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## DEFAMATION LAW OF WISCONSIN

JAMES PATRICK BRODY\*

### I. INTRODUCTION

This article is intended to provide an overview of the law of defamation in Wisconsin.<sup>1</sup> The law of defamation, which has experienced significant changes in the past two decades, principally because of federal constitutional decisions, represents the interface between significant conflicting claims of right — on one side, the right of the individual to protect his reputation and on the other side, the right of persons to speak freely. Protection of the former right is obviously desirable, but if it is carried to an extreme and chills communication, it has an adverse effect on the quality of society. The courts and legislatures have tried to strike a balance by reasonably defining defamation, recognizing various privileges and constitutional rights and imposing certain preconditions to suit.

In order for defamation to be actionable, the communication must be defamatory of the plaintiff, it must be false and there must be publication to a third party. At least in some situations, there must be some degree of fault on the part of the communicator, and at least in some situations, damages can be recovered only if there is actual harm. Privileges, absolute or conditional, may protect the communicator from liability even though he has published false and defamatory words.

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1. The *Marquette Law Review* has asked me to survey the law of defamation in Wisconsin. Because the subject is broad, it is not possible in this space to include all subjects or discuss fully those subjects which are included. An effort has been made to make reference at least to the principal subjects. I have tried to present an objective view of the law. However, the reader should be informed that I principally represent media defendants in this field and have appeared in some of the cases discussed as attorney for a party or for an *amicus curiae*.

## II. LIBEL — SLANDER — HOW THEY DIFFER

### A. Definition

Generally "libel" relates to publication of written or printed defamatory words or defamation embodied in physical or other relatively permanent form. "Slander" relates to spoken words and transitory gestures.<sup>2</sup> Words are, of course, the common vehicles for defamation, but physical conduct sometimes serves as defamation.<sup>3</sup>

Which law governs radio and television? The Wisconsin Supreme Court once noted the question (regarding radio) but did not have to answer it,<sup>4</sup> and it has never been decided by our court.

### B. Difference in Exposure

Depending on the nature of the defamation, damages may be harder to establish in slander than in libel. No recovery can be had for slander unless "special damages" are pleaded and proved. There are, however, four types of slander which do not require such proof: imputation of certain crimes, or imputation of a loathsome disease, or allegations affecting one's business, trade, profession or office or imputation of unchastity to a woman.<sup>5</sup> If the slander fits one of those categories, no special damages need be shown.

For many years, special damages had to be pleaded in some libel suits too, but that requirement as to libel was removed in 1962 in *Martin v. Outboard Marine Corp.*<sup>6</sup> The court said that under the common law rule, which the court adopted,<sup>7</sup> damages to reputation were presumed from the

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2. See generally RESTATEMENT (SECOND) OF TORTS § 568 (1977); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112 (4th ed. 1971).

3. See *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 9, 287 N.W.2d 747, 750-51 (1980), where the defendant's conduct was considered as the basis for a libel action. At what point in time does transitory conduct (slander) become sufficiently persistent to be libel? See generally RESTATEMENT (SECOND) OF TORTS § 568 comment d (1977).

4. *Singler v. Journal Co.*, 218 Wis. 263, 268, 260 N.W. 431, 433 (1935); see also *supra* note 2.

5. *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 13, 287 N.W.2d 747, 752 (1980).

6. 15 Wis. 2d 452, 460-61, 113 N.W.2d 135, 139 (1962).

7. *Id.*

publication of the libel itself.<sup>8</sup> As discussed below, under recent United States Supreme Court decisions, damages may not be *presumed* against a defendant who is protected by those decisions, nor punitive damages awarded, unless the publication is made with "actual malice," which is with knowing or reckless disregard for the truth. Damages must be proved unless actual malice exists, but they may include elements other than out-of-pocket loss.<sup>9</sup>

### III. WHAT IS DEFAMATORY? WHEN AND HOW IS DEFAMATION TESTED?

#### A. Definition of Defamation

Words may be critical, unfavorable and insulting without necessarily being defamatory. Nor are they defamatory merely because they have damaged the plaintiff.<sup>10</sup> In order to be defamatory, words must have a certain quality and meet certain specific tests.

