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Libel and the First Amendment: *Time, Inc. v. Firestone*, 424 U.S. 448 (1976)

Richard J. Butler
University of Nebraska College of Law

Note

Libel and the First Amendment

Time, Inc. v. Firestone, 424 U.S. 448 (1976).

I. INTRODUCTION

The following item appeared in the December 22, 1967, issue of Time Magazine:

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

Mrs. Firestone responded to the article with a libel action, the merits of which were reviewed by the United States Supreme Court in *Time, Inc. v. Firestone*.[1] The suit presented the Court with the opportunity again to set forth the appropriate balance between competing interests inherent in the tort of libel—the protection of individuals from libelous falsehoods and the first amendment right of freedom of the press. The balance was last struck in *Gertz v. Robert Welch, Inc.*,[2] where the Court held that publications concerning public figures were constitutionally protected if not published with actual malice,[3] whereas publications concerning private individuals could result in liability after a finding of fault and actual injury. The *Gertz* decision aroused considerable adverse commentary and the judiciary experienced difficulty in applying its holdings.[4] *Firestone* presented an avenue by which the Court

1. 424 U.S. 448 (1976).
2. 418 U.S. 323 (1974).
3. Actual malice is defined as knowledge of, or reckless disregard for, the truth. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). In St. Amant v. Thompson, 390 U.S. 727 (1967), the term was further defined as requiring that a publisher must have entertained serious doubt as to the truth of his publication. *Id.* at 731.
4. In El Meson Espanol v. NYM Corp., 389 F. Supp. 357 (S.D.N.Y. 1974), *aff'd*, 521 F.2d 737 (2d Cir. 1975), the court characterized the decision as "a dangerous and unworkable step backward." *Id.* at 358-59. Also critical of the decision are Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450 (1975); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., — Ind. App. —, 321 N.E.2d 580 (1974); Commercial Programming Unltd. v. Columbia Broadcasting Sys., Inc., 81 Misc. 2d 678, 367 N.Y.S.2d 986 (Sup. Ct. 1975).

could clarify its position by applying the holdings of *Gertz* to a uniquely new fact situation. In particular, the Court was drawn to consider whether Mary Firestone was a public figure, and if not, whether fault and actual injury had been shown. Additionally, the Court was asked to determine the appropriate constitutional standard for gauging the liability of a publisher of a defamatory, inaccurate report of a judicial proceeding. This note will examine the Court's handling of these issues.

II. HISTORY

Libel is a tort which provides an individual, whose reputation has been injured by a publication, a cause of action against the publisher.[5] At common law, the tort was one of strict liability.[6] Defamatory or false statements were presumed to be actionable. To escape liability the defendant had to show that the publication was either privileged or true.[7]

Prior to 1964, the tort was independent of any specific constitutional limitations.[8] However, in *New York Times Co. v. Sullivan*,[9] the Court began to redefine the dimensions of the tort. There, the Court held that libelous statements about public officials were not actionable unless it was shown that the statements had been made with actual malice. The first amendment was read to mandate this result in order to avoid self-censorship[10] and to allow for uninhibited criticism and debate of public matters.[11] The application of the actual malice standard later was expanded to libelous statements about candidates for public office,[12] public figures,[13] and com-

For critical commentary see Anderson, *Libel and Press Self-Censorship*, 53 TEXAS L. REV. 422 (1975); Beytagh, *Privacy and Free Press: A Contemporary Conflict in Values*, 20 N.Y.L.F. 453 (1975); Turkington, *Foreseeability and Duty Issues in Illinois Torts; Constitutional Limitations to Defamation Suits After* Gertz, 24 DE PAUL L. REV. 243 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 139 (1974); Note, 41 BROOKLYN L. REV. 389 (1974).

5. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1971); F. POLLOCK, THE LAW OF TORTS 176 (15th ed. 1951).
6. *See* W. PROSSER, *supra* note 5, § 113.
7. HANSON, LIBEL AND RELATED TORTS ¶ 96 (1969).
8. *See, e.g.*, Konigsberg v. State Bar of California, 366 U.S. 36, 49 (1961); Roth v. United States, 354 U.S. 476, 483 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Near v. Minnesota, 283 U.S. 697, 715 (1931).
9. 376 U.S. 254 (1964).
10. *Id.* at 279.
11. *Id.* at 270-71.
12. Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 299 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971).
13. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); Associated Press v. Walker, 388 U.S. 130, 155 (1967).

ments on matters of public concern by a government employee.[14] Continuing the trend of providing greater constitutional protection to the press, in *Rosenbloom v. Metromedia, Inc.*,[15] a plurality of the Court held that the actual malice standard attached to any publication of a matter of public interest. In *Gertz*, the Court abandoned the public interest test and limited the actual malice standard to reports concerning public figures. Additionally, the Court looked beyond the actual malice standard for the first time and held that a defamed, private individual could recover only upon showing fault and actual injury.

The case history of *Time, Inc. v. Firestone* reflects the constitutional changes that the tort of libel has undergone in recent years. The Florida Palm Beach Circuit Court announced a $100,000 jury award of damages to Mary Firestone.[16] Before the district court of appeals, it was found that the publication was a matter of public interest[17] and that according to *Rosenbloom*, Time could not be held liable absent a showing of actual malice. Finding that Mary Firestone failed to meet this burden, judgment was entered for Time. On review, the Florida Supreme Court found the actual malice standard to be inapplicable and thus remanded the suit.[18] On remand the sympathies of the district court of appeal again extended to Time.[19] This time, the court found the article to be privileged conditionally under state law because it was a report of a judicial proceeding.[20] It was also reasoned that Time should prevail because Mary Firestone had failed to prove that she had suffered injury to her reputation by reason of the publication.[21] The Florida Supreme Court reversed,[22] finding that the report was not privileged as a judicial report because it was inaccurate.[23] Moreover it was held that under the recently rendered *Gertz* decision, lack of reputational injury was not fatal to the action.[24]

14. Pickering v. Board of Educ., 391 U.S. 563, 574 (1968).
15. 403 U.S. 29 (1971).
16. 305 So. 2d 172, 174 (Fla. 1974).
17. 254 So. 2d 386, 389 (Fla. App. 1971).
18. 271 So. 2d 745 (Fla. 1972). The court distinguished between "public interest" and "public concern." *Id.* at 749. *Rosenbloom* was interpreted as holding the actual malice standard exclusively applicable to the latter. The court found the divorce proceedings to be not a matter of public concern and consequently that constitutional protection did not attach. *Id.* at 752.
19. 279 So. 2d 389 (Fla. App. 1973).
20. Florida law provided that a fair and accurate report of judicial proceeding was conditionally privileged. *Id.* at 394.
21. *Id.* at 394.
22. 305 So. 2d 172 (Fla. 1974).
23. *See* note 54 *infra.*
24. 305 So. 2d 172, 176 (Fla. 1974).

III. THE ISSUES

On appeal to the Supreme Court, Time contended that the lower court had erred on several grounds. First, Time asserted that it could not be held liable absent a showing of actual malice because Firestone was a public figure.[25] Second, it contended that the actual malice standard applied because the contested publication was a report of a judicial proceeding.[26] Third, it argued that because Firestone had not proven injury to her reputation she had not met the burden of proving actual injury.[27] The Supreme Court, in an opinion delivered by Justice Rehnquist,[28] rejected each of Time's contentions. However, the Court found error in the fact that the Florida courts had not made a definite determination that Time was at fault. Therefore, the Court vacated the lower court's decision and remanded for a finding of fault.[29]

A. Public Figure

Mary Firestone was a prominent figure in Palm Beach society, a member of the sporting set, and the wife of the scion to an industrial fortune. She subscribed to a press clipping service from which she probably received great benefit, as no less than eighty-eight articles concerning her divorce appeared in various Miami circulations. During the divorce trial she held press conferences and the public interest in the proceedings was such that one Florida court characterized the divorce trial as a "cause celebre."[30]

1. Prominence or Participation in Controversy

To determine whether Mary Firestone was a public figure, in light of the foregoing factors, the Supreme Court primarily employed two tests: (1) whether Mary Firestone had assumed a role of special prominence in the affairs of society,[31] and (2) whether she voluntarily had involved herself in the resolution of a public controversy.[32]

