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# Libel—New Standard for Liability for Media Defendants—Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 546 P.2d 81 (1976)

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LIBEL—NEW STANDARD OF LIABILITY FOR MEDIA DEFENDANTS—*Taskett v. KING Broadcasting Co.*, 86 Wn. 2d 439, 546 P.2d 81 (1976).

William Taskett's advertising business had suffered serious financial setbacks which caused him to seek statutory corporate dissolution. Believing that his affairs had been put in order, he left the state for an extended vacation.[1] Because his whereabouts were unknown to his unsatisfied creditors, which included several prominent Seattle businesses, KING Broadcasting Company decided that his "disappearance" was newsworthy,[2] and made it the subject of a television news story.

Taskett brought suit against KING for libel, alleging that its story had depicted him as a "thief and a swindler." Relying upon the controlling Washington authority of *Miller v. Argus Publishing Co.*,[3] the trial court granted KING a summary judgment dismissing the action. *Miller* recognized a conditional privilege for publishers and broadcasters in defamation actions arising out of any publication involving a matter of public interest, which could be defeated only by a showing that the defendant had published with "actual malice."[4]

Taskett appealed. Relying upon the recent decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*,[5] the Washington Supreme Court reversed.[6] *Held:* When a publication concerns a subject of public interest and the substance makes the danger to reputation apparent, a private individual may recover in a defamation action against a publisher or broadcaster only upon a showing that the defendant knew, or in the exercise of reasonable care should have known, that the publication was false or would create a materially false impression.[7] If the plaintiff cannot show "actual malice," how-

1. 86 Wn. 2d 439, 440–41, 546 P.2d 81, 82–83 (1976).
2. Brief for Respondents at 6, Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 546 P.2d 81 (1976). The trial court found that the story related to a matter of general public concern. *Id.* at 441–42, 546 P.2d at 83.
3. 79 Wn. 2d 816, 490 P.2d 101 (1971).
4. *Id.* at 827, 490 P.2d at 109.
5. 418 U.S. 323 (1974). *Gertz* allowed the states considerable latitude to reduce the protection for the media defendant which had previously been held required by the Constitution. *Id.* at 347. Although *Gertz* had been decided by the time of the trial court decision in *Taskett,* that court believed that *Miller* was controlling, and stated that any change in the law would have to come from the state supreme court. Taskett v. KING Broadcasting Co., 86 Wn. 2d at 441–42, 546 P.2d at 83.
6. 86 Wn. 2d at 450, 546 P.2d at 88. The case had been certified directly to the Washington Supreme Court by the court of appeals. *Id.* at 442, 546 P.2d at 83.
7. *Id.* at 445, 546 P.2d at 85.

ever, recovery will be limited to actual damages.[8] *Taskett v. KING Broadcasting Co.*, 86 Wn. 2d 439, 546 P.2d 81 (1976).

With *Taskett,* the Washington Supreme Court has reduced from "actual malice" to "negligence" the degree of fault which must be shown in order to defeat a publisher's or broadcaster's constitutional privilege in most defamation actions brought by a private individual. The *Taskett* privilege is nonetheless based upon the same constitutional considerations which led to the adoption of the "malice" standard in *New York Times Co. v. Sullivan.*[9] Cases which apply the new *Taskett* standard should therefore be governed by the procedural safeguards which are an integral part of the *New York Times* standard.

The *Taskett* holding is expressly limited to cases in which the subject of the publication involves a matter of public interest. However, because *Gertz,* which established the constitutional foundation for *Taskett,* extends the protection of the constitutional privilege to *any* defamation regardless of the subject matter, the limitation is inapposite. There may no longer be strict liability in defamation imposed against a publisher or broadcaster.

*Taskett* limits plaintiff's recovery to "actual damages" when a degree of fault less than "actual malice" is shown. A subsequent Washington case holds that "actual damages" will not be narrowly construed.[10]

## I. THE LAW OF DEFAMATION IN WASHINGTON

In Washington, as in most other states, common law defamation was a strict liability tort which could be defeated only by the defenses of truth, consent, or absolute or conditional privilege.[11] In 1964, the United States Supreme Court decided *New York Times Co. v. Sulli-*

8. *Id.* at 447, 546 P.2d at 86.
9. 376 U.S. 254 (1964).
10. Rasor v. Retail Credit Co., 87 Wn. 2d 516, 554 P.2d 1041 (1976).
11. Jolly v. Fossum, 63 Wn. 2d 537, 388 P.2d 139 (1964). *See, e.g.,* Gold Seal Chinchillas, Inc. v. State, 69 Wn. 2d 828, 420 P.2d 698 (1966) (absolute privilege); Owens v. Scott Publishing Co., 46 Wn. 2d 666, 284 P.2d 296 (1955), *cert. denied,* 350 U.S. 968 (1956) (conditional privilege). "Fair comment," although sometimes treated as an independent defense, Jolly v. Fossum, 63 Wn. 2d 537, 541, 388 P.2d 139, 141 (1964), is considered a species of conditional privilege. *See, e.g.,* Cohen v. Cowles Publishing Co., 45 Wn. 2d 262, 273 P.2d 893 (1954) (fair comment), W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 111–116 (4th ed. 1971). *See generally* Comment, *An Outline of the Law of Libel in Washington,* 30 WASH. L. REV. 36, 40–45 (1955).

