action solely on those grounds. Instead, he further stated that the "appropriate" test to be applied when a private individual is injured by a media defendant in a matter of public interest is the *New York Times* standard of actual malice.[78] The judge did not articulate the reasons for the appropriateness of the standard, nor did he indicate whether the statement was the holding of the case or merely dicta.[79] He did, however, state that the *Gertz* decision gave each state the

73. *See* Sullivan v. Meyer, 91 F.2d 301 (D.C. Cir. 1937) (newspaper article relating to a matter of public interest which is not libelous per se requires that plaintiff prove special damages).

74. One other superior court decision avoided the issue of what standard to apply to private defamation plaintiffs by holding that a defendant in a murder trial is a public figure for the limited purpose of his trial and thus is held to the *New York Times* standard of actual malice. Donaldson v. Washington Post Co., 46 U.S.L.W. 2316, 105 DAILY WASH. L. REP. 2313 (D.C. Super. Ct. 1977).

75. CA 8298-75 (D.C. Super. Mar. Ct. 15, 1976).

76. *Wash. Star*, June 20, 1975, § B, at 1, col. 2.

77. *Star*'s Motion for Summary Judgment at 13 n.5.

78. Order Granting Summary Judgment at 1-2.

79. One of the factual findings was lack of negligence in publishing the article thus raising the question of whether the negligence standard was properly addressed. *See* 105 DAILY WASH. L. REP. at 1432.

opportunity to develop its own standard and indicated that he was exercising that option.

IV. Limiting Press Protection: The Negligence Standard

Given the questionable legal basis of the *Hatter* decision, due in part to the failure of the court to articulate the reasoning for its decision, the *Phillips* court had wide latitude to formulate a standard for defamed private plaintiffs. It quickly narrowed its scope, however, by stating that it would determine the proper standard by applying the common law rule as modified by *Gertz*, thus rejecting the *Hatter* decision and its public interest standard.

Judge Revercomb characterized the *Hatter* decision as ambiguous.[80] Uncertain of its basis in common law privilege or in an "unexpressed policy consideration," he concluded that he could not follow *Hatter*.[81] Regardless of the *Hatter* opinion, however, the court was critical of the public interest standard. Judge Revercomb expressed concern that the public interest standard allowed the media to arouse the public interest by giving sufficient publicity to a person or event.[82] Apparently, he was also persuaded by *Gertz* that a public interest standard would force judges to decide which publications address the public interest. The court also noted that the *Gertz* Court believed a public interest standard would increase the liability of the press and deny many private plaintiffs redress for their injury.[83] The court concluded that these "cogent concerns" and the ambiguous *Hatter* opinion warranted rejection of the public interest test.[84]

It should be noted, however, that many of the shortcomings of the public interest test criticized by the court were not present in *Phillips*. The *Star*'s publication of the Phillips shooting was simply a routine police report with no attempt to publicize Mr. Phillips. Furthermore, the court did not contend that reports of police activities are beyond the scope of the public interest, and it is difficult to see how the press would be exposed to more litigation under a public interest standard than under a negligence standard. The court's only remaining concern, the redress of the plaintiff's injury, appears to be its sole reason for rejecting the public interest standard.

Having rejected the *Hatter* approach, the court applied the principles of common law defamation as modified by *Gertz*. The court stated that

80. *Id.*
81. *Id.*
82. *Id.* The court described this as the "bootstrap aspect" of the newsworthy standard.
83. *Id.* at 1431.
84. *Id.* at 1432.

the District of Columbia "has long sought to provide the defamed Plaintiff a maximum standard of protection, strict liability. . . . [This] basic policy . . . remained in the absence of important offsetting considerations."[85] Although *Gertz* required that the strict liability standard be abandoned, the court believed the District's policy of utmost protection for defamed individuals remained intact. Thus, the court held that the standard of care to be applied was "translated by *Gertz* from strict liability to its next most proximate standard of care—that of negligence."[86]