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25. 424 U.S. at 453.
26. *Id.*
27. *Id.* at 460.
28. Burger, C.J., and Stewart, Blackmun, & Powell, J.J., joined in the opinion. Stevens, J., took no part in the consideration or decision of the case.
29. 424 U.S. at 464.
30. 271 So. 2d 745, 751 (Fla. 1972).
31. 424 U.S. at 453.
32. *Id.*

Applying these standards, the Court found that, although Firestone was perhaps prominent in the societal affairs of Palm Beach, she was not a public figure for having assumed a role of special prominence in the affairs of society. The Court also found that she had not become a public figure by voluntarily involving herself in the resolution of a public controversy. It was reasoned that she did not fall under this category because her actions were neither related to a public controversy nor voluntary. This conclusion was reached by finding that whereas the divorce proceedings may have been of interest to some readers, they were not a matter of public controversy. Additionally, it was found that although she had initiated the divorce suit, her actions were not voluntary because she was compelled to enter the courtroom to obtain a legal remedy.[33] As to the press conferences which she had held during the divorce proceedings, the Court intimated that these were not so much voluntary as they were "attempts to satisfy inquiring reporters."[34]

The majority went on to note, unaccompanied by any prefatory or explanatory remarks, that Firestone had not assumed "special prominence in the resolution of public questions."[35] Upon this and the foregoing findings it was concluded that Firestone was not a public figure.

2. *Selective Application of* Gertz

The tests that the Court used in determining the public figure question were drawn directly from *Gertz*.[36] However, a comparison of the definitions announced in *Gertz* as to what constitutes a public figure and those used in *Firestone* reveals that in *Firestone* the Court made a selective application of the *Gertz* tests.

Although difficult to quantify, a composite of the language in *Gertz* revealed that there the Court considered two main categories of public figures to exist. First, there were individuals who because of their pervasive "fame or notoriety,"[37] or "power and influence,"[38] or "involvement in the affairs of society,"[39] became

33. As authority for the proposition that resort to a judicial remedy is not voluntary, the Court referred to Boddie v. Connecticut, 401 U.S. 371, 376 (1971). In *Boddie* the Court had held that state denial of divorce proceedings to indigents violated the due process clause.
34. 424 U.S. at 454 n.3.
35. *Id.* at 454.
36. *Id.* at 453-54.
37. 418 U.S. at 351.
38. *Id.* at 345.
39. *Id.* at 352.

public figures for all purposes. Second, those individuals who had injected themselves or were drawn into the resolution of public controversies were considered to be public figures when acting within the realm of the particular controversy.[40] Common to both the all-purpose and limited-public-figure tests were the elements that the person had "invite[d] attention and comment"[41] and assumed "special prominence in the resolution of public questions."[42]

Absent in the *Firestone* decision was consideration of whether Mary Firestone had become a public figure by achieving fame or notoriety in the community. Also absent was whether or not she had been "drawn" into a public controversy. Similarly, the opinion did not entertain whether she had invited attention or comment.

Whether the Court would have found Firestone not to be a public figure had a verbatim application of *Gertz* been used is unclear. Therefore, *Firestone* raises the problem of whether it should be interpreted as eliminating the unused language of *Gertz* from future public figure questions, or whether the Court considered the absent standards as merely equating to those utilized and hence superfluous. However, there was some indication that *Firestone* at least eliminated fame or notoriety as a test for determining public figures. The following illustrates this thesis.

3. What Community?

The majority found Firestone's involvement in Palm Beach society to be insufficient to satisfy the test of whether she had assumed a role of special prominence in the affairs of society. As Palm Beach was Mary Firestone's local community, the Court appeared to hold that involvement beyond the scope of one's local community is required to create a public figure under the applied test. Such a requirement is inconsistent with a careful reading of *Gertz*.