*van*,[12] the first of a line of cases which were to profoundly alter the common law of defamation. *New York Times* recognized that strict liability in defamation actions has a "chilling effect"[13] upon the exercise of freedoms which are guaranteed by the first amendment. The Court held that in defamation actions brought by public officials for falsehoods relating to their official conduct, the Constitution requires that publishers[14] be protected by a privilege which may be defeated only upon a showing that the defamatory statement was made with "actual malice"; that is, "with knowledge that it was false or with reckless disregard of whether it was false or not."[15] The *New York Times* privilege was subsequently extended in *Curtis Publishing Co. v. Butts*[16] to apply to cases in which the defamed individual was merely a "public figure."[17] Washington recognized the constitutional privilege

12. 376 U.S. 254 (1964). *New York Times* involved a suit brought by an Alabama city commissioner over a paid advertisement which connected him with the maltreatment of black students.

13. Defense of any defamation claim involves both economic and non-economic costs. The most obvious costs are the cost of defense, and, if unsuccessful, the damage award; in lieu of these a defendant may agree to a settlement cost. Less easily reduced to economic terms are the damages to a publisher's professional reputation, regardless of who prevails. In order to avoid these costs, a "rational" publisher will tend to avoid publishing material which is likely to give rise to law suits, hence the "chilling effect" upon first amendment freedoms.

The degree of this "chilling effect" is related to the probability that given conduct will give rise to a law suit, and to the probability that the publisher will lose. When the publisher is held to a standard of strict liability, suits are both more likely to be brought and more likely to be successful. The strict liability standard, therefore, has the greatest "chilling effect." *See generally* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430–38 (1975). *See also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

14. *See* note 29 *infra*.

15. 376 U.S. at 279–80.

16. 388 U.S. 130 (1967). *Butts* involved an action brought by a well known college football coach and athletic director over a story appearing in the *Saturday Evening Post* which charged him with "fixing" a football game. A companion case, Associated Press v. Walker, 388 U.S. 130 (1967), involved an action brought by a retired general over a news account distributed by the Associated Press wire service describing his involvement in a racial disturbance.

17. *Id.* at 155. In determining the "public figure" character of a plaintiff, the Court looked to "ordinary tort rules." It concluded that the two plaintiffs in *Butts* and *Walker* were both "public figures" because they both "commanded a substantial amount of independent public interest at the time of the publications." One plaintiff attained that status by "position alone," as a nationally prominent football coach, the other "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 154–55.

The necessity of determining whether or not a plaintiff is a "public figure" was made temporarily moot by Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), where a plurality held that the character of the plaintiff was no longer decisive. This position was reconsidered three years later in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), where the character of the plaintiff was once again held to be constitutionally critical. *See* note 28 *infra*.

in defamation actions brought by public officials or public figures in *Grayson v. Curtis Publishing Co.*[18]

In 1971, the Supreme Court extended the *New York Times* privilege even further in *Rosenbloom v. Metromedia, Inc.*[19] Reasoning that the privilege is conferred to protect all debate on public issues, the Court held, but only by a plurality,[20] that a publisher or broadcaster[21] is protected by the *New York Times* privilege whenever the subject of the publication involves a matter of public or general interest, even if the defamed person is a purely private individual.[22] Washington adopted the *Rosenbloom* rule in *Miller v. Argus Publishing Co.*[23] that same year.

*Rosenbloom* was decided with considerable dissension within the Supreme Court,[24] and some Justices were concerned that the Court had not made its position on defamation absolutely clear.[25] For this reason, the Court reconsidered the *Rosenbloom* holding in *Gertz*,[26] and

18. 72 Wn. 2d 999, 436 P.2d 756 (1967). *Grayson* involved an action brought by a former University of Washington basketball coach over an article which had appeared in the *Saturday Evening Post* charging that he lacked good sportsmanship.

19. 403 U.S. 29 (1971). *Rosenbloom* involved an action brought by a distributor of nudist magazines against a Philadelphia radio station which had reported that he sold "obscene" literature, and accused him of improperly pressuring public officials and news media to "lay off the smut racket." *Id.* at 33–34.