The older cases defined a libel as:

language which imputed the commission of certain crimes or tended to degrade or disgrace a person generally or to subject one to public distrust, ridicule, or contempt in the community where he had been regarded in high confidence and esteem; or, as language which tends to bring the plaintiff into public hatred, contempt or ridicule or imply or be generally understood to imply reproach, dishonesty, scandal or ridicule.<sup>11</sup>

In 1966 the Wisconsin Supreme Court adopted a broad definition. It said, adopting the *Restatement* test, that a communication is defamatory if it so harms one's reputation "as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."<sup>12</sup> In his

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8. *Id.* at 458, 113 N.W.2d at 138.

9. See *Denny v. Mertz*, 106 Wis. 2d 636, 659, 318 N.W.2d 141, 152 (1982); *Prahl v. Brosamle*, 98 Wis. 2d 130, 144-46, 295 N.W.2d 768, 777-78 (Ct. App. 1980).

10. "[U]nless the statement is libelous on its face, it is not made so because of the effect or damage it might have . . . Actual damage does not determine the nature or character of the cause of the injury." *Frinzi v. Hanson*, 30 Wis. 2d 271, 278, 140 N.W.2d 259, 262 (1966).

11. *Id.* at 275, 140 N.W.2d at 261 (footnotes omitted).

12. *Id.* at 275, 140 N.W.2d at 261. The court cited RESTATEMENT OF TORTS § 559 (1939). See RESTATEMENT (SECOND) OF TORTS § 559 (1977). After analyzing the three

treatise, after listing a number of cases in which words were held not defamatory, Dean Prosser noted that in those cases the language might support some other causes of action but it "lacks the element of personal disgrace necessary for defamation; and the fact that the plaintiff finds it unpleasant and offensive is not enough."<sup>13</sup>

### B. *When Is Defamability Tested?*

Resolving the threshold question of whether the words in suit are capable of a defamatory meaning is a function of the trial court.<sup>14</sup> It "is generally raised on demurrer [now motion to dismiss]."<sup>15</sup> If the words are not capable of a defamatory meaning, "that ends the matter";<sup>16</sup> the motion to dismiss must be sustained. If the words are capable only of a defamatory meaning, the motion must be denied; likewise, if they are capable of either a defamatory or a nondefamatory meaning, a jury question is presented as to which way the statement was understood by the reader or listener.<sup>17</sup>

In holding that a jury question is presented if a statement is capable of defamation, even though the statement also has one or more innocent meanings, Wisconsin has taken a harsher position toward the libel defendant and has delegated more to the jury than has a neighbor state. Illinois, conversely to Wisconsin, has applied an "innocent construction" rule. If allegedly libelous words are capable of being read innocently, they must be so read and declared nonactionable as a matter of law,<sup>18</sup> and questions of innocent construction are for the

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allegedly libelous statements, the court ruled they were not capable of a defamatory meaning.

13. W. PROSSER, *supra* note 2 at § 111.

14. *Hoan v. Journal Co.*, 238 Wis. 311, 329, 298 N.W. 228, 236 (1941).

15. *Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 461, 113 N.W.2d 135, 140 (1962).

16. *Lathan v. Journal Co.*, 30 Wis. 2d 146, 151, 140 N.W.2d 417, 420 (1966).

17. *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 11, 287 N.W.2d 747, 751-52 (1980); *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 6, 259 N.W.2d 691, 693 (1977); *Frinzi v. Hanson*, 30 Wis. 2d 271, 275-76, 140 N.W.2d 259, 261 (1966).

18. *John v. Tribune Co.*, 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962). The innocent construction rule has been justified on the ground of "encouraging the robust discussion of daily affairs [citation omitted] as well as of reducing litigation." *Dauw v. Field Enters., Inc.*, 78 Ill. App. 3d 67, —, 397 N.E.2d 41, 44 (1979); *see also Fleck Bros. Co. v. Sullivan*, 385 F.2d 223 (7th Cir. 1967).

court, to be decided as a matter of law.<sup>19</sup>

### C. *How Is the Test Applied?*

In every defamation suit, plaintiff, in order to have a jury issue, must show that the words involved, either expressly or by implication, were capable of conveying a defamatory meaning. The Wisconsin Supreme Court, like other courts, has recognized the need for a threshold at the courthouse door and over the years has developed a practical rule of reason. The test of capability of a defamatory meaning is not whether, by ingenuity, or stretch of the imagination or semantics, or by considering an extreme possibility, the words might be defamatory. Rather, the determination to be made is whether the language used "is *reasonably* capable of conveying a defamatory meaning to the *ordinary mind* and whether the meaning ascribed by plaintiffs is a natural and *proper* one."<sup>20</sup> The words charged as libelous "must be construed in the *plain* and *popular* sense in which they would *naturally* be understood."<sup>21</sup> The words must be "reasonably interpreted."<sup>22</sup> The court will not give words a "strained" or "unnatural construction."<sup>23</sup> The words cannot be read alone, out of context. The entire writing must be considered.<sup>24</sup> Circumstances are also relevant: "[T]he words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the *context* in which they were used *and under the circumstances* they were uttered."<sup>25</sup>