In *Gertz*, both prominence in the affairs of society and fame or notoriety were described as grounds for finding a person to be a public figure for all purposes. In determining whether fame or notoriety was present in *Gertz*, the Court looked at whether this had been achieved in the plaintiff's local community.[43] If, as the

40. *Id.* at 351.
41. *Id.* at 345.
42. *Id.* at 351.
43. *Id.* at 352.

Gertz opinion suggests, fame or notoriety equate with prominence in societal affairs, it becomes syllogistic that the local community is the determinative locale as to whether one has assumed prominence in the affairs of society. Thus, Mary Firestone's prominence in Palm Beach society would warrant that she be deemed a public figure. The fact that this result did not obtain suggests not only that fame or notoriety do not equate with prominence in societal affairs, but also that *Firestone* eliminates fame or notoriety as a viable standard in the public figure question.

Beyond the initial uncertainty as to whether the terms in *Firestone* parallel those left untouched from *Gertz*, difficulties arise in determining what constitutes, "affairs of society," "public controversies" and "public questions." If the local community does not supply the boundaries for determining whether a person has obtained special prominence in societal affairs, what community or society should be examined? *Firestone* provided little guidance on this point. One can hypothesize that "affairs of society" refers in some absolute sense to a society larger than that of Palm Beach. Perhaps a state, regional, or national society is the appropriate focal point. However, where the line should be drawn is entirely unclear.

4. Divorce Proceedings

Similarly perplexing is the Court's conclusion that divorce proceedings are not public controversies. Again the opinion did not articulate how this conclusion was reached. In the absence of any guidelines, the Court created a test subject to the discretionary evils that *Gertz* had sought to eradicate.

Gertz replaced the public interest test with the public figure test for determining when the actual malice standard applied. It did so because the former test, as a subject matter criterion, gave judges too much discretion and allowed for ad hoc decision making.[44] By failing to provide guidelines as to what constitutes a public controversy, *Firestone* allowed the problem that *Gertz* sought to eliminate once again to emerge. The public controversy test parallels the public interest test as a subject matter criterion and in the absence of any direction as to what the test entails, judges once again are allowed discretion which will result in ad hoc determinations.[45]

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44. *Id.* at 346.
45. For similar criticism, see Justice Marshall's dissent, 424 U.S. at 488. *See also* 49 S. CAL. L. REV. 1131, 1213 (1976).

Although the majority in *Firestone* ignored some language from *Gertz*, it chose not to ignore consideration of whether Mary Firestone had assumed special prominence in the resolution of public questions. The Court's finding in the negative, without explanation, created the same problems of concreteness already described with reference to "affairs of society" and "public controversies."

Whereas it is clear that the Court is struggling to define what constitutes "affairs of society," "public controversy" and "public questions," this uncertainty works against the constitutional reasons for such standards. The tests are employed to gauge when the actual malice standard should be invoked. The constitutional reasons for imposing the actual malice standard are to provide for uninhibited debate and criticism by the press.[46] Yet it is unlikely that a prudent publisher will be able to enjoy this breathing space when the line between who is a public figure and who is a private individual is so difficult to discern. The fear of guessing wrong is likely to lead a publisher to exercise a degree of self-censorship, an additional evil which the public figure category was created to combat.[47] The net result is that the breathing space that the press should enjoy has been polluted by uncertainties.

The Court's finding that Mary Firestone had not acted voluntarily in initiating the divorce proceedings rested on more settled ground. Policy considerations support the Court's holding. To have held that commencement of a suit is a voluntary action, sufficient to trigger public figure classification when a public controversy is involved, could have gone far toward deterring individuals from seeking judicial relief. The increased possibility of noncompensatory reputational harm which a public figure incurrs is not a risk which should be engendered solely because one seeks justice.

5. Public Figure Rationale

The Court's additional finding that Firestone's press conferences were not necessarily voluntary is more tenuous. In *Gertz*, one of the specific reasons given for concluding that the plaintiff was not a public figure was that he had not gone to the press with his views.[48] Thus it would seem that Firestone's press conferences should have gone far toward drawing her into the public figure category. By finding otherwise, the Court in *Firestone* made clear

46. *See* note 11 and accompanying text *supra*.
47. *See* note 10 and accompanying text *supra*.
48. 418 U.S. at 352.

that it will not easily find an individual's actions to be of a voluntary nature so that he or she should be deemed a public figure.