20. Justice Brennan wrote the opinion of the Court, joined by Chief Justice Burger and Justice Blackmun. Separate concurring opinions were written by Justices Black and White. Separate dissenting opinions were written by Justice Marshall with Justice Stewart joining, and by Justice Harlan. *See* note 24 *infra*.

21. *See* note 29 *infra*.

22. 403 U.S. at 43–44.

23. 79 Wn. 2d 816, 490 P.2d 101 (1971). *Miller* involved an action brought by a public relations consultant who had been employed by several political candidates. He sued over a story which suggested that he supported "right wing" candidates and that his expensive political campaigns were ineffective. *Id.* at 818–19, 490 P.2d at 104.

24. The Supreme Court later said of its *Rosenbloom* decision:

> [N]o majority could agree on a controlling rationale. The eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case; they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 333 (1974) (footnote omitted).

25. *Id.* at 353–54 (Blackmun, J., concurring). Justice Blackmun cast the vote which made *Gertz* a majority decision. Although *Gertz* abandoned the reasoning which he preferred, and for which he voted with the lead opinion in *Rosenbloom*, he strongly believed it to be "of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity." *Id.* at 354.

26. 418 U.S. at 323. *Gertz* involved a prominent Chicago attorney who represented a murder victim's family in a civil action against the slayer, a police officer. In an article appearing in *American Opinion*, a John Birch Society publication, Gertz

concluded that a state's interest in protecting the reputation of one of its citizens is greater if he is a private individual than if he is a public official or public figure.[27] It held that when the plaintiff is a purely private individual,[28] each state may choose for itself any standard of liability which it deems appropriate for the publisher or broadcaster defendant,[29] so long as it does not impose liability without fault.[30]

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was portrayed as a communist and accused of "framing" the police officer. The Court concluded that in his capacity as an attorney, Gertz was neither a public official nor a public figure.

27. *Id.* at 342–45.

28. A "private individual" may be distinguished from a public official or a "public figure." A person may be a "private individual" for some purposes, but a "public figure" for others. In *Gertz* the Court said:

> [The] designation [as a public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351. *See* note 17 *supra.*

In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the plaintiff and her husband, a famous industrialist, were involved in a contested and highly publicized divorce proceeding. *Time* magazine reported that the divorce was granted on the basis of the wife's cruelty and adultery, when in fact the final judgment was ambiguous and did not specify grounds. The wife sued *Time* for libel. The question of her public character was appealed to the Supreme Court. The majority concluded that she was not a public figure, reasoning that a marriage dissolution is not the kind of public controversy contemplated by *Gertz,* in which the Court defined a public figure as one who assumes a role of special prominence or thrusts himself into a particular public controversy. *Id.* at 454.

29. The *New York Times* privilege, as originally announced and as extended by *Butts,* did not precisely define the type of defendant to whom the rule applied. The privilege has generally been applied to both media and non-media defendants. Comment, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants,* 47 S. CAL. L. REV. 902, 903 (1974). In the more recent extensions of the constitutional privilege, however, the Supreme Court has been more explicit about the contemplated defendant. In both *Rosenbloom* and *Gertz,* the Court used language which identified the objects of the privilege as "publishers and broadcasters." At least on its facts, *Gertz* is limited to media defendants.

The view of many legal commentators is that the reasoning of *Gertz* is applicable to any defendant. They consider it inevitable that the *Gertz* abolition of strict liability in defamation will be expanded, either by the Supreme Court or by the state courts, to include any defendant. At least one state court has done so already. Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688, 695–96 (1976). *See* RESTATEMENT (SECOND) OF TORTS § 580B, comment d (Tent. Draft No. 21, 1975). *See also* Anderson, *supra* note 13, at 442 n.95; Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349, 1416–17 (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, 507–11 (1975).

30. 418 U.S. at 347. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Supreme Court held that when it abolished liability without fault, it did not limit the ability of the states to determine how or where fault must be found, so long as it is found by an

## II. THE *TASKETT* STANDARD

*Taskett* presented the Washington Supreme Court with its first opportunity[31] to exercise the discretion allowed to the states by *Gertz*.[32] The court held that a media defendant[33] is privileged only so long as it exercises "reasonable care" in publishing,[34] at least when the defamatory potential of the publication is apparent.[35] A plaintiff

express determination. Fault may be found by any competent finder of fact—a jury, a trial court, or an appellate court. *Id.* at 461–63.

31. Childress v. Hearst Corp., 86 Wn. 2d 486, 546 P.2d 108 (1976), decided immediately following *Taskett*, raised identical questions. *Taskett* was deemed to be controlling, and the case was decided without additional reasoning.

32. *Gertz* held that "the States may define for themselves the appropriate standard of liability for a publisher or broacaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347.