The court's acceptance of the common law standard of strict liability as a point of departure indicates its unwillingness to reevaluate this policy in light of court decisions giving greater deference to free speech and debate. The court apparently did not consider the interests of the press as "important offsetting considerations" sufficient to warrant an examination of the common law principles. As the decision in *Sweeney v. Patterson* indicates, however, courts in the District have recognized this interest as a significant limitation upon the policy of protecting the individual's interest in his reputation. Yet the court did not discuss the problems imposed on the press by the negligence standard. The fact that in *Phillips* the *Star* is potentially liable for accurately reporting a statement made in reliance upon a routine police report should have been considered by the court in deciding whether to apply a negligence stan-

85. *Id.*

86. *Id.* (citation omitted). The court next considered whether the *Star* had a common law defense to the action. The *Star* asserted that because the hot line report was an official record, the conditional privilege to report official proceedings attached and malice must be shown for the plaintiff to maintain the action. Judge Revercomb, however, refused to extend the privilege to the hot line report because it did "not carry the dignity and authoritative weight as a record for which the common law sought to provide a reporting privilege." *Id.* at 1433.

A major reason conditional privileges were narrowly construed in the past is that the courts were uncertain that the circumstances weighed in favor of publication to the prejudice of the defamed individual. *See* Frakt *supra* note 1, at 496. Since all media publication is protected to some degree after *Gertz*, this justification for a restrictive application of this privilege is no longer valid. Further, since the court adopted the minimum standard of negligence, a broader interpretation of the common law privilege would have provided a means to better protect information of particular public interest. The public's interest in receiving information of police activities, the reliability of the police sources and the time restrictions on publication are important considerations which warranted an extension of the official reports privilege.

The *Star* also argued that the common law privilege of fair comment should attach. In the District of Columbia, the fair comment privilege protects good faith statements of opinion on matters of public interest. *See* Washington Times Co. v. Bonner, 86 F.2d 836 (D.C. Cir. 1936); Fisher v. Washington Post Co., 212 A.2d 335 (D.C. 1965). The *Phillips* court concluded that the statement "during a quarrel" was not an opinion and, therefore, no covered by the privilege. 105 DAILY WASH. L. REP. at 1432.

dard. Further, the possible chilling effect such a standard may have on the reporting of crime and the burden of verification it requires should also have been considered. Arguably, although *Gertz* stated that a negligence standard is all that is constitutionally required, it may not be constitutional to impose liability when the media defendant accurately reports a defamatory statement made by a reliable third party, such as a wire service or a government source.[87] Given the division of the Supreme Court in *Gertz* and the criticism that decision has received,[88] the application of a negligence standard to the facts of this case should have been more carefully examined.

V. CONCLUSION

The controversy in the courts over the standard to apply in defamation cases brought by private individuals involved in matters of public interest is likely to continue for some time. What the standard is, or should be, in the District is uncertain. Two superior court decisions have reached diametrically opposite conclusions. The negligence standard applied in the *Phillips* case, however, clearly illustrates the harshness of that standard to the media defendant when the defamation originates from a reliable public source. Because the standard applied to defamation cases is crucial in determining whether an action can be disposed of by pretrial motions or whether the time and expense of a trial is necessary, it is important that the standard be defined by the District of Columbia Court of Appeals. Hopefully, the shortcomings of the negligence standard applied in this case will be recognized.

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87. In its petition for mandamus, the *Star* claimed that because it accurately reported what the police said and properly attributed it to them, it was without fault and should not be responsible for the underlying truth of the statements made. *Star*'s Petition for a Writ in the Nature of Mandamus at 22. Although the overwhelming weight of authority supports the view that the publisher of a defamatory statement is responsible for the accuracy of the statement and not merely the accuracy of the report, *see* note 23 *supra*, the *Star*'s view has some support. *Cf.* Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 647 (1978). In that case, the court held that a defamatory statement made in the defendant's magazine and reprinted in the *New York Times* could not subject the *Times* to liability because the first amendment protects neutral reporting of newsworthy statements about public figures regardless of whether the reporter had serious doubts about the truth of the statements. *See also* Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933) (newspaper republication of wire service dispatch not actionable).

88. *See* note 48 *supra*; Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion*, 3 HASTINGS CONST. L.Q. 363 (1976) (increased risk of liability and the cost of litigation will have chilling effect on press reporting and the names of some private persons will be stricken from newsworthy stories). *Id.* at 369.