Also clear from the Court's decision is that the criteria for determining a public figure are narrower than the underlying reasons for distinguishing between public figures and private individuals. In *Gertz*, the Court reasoned that public figures should receive different constitutional treatment than private persons because the former had (a) access to means of rebuttal[49] and (b) assumed the risk of libelous falsehoods.[50] Utilizing these factors as the standards for determining who is a public figure, Justice Marshall, in his dissenting opinion, concluded that Mary Firestone should have been held to be a public figure.[51]

Justice Marshall contended that Mary Firestone had sufficient access to a self-help remedy, evident by the facts that she had held press conferences and had been the topic of numerous press items which were "evidently frequent enough to warrant her subscribing to a press-clipping service."[52] Additionally, he argued that by choosing to be an active member of the sporting set, initiating the divorce proceedings and voluntarily holding press conferences, Firestone had assumed the risk of defamatory injury. Viewing Firestone as aligned with the reasons for treating public figures differently than private individuals, he concluded that she was a public figure.

The dissent evidenced that using the reasons for the public figure distinction can lead to a result contrary to that reached under the standards adopted by the majority. By rejecting Justice Marshall's view and employing different tests for a public figure question, the majority clearly indicated that access to means of rebuttal and assumption of the risk were not the standards to be used in determining who is a public figure. However, the net result, evident from the divergent results of the majority and the dissent, is that the reasons supporting the public figure classification are much broader than the confines of the class itself. The imbalance would seem to leave open the possibility of a future need to either refine the base or relax the tests.

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49. *Id.* at 344.
50. *Id.* at 345. *See also* Eaton, *The American Law of Defamation through* Gertz v. Welch, Inc., *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1419 (1975).
51. 424 U.S. at 484.
52. *Id.* at 485.

B. Reports of Judicial Proceedings

Although the Court recently had decided that accurate reports of judicial proceedings were absolutely privileged,[53] the specific constitutional protection for inaccurate reports had not been decided. The Court rejected Time's urging that the actual malice standard automatically should extend to its inaccurate report of a judicial proceeding.[54] Instead, the Court found that the fault standard was the appropriate test for assessing a publisher's liability.

Three main justifications for this holding were offered. First, the Court reasoned that extending the actual malice standard to reports of judicial events would create a subject matter criterion, a type of classification that had been eschewed in *Gertz*.[55] Whereas

53. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

54. Mary Firestone commenced a suit for separate maintenance. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery. The divorce court granted the divorce stating:

> According to certain testimony in behalf of the defendant, extra-marital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony, in plaintiff's behalf, would indicate defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr. The court is inclined to discount much of this testimony as unreliable. Nevertheless, it is the conclusion and finding of the court that neither party is domesticated, within the meaning of that term as used by the Supreme Court of Florida . . . .
>
> In the present case, it is abundantly clear from the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication, and that the marriage should be dissolved.
>
> That the equities in this cause are with the defendant; that defendant's counterclaim for divorce be and the same is hereby granted, and the bonds of matrimony which have heretofore existed between the parties are hereby forever dissolved.

424 U.S. at 450-51. The court also ordered divorce payments. *Time* had reported that adultery was one of the grounds for divorce. The issue of the accuracy of the report turned on whether such was a basis for the decree. The Florida Supreme Court twice held that adultery was not the grounds for the divorce. In reviewing an appeal from the decree the Court found that judgment had been entered on the ground of lack of domestication. 271 So. 2d 745 (Fla. 1972). Later in reviewing the libel action the same court stated that extreme cruelty was the basis for the decision. It was reasoned that because Florida law prohibited awarding alimony where adultery was found, that in view of the fact that alimony was awarded necessarily adultery could not have been a basis for the divorce and that the report was false. 305 So. 2d at 178. In deference to the state court findings the Supreme Court held the article to be inaccurate because it stated that adultery was one of the grounds for the divorce.