33. The holding of *Taskett* is limited to defamation by "media" defendants. 86 Wn. 2d at 447, 546 P.2d at 86. This limitation, however, may eventually prove to be overly restrictive. *See* note 29 *supra*. Nonetheless, the remaining discussion in this note will be limited to application of the *Taskett* rule to media defamations.

34. In adopting the "reasonable care" standard, Washington is among the clear majority of states which have considered the question of liability involving a private individual plaintiff since the Supreme Court's holding in *Gertz*. To date the choice has been considered in twenty states. Thirteen have opted for a "negligence" test, or some other standard of fault less than "actual malice." Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975); Helton v. United Press Int'l, 303 So. 2d 650 (Fla. Dist. Ct. App. 1974); Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 552, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill. 2d 184, 340 N.E.2d 292 (1976); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161 (Mass. 1975); Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975); Walters v. Sanford Herald, Inc., 31 N.C. App. 233, 228 S.E.2d 766 (1976); Thomas H. Maloney & Sons v. E.W. Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494, *cert. denied*, 423 U.S. 883 (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*, 97 S. Ct. 1160 (1977); Taskett v. KING Broadcasting Co., 86 Wn. 2d 439, 546 P.2d 81 (1976).

Four states have opted for the "actual malice" test originally announced in *Rosenbloom*. Peagler v. Phoenix Newspapers, Inc., 26 Ariz. App. 274, 547 P.2d 1074 (1976); Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976); Le Boeuf v. Times Picayune Publishing Co., 327 So. 2d 430 (La. Ct. App. 1976).

Three states have expressly reserved judgment on the question. McCarney v. Des Moines Register and Tribune Co., 239 N.W.2d 152 (Iowa 1976); Barbetta Agency, Inc. v. Evening News Publishng Co., 135 N.J. Super. 214, 343 A.2d 105 (1975); Newspaper Publishing Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132 (1976).

35. 86 Wn. 2d at 445, 546 P.2d at 85. The limitation to situations in which the defamatory potential of the publication is apparent echoes the limitation in *Gertz*. Where the defamatory potential is *not* apparent, the Supreme Court expressly withheld judgment as to the proper constitutional standard, saying only that different considerations would be involved. 418 U.S. at 348. Justice White believed that the Court was implying that where danger to reputation is not apparent the *New York Times* "actual malice" standard will apply. *Id.* at 389 n.27 (White, J., dissenting).

who prevails upon the minimum showing[36] of lack of reasonable care may recover only actual damages. In order to recover presumed damages, actual malice must be shown. Punitive damages are never recoverable.[37]

The remaining discussion will be devoted to four issues which should prove to be important in the development and application of the new *Taskett* standard. First, although *Taskett* announces a new principle of law for Washington, it shares a common origin and purpose with the well developed principles of *New York Times,* and these should guide the development of the *Taskett* rule. Second, the constitutional concerns which demanded the incorporation of certain procedural safeguards into the *New York Times* privilege are equally compelling in cases subject to the *Taskett* rule, and these safeguards should be incorporated into it as well. Third, because *Gertz* abolished strict liability in defamation, at least when the defendant is a publisher or broadcaster, any inference that the constitutional privilege recognized by *Taskett* is limited to cases which involve matters of public interest is incorrect. Fourth, although a plaintiff 's award under a finding of lack of "reasonable care" is limited to "actual damages," this measure of damages will probably not be narrowly construed.

### *A. A Constitutional Standard*

Because the *Gertz* minimum constitutional standard has gained widespread identity as one of "negligence,"[38] it is not surprising that

36. The court's language in *Taskett* evidenced its clear intent to provide only the minimum privilege for the media required by *Gertz*. The court said: "[T]he test which we have adopted merely represents a return to our pre-*New York Times* rule [of strict liability], insofar as *Gertz* permits." 86 Wn. 2d at 448, 546 P.2d at 87.

In adopting a rule which turns on the character of the plaintiff, the Washington court embraced the reasoning used by the Supreme Court in *Gertz*—that the Constitution allowed the states to distinguish among classes of plaintiffs. First, public officials and public figures usually have better access to channels of communication and have a more realistic opportunity to correct falsehoods. Second, the state's interest in protecting private individuals is greater than it is for public officials and public figures because the latter two groups willingly expose themselves to public scrutiny, thereby relinquishing some of their interest in protecting their reputations. 86 Wn. 2d at 445–46, 546 P.2d at 85. *See* note 28 *supra.*

37. Because Washington does not allow the award of punitive damages under any circumstances, it is in this respect more protective of publishers than *Gertz* requires. *See* note 67 *infra.*

38. The standard was characterized as "negligence" by members of the Court in *Gertz* itself. 418 U.S. at 354 (Blackmun, J., concurring); *id.* at 355 (Burger, C.J., dissenting); *id.* at 360 (Douglas, J., dissenting); *id.* at 376 (White, J., dissenting). The position that the standard is one of negligence is taken by the RESTATEMENT (SECOND)

the *Taskett* standard has been similarly characterized.[39] Although *Taskett* "negligence" and common law negligence are in some respects similar, they are nonetheless fundamentally different legal principles. At common law, negligence is a separate tort which has evolved as an independent basis of liability in order to make available a cause of action for injuries that are caused unintentionally.[40] In contrast, the *Taskett* "reasonable care" or "negligence" standard imposes a limitation upon immunity from liability, a privilege which is constitutionally conferred in order to safeguard first amendment freedoms. This constitutional standard has no historical common law antecedent.[41]

The *Taskett* "negligence" standard, like the *Gertz* minimum standard, is analogous to the "actual malice" standard of *New York Times*. Both are intended to reconcile the "tension [which] necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury."[42] The different degrees of fault tolerated by *Times* and *Gertz* simply reflect the notion that the state's interest in protecting reputation is greater with private individuals than with public officials or public figures.[43] In all other respects, the standards are the same, and this identity should be acknowledged as the doctrine of *Taskett* "negligence" evolves.

### *B. Procedural Safeguards*

Procedural as well as substantive rules clearly have a significant impact upon the "chilling effect" of a potential defamation action.[44]

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OF TORTS § 580B (Tent. Draft No. 21, 1975). *See generally* Anderson, *supra* note 13, at 456; Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1426 (1975); Comment, *Defamation Law in the Wake of* Gertz v. Robert Welch, Inc.: *The Impact on State Law and the First Amendment*, 69 NW. L. REV. 960, 970 (1975).

39. The court in *Taskett* said that it adopted "negligence criteria." 86 Wn. 2d at 449, 546 P.2d at 87. Justice Horowitz, in his dissent, referred to the test as a "negligence standard." *Id.* at 476, 546 P.2d at 103.

40. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 28 (4th ed. 1971).

41. In *Gertz* Chief Justice Burger wrote: "I do not know the parameters of a negligence doctrine as applied to the news media. . . . [We] embark on a new doctrinal theory which has no jurisprudential ancestry." 418 U.S. at 355 (Burger, C.J., dissenting).

42. 418 U.S. at 342.

43. The Court concluded that "the state interest in compensating injury to the reputation of private individuals requires a different rule." *Id.* at 343. The reason that the Court believed that the distinction can and should be made is discussed at note 28 *supra*.

44. Some important elements of the "chilling effect" are discussed at note 13 *supra*.

Procedural rules influence both the probability that liability will be imposed,[45] and the direct cost of litigation.[46] In *New York Times,* the Supreme Court recognized that constitutionally protected conduct is discouraged by fear of defamation damage awards,[47] and it announced both substantive[48] and procedural rules to reduce this "chilling effect." The *Times* Court held that the Constitution demands that a plaintiff show "actual malice" with "convincing clarity,"[49] and that because an ultimate finding for the plaintiff involves a constitutional question, it is subject to de novo review throughout the appellate process.[50]

45. For example, a summary judgment precludes any subsequent possibility that a jury might find the defendant liable. The burden of proof imposed on a plaintiff will influence the likelihood of his prevailing with given evidence (*e.g.,* a burden of "convincing clarity" is more difficult to carry than a burden of "preponderance of the evidence"). A rule that only a judgment against the defendant may be appealed de novo increases the number of opportunities for the defendant to prevail.

46. Summary judgment will of course eliminate the sometimes substantial cost of the actual trial.

47. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

48. The substantive rule announced by the Court in *New York Times* is that the Constitution confers a privilege requiring proof of "actual malice." *Id.* at 283.

49. The Supreme Court held that the "constitutional standard demands" that proof be presented to show "actual malice" with "convincing clarity." *Id.* at 285–86. In *Gertz,* the burden is restated as "clear and convincing proof." 418 U.S. at 342.

"Convincing clarity," "clear and convincing proof," "clear, cogent and convincing proof," or other combinations of these terms are generally used to indicate the same degree of proof. "Clear and convincing proof" has been held to mean that measure or degree of proof which will produce a firm belief or conviction; more than by a preponderance of the evidence, but less than beyond a reasonable doubt. Hobson v. Eaton, 399 F.2d 781 (6th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969); Cross v. Ledford, 161 Ohio St. 469, 120 N.E.2d 118 (1954); Cromwell v. Hosbrook, 81 S.D. 324, 134 N.W.2d 777 (1965); Fred C. Walker Agency, Inc. v. Lucas, 215 Va. 535, 211 S.E.2d 88 (1975). Washington courts have held "clear, cogent and convincing" proof to be greater than a preponderance, but less than "beyond a reasonable doubt." Bland v. Mentor, 63 Wn. 2d 150, 385 P.2d 727 (1963); Cheesman v. Sathre, 45 Wn. 2d 193, 273 P.2d 500 (1954).