55. *See* note 44 and accompanying text *supra*.

the Court was accurate in noting that the desired expansion would create a subject matter criterion, it failed to notice that the rationale upon which *Gertz* premised its disfavor[56] was not applicable to reports of judicial proceedings. A determination of what is a report of a legal proceeding is not subject to the wide discretion feared in *Gertz*. Rather, readily definable standards exist for classifying judicial reports. Contrary to reports of public interest, reports of judicial proceedings can be traced to tangible events. Thus, upon scrutiny, the Court's fears are revealed to be unwarranted and hence not supportive of its finding.

Second, the Court noted that there was little reason to diminish the constitutional protection against libelous falsehoods that a private individual otherwise would enjoy simply because he was party to a suit. This argument carries more force because decreasing an individual's chances of recovering for defamatory harm would be likely to impede justice.[57]

Finally, the Court reasoned that the actual malice standard was not necessary because reports of judicial proceedings most often would add little to the advancement of uninhibited debate of public issues. Perhaps this argument is used best when applied to the facts before the Court, however the strength of the Court's language is difficult to accord with the importance attributed to reports of judicial events in previous decisions. Prior Supreme Court decisions recognized that press coverage of judicial proceedings was essential to enable intelligent voting,[58] to guarantee the fairness of trials[59] and to subject the judiciary to public scrutiny and criticism,[60] all of which would seem to be public issues.

In a dissenting opinion in *Firestone*,[61] Justice Brennan siezed these prior decisions to reach the conclusion that judicial reporting should be protected by the actual malice standard. His thesis was that the core meaning of the first amendment was that the citizenry have access to information necessary for self-government. Reading several Supreme Court decisions to place judicial reports within this core, Justice Brennan argued that a fault standard did not adequately reflect the constitutional importance of such reports.

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56. *Id.*
57. The Supreme Court's position parallels its posture in deciding that entering the courtroom is not a voluntary act. *See* text following note 47 *supra.*
58. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).
59. *See id.*
60. *See* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).
61. 424 U.S. at 471.

The majority evidently did not perceive this importance, as it held that reports which fell both within and outside the core were to be scrutinized under a standard of fault. However, this disparity may be illusory in view of the uniqueness of reports of judicial proceedings. At common law, inaccurate reports of judicial proceedings were held to result in strict liability.[62] The primary justification for the stringency of this standard was that because official court records were available to reporters, coverage of judicial proceedings was uniquely susceptible to accurate reporting.[63] In contrast to reports which fall outside the core, but which are contingent upon futile or fallible modes of investigation, one could argue that the constitutional importance of judicial reporting is counterbalanced by their unique circumstance and that an umbrella of fault best accommodates both kinds of reports.

Thus the Court's holding that inaccurate reports of legal proceedings are governed by a fault standard appears to be a reasonable compromise of the competing interests of the individual and the press. The fault standard allows for error in reporting while maintaining protection for the individual. Public figures involved in litigation would still fall under the actual malice standard[64] and the Court even indicated that more narrowly focused reports of judicial proceedings might receive greater constitutional protection.[65] At least the Court has left open the possibility of providing greater protection to the press in the future.

C. Actual Injury

Having determined that the actual malice standard did not apply, the Court turned to consider whether the constitutional limitations on recovery by a libeled private individual had been satisfied. *Gertz* had announced that where the actual malice standard did not attach, a plaintiff could be compensated only for actual injury. The rationale for this requirement was that the common law practice of presumed damages operated too harshly against the press by inhibiting "vigorous exercise of First Amend-

62. Most common law privileges pertaining to reports of judicial proceedings were predicated upon the report being accurate. *See* 25 Sw. L.J. 800 (1971). Nebraska law follows suit. *See* Rhodes v. Star Herald Printing Co., 173 Neb. 496, 113 N.W.2d 658 (1962). In the absence of truth or a privilege libel becomes a tort of strict liability. *See also* notes 6 and 7 *supra.*

63. *See* Jones v. Commercial Printing Co., 249 Ark. 952, 463 S.W.2d 92 (1971); Gobin v. Globe Publishing, 216 Kan. 223, 531 P.2d 76 (1975).

64. 424 U.S. at 457.