The reason that the Constitution requires this higher standard of proof was discussed in *Gertz,* in which Justice Brennan quoted from *Rosenbloom v. Metromedia, Inc.* as follows:

> "In the normal civil suit where [the preponderance of the evidence] standard is employed, 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom,* 403 U.S. at 50.

418 U.S. at 366–67 (Brennan, J., dissenting) (citation omitted).

50. The Supreme Court wrote: "We must 'make an independent examination of the whole record,' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." 376 U.S. at 285. *See* Edwards v.

In defamation actions involving a constitutional standard, the Washington Supreme Court has expressly adopted both of these procedural safeguards—burden of proof of "convincing clarity"[51] and de novo appellate review.[52] In addition, it has held that because the mere prospect of a full trial has a chilling effect upon protected activity, summary judgment is proper to dispose of the question of "actual malice" in libel actions.[53]

In *Taskett,* the court mandated examination of the facts at the summary judgment stage,[54] but addressed neither the question of burden of proof nor appellate review. It did expressly state, however, that it was overruling *Miller v. Argus Publishing Co.,* which incorporated both of these procedural safeguards,[55] only to the extent that *Miller* was inconsistent.[56] Because the essential inconsistency between *Taskett* and *Miller* lay in the standard of liability, and not in any pro-

South Carolina, 372 U.S. 229, 235 (1963); Pennekamp v. Florida, 328 U.S. 331, 335 (1946).

51. Chase v. Daily Record, Inc., 83 Wn. 2d 37, 41, 515 P.2d 154, 156 (1973); Miller v. Argus Publishing Co., 79 Wn. 2d 816, 827, 490 P.2d 101, 109 (1971). The burden of "convincing clarity" was implicit in Grayson v. Curtis Publishing Co., 72 Wn. 2d 999, 1008, 436 P.2d 756, 762 (1968) in which the court held that the question of actual malice must be "litigated under *New York Times* standards." *Id.*

52. Miller v. Argus Publishing Co., 79 Wn. 2d 816, 829, 490 P.2d 101, 110 (1971). *See also* Mellor v. Scott Publishing Co., 10 Wn. App. 645, 657, 519 P.2d 1010, 1018 (1974).

53. Chase v. Daily Record, Inc., 83 Wn. 2d 37, 43, 515 P.2d 154, 157 (1973). The reason for examination of the facts at the summary judgment stage of the proceeding was discussed in Tait v. KING Broadcasting Co., 1 Wn. App. 250, 255, 460 P.2d 307, 311 (1969):

> Our court has been conservative in granting summary judgment where the issues involve [questions such as] negligence. These issues do not normally involve, however, the pursuit of constitutionally protected practices.
>
> Serious problems regarding the exercise of free speech and free press guaranteed by the First Amendment are raised if unwarranted lawsuits are allowed to proceed to trial. The chilling effect of the pendency of such litigation can itself be sufficient to curtail the exercise of these freedoms. . . .
>
> It would seem to us these considerations are of sufficient concern to compel the court to carefully review the record in motions for summary judgment in libel cases involving the exercise of First Amendment guarantees and, at that stage, determine whether there is substantial evidence presented which, if believed, could persuade a jury with convincing clarity the defendant was guilty of [actual malice].

In *Chase* the Washington Supreme Court modified the *Tait* rule, and stated that plaintiffs are not required to present "substantial" evidence, so long as the evidence is sufficient for "convincing clarity." 83 Wn. 2d at 43 n.3, 515 P.2d at 158 n.3. *See also* Bon Air Hotel, Inc. v. Time, Inc., 426 F.2d 858, 865 (5th Cir. 1970); Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), *cert. denied,* 395 U.S. 922 (1969).

54. 86 Wn. 2d at 450, 546 P.2d at 88.

55. 79 Wn. 2d at 827, 490 P.2d at 109 ("convincing clarity"); *id.* at 829, 490 P.2d at 110 (de novo review).

56. 86 Wn. 2d at 447, 546 P.2d at 86.

cedural matters, it may be inferred that the *Taskett* court contemplated application of the full panoply of these procedural safeguards,[57] even as it adopted the lesser constitutional standard.[58]

### C. *No Subject Matter Limitation*

The *Taskett* "reasonable care" standard should apply to any defamation regardless of the subject matter of the publication, despite language in the opinion which limits it to cases which involve the publication of "matters of general or public interest."[59] The Washington

57. Although there is no direct precedent in Washington law, the United States Court of Appeals for the Ninth Circuit recently held that a further procedural requirement may be necessary to satisfy the Constitution. The court of appeals required that a plaintiff's pleadings must state allegations which are more specific than usual: "[I]n any case . . . [based upon] conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082–83 (9th Cir. 1976).

58. This inference is apparently not obvious, at least as it relates to the burden of proof. For example, Justice Horowitz assumed that the burden will be "preponderance" because that is the burden "in negligence cases," 86 Wn. 2d at 477, 546 P.2d at 104 (Horowitz, J., dissenting), and Justice Brennan expressed the same view in *Gertz*, 418 U.S. at 366–67 (Brennan, J., dissenting), but both Justices were clearly hostile toward the lesser fault standard. The RESTATEMENT (SECOND) OF TORTS § 580B, comment i (Tent. Draft No. 21, 1975) also takes the view that the burden will be "preponderance."

An interesting problem would be presented if the lesser burden were adopted. In order to win presumed damages, a plaintiff must prove "actual malice." *See* text accompanying notes 66–67 *infra*. It would be confusing to instruct a jury that it may find "negligence" and award actual damages upon a showing of a "preponderance of the evidence," but in order to award presumed damages it must find "actual malice" by a showing of "convincing clarity."

The Supreme Court has not spoken to the question of whether the *New York Times* procedural safeguards are a necessary part of *Gertz*. Therefore, it is not clear that Washington is constitutionally required to incorporate them into the *Taskett* rule. Nevertheless, the reasons which compelled their incorporation into the *New York Times* privilege seem at least as compelling in the *Gertz* setting. Indeed, because the lesser fault requirement will probably result in more actions, there may be a greater risk of errors which will offend the Constitution and more need for procedural protections. That the Constitution mandates a lesser standard of fault should not imply that less protective procedural safeguards are permissible.

59. 86 Wn. 2d at 445, 546 P.2d at 85. In litigation under the *Rosenbloom* rule, in which the public interest character of the publication determined whether the standard of fault would be "actual malice" or strict liability, the overwhelming majority of publications considered were adjudged to be of public interest. Gertz v. Robert Welch, Inc., 418 U.S. at 377 n.10 (White, J., dissenting); 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, 478–79 (1975); Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predicability and the New Synthesis*, 70 MICH. L. REV. 1547, 1562 (1972). It seems, therefore, that in the large majority of cases, the significance of uniform application of the

Supreme Court erred in attributing a subject matter limitation to the basic *Gertz* holding that the states may not impose liability without fault.[60] Such an interpretation is contrary to the widely accepted view that the *Gertz* minimum constitutional privilege applies uniformly to all cases of media defamation of a private individual.[61] Indeed, it was primarily a fundamental disaffection for any "public interest" test which induced the Supreme Court to reconsider and repudiate the *Rosenbloom* test.[62] In a later case, *Time, Inc. v. Firestone*,[63] the Su-

"reasonable care" standard would be the practical benefit to be derived from avoiding litigation of the question. For example, under the reasonable care standard a summary judgment never need be denied because a question remains as to the character of the subject matter of the publication.

60. In its discussion of *Gertz*, the court in *Taskett* said, "[T]he holding . . . permitted each state to establish its own standard for libel actions brought by private individuals *over stories relating to matters of public concern*." 86 Wn. 2d at 441, 546 P.2d at 83 (emphasis added). *Gertz* was neither qualified nor limited in its application by any subject matter consideration. *See* 418 U.S. at 347–48. The critical parameters of the *Gertz* privilege are the character of the plaintiff (*see* note 28 *supra*), the character of the defendant (*see* note 29 *supra*), and the apparentness of the defamatory potential of the publication (*see* note 35 *supra*).

61. Support for the position that the *Gertz* holding is not limited to publications which involve matters of public interest may be found in cases, commentaries, and treatises. Justice White said in *Gertz*:

> The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel . . . . In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood [in the case of a public official or public figure], or negligence [in the case of a private individual].

418 U.S. at 375–76 (White, J., dissenting). At least one state court has expressly reached this conclusion. Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976). *See* RESTATEMENT (SECOND) OF TORTS § 580B, comment e (Tent. Draft No. 21, 1975). *See generally* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 424 (1975); Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 200 (1976); Comment, *Defamation—Extent of Constitutional Privilege Afforded Inaccurate Reports of Judicial Proceedings and Status of Participants Therein*, 7 MEM. ST. U.L. REV. 152, 156 (1976); Comment, *Defamation Law in the Wake of* Gertz v. Robert Welch, Inc.*: The Impact on State Law and the First Amendment*, 69 NW. U.L. REV. 960, 969 (1975); Comment, Gertz v. Robert Welch, Inc.*: New Contours on the Libel Landscape—A Pyrrhic Victory for Plaintiffs*, 5 N.Y.U. REV. L. & SOC. CHANGE 89, 102 (1975).