65. 424 U.S. at 456.

ment freedoms."[66] Additionally, disfavor was found with presumed damages because they allowed juries to award compensation merely to punish unpopular opinion rather than to compensate injury actually sustained by reason of the publication.[67] Compensation only for actual injury was imposed to circumvent these evils. The Court refused to define actual injury, observing that trial courts had sufficient experience for framing the issue, but *Gertz* did note that:

> [T]he more customary types of actual harm . . . include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury . . . .[68]

The question that lingered after *Gertz* was whether proof of reputational injury was a condition precedent to recovery for personal humiliation or mental anguish and suffering, or whether the latter elements alone were sufficient to satisfy the actual injury requirement.[69] The issue was squarely presented in *Firestone*. The plaintiff had recovered solely on the basis of mental pain and suffering.[70]

The Supreme Court, referring to its language in *Gertz*, ruled that reputational injury need not be shown to satisfy the actual injury standard, and that the grounds upon which Mary Firestone had recovered were acceptable. It then turned to whether the award was supportable by competent evidence. Observing that several witnesses[71] had attested to the anxiety experienced by the plaintiff, the Court held that the actual injury test had been met.

Justice Brennan again differed with the Court's holding.[72] He argued that proof of injury to reputation was a condition precedent to recovery for mental pain and suffering. The dissent construed the Court's decision as a return to allowing presumed damages and punishment of unpopular opinions.[73]

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66. 418 U.S. at 349.
67. *Id.*
68. 418 U.S. at 350.
69. *See* Anderson, *supra* note 4, at 472 (Reading *Gertz* as holding reputational injury to be a condition precedent to recovery); Eaton, *supra* note 50, at 1437, (Interpreting *Gertz* as possibly allowing recovery without showing injury to reputation).
70. Plaintiff withdrew her claim of injury to reputation prior to the trial. 424 U.S. at 475 n.3 (dissenting opinion).
71. A minister, an attorney, a physician, and several friends of Mrs. Firestone testified to the extent of her anxiety. Evidence also was adduced that she had taken sedatives to try to reduce this tension.
72. 424 U.S. at 471 (dissenting opinion).
73. Additionally, he argued that the Court's holding would eliminate the

The dissenter's position lacked merit. He ignored that regardless of form, awards for actual injury have to be supported by competent evidence. This factor controls an argument that the Court has returned to presumed damages and punishment of minority views because the awards cannot extend beyond the facts.

The traditional conceptualization of libel is that damage to reputation is the essence of the tort.[74] *Firestone* firmly established that the tort can exist constitutionally in the absence of such injury. While removal of this element as a requisite to the tort is likely to create havoc,[75] objections should be addressed to state lawmakers, not the Supreme Court. *Firestone* does not preclude a state from requiring injury to reputation as an element of the tort. Rather the Court has given the states the latitude to define the tort.

D. Fault

Gertz threw out the common law rule that libelous utterances are subject to strict liability. The Court saw this standard as working too vigorously against the press, because even if a publisher took every reasonable precaution to ensure the accuracy of a publication, he could be held liable if it turned out to be inaccurate.[76] The Court reasoned that a fault standard should be applied because it was more accommodating to the competing interests involved. Thus it was held that as long as liability was not imposed without fault, the states could decide for themselves the liability of a publisher who had defamed a private individual.

Gertz had just been decided when the Florida Supreme Court was entertaining *Firestone* for the second time. Toward the end of its opinion on the case the court stated:

> [T]his erroneous reporting is clear and convincing evidence of the negligence in certain segments of the news media in gathering the news. *Gertz v. Welch, Inc., supra.* . . . A careful examination of the final decree prior to publication would have clearly demonstrated that the divorce had been granted on the grounds of extreme cruelty, and thus the wife would have been saved the humiliation of being accused of adultery in a nationwide magazine. This is a flagrant example of "journalistic negligence."[77]

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use of summary judgment procedures in libel actions and thus inhibit the press by subjecting publishers to the fear of increased litigation expenses. *Id.* at 475 n.3. For a treatment of this thesis see Anderson, *supra* note 4, at 469 n.218.

74. Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971).
75. *See* Eaton, *supra* note 50 at 1437.
76. 418 U.S. at 346.
77. 305 So. 2d at 178.

The issue before the Supreme Court was whether the Florida Supreme Court opinion should be read as finding fault on the part of Time in making its publication. Basically the Court had three alternatives: (1) to affirm the language of the Florida Supreme Court as a valid finding of fault, (2) to make a de novo determination of fault, and (3) to remand for a further determination of fault. The third was adopted on the grounds that the lower court opinion did not reveal that a conscious determination of fault had been made.[78]

By considering what guidelines the lower court should follow in making a conscious determination of fault, the concurring and dissenting opinions revealed that some members of the bench were willing to go further than the majority in explaining what the fault standard requires. Justices Powell, Stewart and Marshall agreed that the rationality of the Time's interpretation of the ambiguous divorce decree[79] should be a crucial element in determining fault.[80] Justices Powell and Stewart also emphasized that the due care which Time had exercised prior to publication must figure into an analysis of fault.[81] Justice Marshall was willing to go further and hold that the choice of one of several rational interpretations of an ambiguous document, without more, was insufficient to support a finding of fault.[82]

Had the Court made an independent determination of fault, the decision would have gone far toward establishing limits by which

78. 424 U.S. at 484.
79. In relevant part, the divorce decree is quoted in note 54 *supra.*
80. 424 U.S. at 467-69, 491.
81. 424 U.S. at 465-66. The *Time* article was composed on the basis of several sources: a statement by Mrs. Firestone's attorney to a *Time* stringer that the divorce had been granted on grounds of adultery and extreme cruelty, a telephone conversation that the stringer had with the trial judge, excerpts from the divorce decree which suggested adultery on the part of both parties, and a wire service dispatch and New York newspaper article which intimated that the grounds for the divorce were extreme cruelty and adultery.
82. As authority for this proposition, Justice Marshall relied heavily upon Time, Inc. v. Pape, 401 U.S. 279 (1971). 424 U.S. at 490. The decision dealt with a *Time* article which had failed to note that it was stating allegations rather than findings of fact. The Court held that a choice of one of several rational interpretations of an ambiguous document was not enough to create a jury issue of actual malice. In *Firestone*, *Time* argued that the rule of the case was that a rational interpretation of an ambiguous document could not result in liability. The majority rejected this argument by holding that *Pape* only applied where the actual malice standard attached. Because the Court found the actual malice standard to be not appropriate to the suit, it found *Pape* to not be controlling. 424 U.S. at 459 n.4.

state courts could define fault.[83] By imposing a requirement of a conscious determination upon the Florida court, the majority did not invade the state's providence to define fault. Rather the Court merely required that the Florida court's reasoning be more than an apparent afterthought. However, the concurring and dissenting opinions revealed that, should the lower court overlook the factors which those justices viewed as important, an appeal might be well-founded.

IV. CONCLUSION

Time, Inc., v. Firestone, cannot be the final word on the appropriate balance between the first amendment and the interests of the individual. The question of who is a public figure remains largely unresolved. Language narrower than that employed in *Gertz* was adopted in *Firestone* for determining who is a public figure, however, whether an actual narrowing of the tests has occurred is difficult to discern. The crux of the problem, which probably will be solved only by future litigation, is what constitutes "affairs of society," a "public controversy," and "public questions." In the interim, publishers are best advised to be wary of their own intuitions of who is a public figure.

A determination of when the actual malice standard would apply to judicial reports is also unresolved. The decision leaves one wondering how far the Court will go in regulating the fault requirement. Although *Firestone* took the threshold step by requiring a conscious determination of fault, the Court's remand makes clear that it is not eager to enter this arena. In view of the path that *Firestone* has traveled up and down the judicial system, it would not be surprising if the same suit later provides the impetus for the Court to clarify the issues left unresolved in the 1976 opinion.

Richard J. Butler, '78

83. One of the questions that remains unclear is what fault standard should be applied: mere, ordinary, or gross negligence. Had the Court wished to make a de novo determination of fault it would have been forced to decide.