62. Speaking of the "[public interest] test proposed by the *Rosenbloom* plurality," the Supreme Court said in *Gertz*:

> [I]t would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." . . . We doubt the wisdom of committing this task to the conscience of judges. . . . The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured [in a matter of public interest] has no recourse unless he can meet the rigorous requirements of *New York Times*. . . . On the other hand, a publisher or broadcaster of a defamatory error [in a matter deemed not of public interest] may be held li-

preme Court reinforced the view that a "subject matter" limitation is no longer an element of constitutional privilege.[64] Therefore, at least the *Taskett* "reasonable care" standard must be applied in *any* defamation action brought in Washington by a private individual against a media defendant.[65]

### *D. Limitation of Damages*

*Taskett* does not signal a total victory for the "private individual" plaintiff. Damages which may be awarded in a defamation action against a publisher or broadcaster are subject to strict constitutional limitations.[66] If the action succeeds upon a showing of less than "ac-

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able in damages even it it took every reasonable precaution to ensure the accuracy [of the story].

418 U.S. at 346.

Clearly, only a standard of fault less than that of *New York Times,* such as negligence, which is applied without regard to the character of subject matter, can ameliorate both dysfunctions caused by the *Rosenbloom* rule.

63. 424 U.S. 448 (1976). *Firestone* was decided one month after *Taskett.*

64. The Supreme Court said:

[U]se of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff.

*Id.* at 456.

65. A state may, of course, constitutionally grant different protections in different situations, so long as each of the protections is at least the minimum "no liability without fault" privilege required by *Gertz.* It is fully consistent with *Gertz* that a state may define an "actual malice" standard where a defamation involves a private plaintiff in a matter of public concern, but a "negligence" standard where the defamation does not involve a matter of public concern.

66. In Gertz v. Robert Welch, Inc., 418 U.S. at 349–50, the Court held that neither presumed nor punitive damages may be awarded upon any showing less than "actual malice." The majority reasoned:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. . . . [T]he States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury.

*Id.* at 349.

Because damages are subject to *constitutional* limitations, the amount of a damage award, like the determination of liability, is properly the subject of de novo appellate review. *See* note 50 *supra.* In Time, Inc. v. Firestone, 424 U.S. at 460–61, *discussed at* note 28 *supra,* the Court let stand a jury award of $100,000, although remanding the case for a determination of liability, saying that the award was supported by competent evidence. Implicit in the Court's decision, however, was a reservation that it would, under proper circumstances, specifically re-examine such a determination.

tual malice," a jury shall be limited to awarding damages for injuries actually sustained. Only upon a showing of at least "actual malice" may a jury presume damages. Under no circumstances may punitive damages be awarded.[67]

Although the *Taskett* opinion itself does not make clear what might constitute "actual damages," the Washington court did address that precise question in the subsequent case of *Rasor v. Retail Credit Co.*[68] Relying extensively on *Gertz,* it held that "actual damages" will not be limited to out-of-pocket losses. Specific examples of harms which might be included are impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.[69] Although awards must be supported by competent evidence, it is not necessary to provide evidence of a specific dollar value of the injuries. Determination of the amount of damages is left to the jury.[70]

## III. CONCLUSION

*Taskett v. KING Broadcasting Co.* will generally make it easier for a private individual plaintiff to succeed in a defamation action against a media defendant. Whether this change will result in a significantly greater long term "chilling effect" upon the media will undoubtedly turn upon the definition of the "reasonable care" standard which will ultimately evolve. For the short term at least, because the new rule is undefined and untested, it may be assumed that the media will publish with special caution. Whatever the eventual chilling effect, it will be mitigated by the limitation to actual damages, and by procedural rules which should safeguard the fragile constitutional balance.

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67. 86 Wn. 2d at 447, 546 P.2d at 86. The rule announced in *Taskett* is more restrictive in its allowance of damages than the *Gertz* test demands. Upon a showing of "actual malice" the *Gertz* majority would allow an award of punitive damages. 418 U.S. at 349. Washington, however, does not allow punitive damages in any civil action absent statutory authority. *See, e.g.,* Steele v. Johnson, 76 Wn. 2d 750, 458 P.2d 889 (1969); Maki v. Aluminum Building Products, 73 Wn. 2d 23, 436 P.2d 186 (1968).

68. 87 Wn. 2d 516, 554 P.2d 1041 (1976). In *Rasor,* a woman who was portrayed in a consumer credit report as having a tarnished moral reputation brought a private action for violation of the Fair Credit Reporting Act. That Act limits awards to "actual damages," which the court compared to the actual damages that may be awarded under the *Gertz* and *Taskett* holdings.

69. *Id.* at 529, 554 P.2d at 1049.

70. *Id.* at 530–31, 554 P.2d at 1050.