Under those tests, in many cases, words have been found to be not capable of defamation as a matter of law, even though some literally possible definitions or inferences might arguably have demonstrated a possibility of defamation. If the

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19. *Valentine v. North American Co.*, 60 Ill. 2d 168, 171, 328 N.E.2d 265, 267 (1974).

20. *Meier v. Meurer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411, 414 (1959) (emphasis added). See *Luthey v. Kronschnabl*, 239 Wis. 375, 1 N.W.2d 799 (1942).

21. *Leuch v. Berger*, 161 Wis. 564, 571, 155 N.W. 148, 151 (1915) (emphasis added).

22. *Meier v. Meuer*, 8 Wis. 2d 24, 29, 98 N.W.2d 411, 414 (1959).

23. *Puhr v. Press Publishing Co.*, 249 Wis. 456, 461, 25 N.W.2d 62, 65 (1946).

24. *Schoenfeld v. Journal Co.*, 204 Wis. 132, 235 N.W. 442 (1931).

25. *Frinzi v. Hanson*, 30 Wis. 2d 271, 276, 140 N.W.2d 259, 261 (1966) (emphasis added).

test were one of mere "possibility," defamatory meanings could be read into the most innocuous of words. This would have a chilling effect on communication, not only by the media, but in business and everyday private dealings. Undue defamation litigation and exposure to damages would occur.

It is sometimes argued by plaintiffs that a "possibility" test be applied in order to give the complaint a "liberal" construction. In some old cases and in three recent cases where the defamatory meaning of allegedly libelous words was challenged on demurrer or motion to dismiss, the Wisconsin Supreme Court briefly noted the general rule that pleadings are to be construed liberally.<sup>26</sup> However, the court in so saying has never abandoned the "reasonable" tests discussed above. In each of the three recent cases, the court referred to "reasonable" inferences or whether communications were "reasonably" understood to be defamatory.<sup>27</sup> In *Denny v. Mertz*<sup>28</sup> the Wisconsin Supreme Court said it had been held that a fact question arises in libel cases "where more than one meaning for a word [i.e., defamatory or nondefamatory] was possible," but the case it quoted in support of that statement dealt with an article the court had said could be defamatory if it "could [so] reasonably be construed."<sup>29</sup> The court in *Denny* also talked of the understanding "reasonable people in the community" would have of the allegedly libelous word.<sup>30</sup> Other cases (not involving defamation) recently cited by the court for the general rule of "liberal construction" of complaints also require

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26. *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 8, 287 N.W.2d 747, 750 (1980) (claims other than defamation were also involved); *Westby v. Madison Newspapers, Inc.* 81 Wis. 2d 1, 5, 259 N.W.2d 691, 693 (1977); *Schaefer v. State Bar*, 77 Wis. 2d 120, 122, 252 N.W.2d 343, 345 (1977). See also *Woods v. Sentinel-News Co.*, 216 Wis. 627, 629-30, 258 N.W. 166, 167 (1935).

27. *Starobin v. Northridge Lakes Dev. Co.*, 94 Wis. 2d 1, 8, 287 N.W.2d 747 751 (1980); *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 5-6, 259 N.W.2d 691, 693 (1977); *Schaefer v. State Bar*, 77 Wis. 2d 120, 124-25, 252 N.W.2d 343, 346 (1977). See also *Denny v. Mertz*, 106 Wis. 2d 636, 663, 318 N.W.2d 141, 154 (1982), where the court considered the understanding of the words "reasonable people" would have.

28. 84 Wis. 2d 654, 659, 267 N.W.2d 304, 307 (1978) (citing *Lathan v. Journal Co.*, 30 Wis. 2d 146, 140 N.W.2d 417 (1966)). The *Denny* litigation also produced two later published appellate decisions bearing the same case name: 100 Wis. 2d 332, 302 N.W.2d 503 (Ct. App. 1981), *aff'd*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982).

29. 84 Wis. 2d at 659-60, 267 N.W.2d at 307 (quoting *Lathan v. Journal Co.*, 30 Wis. 2d 146, 154, 140 N.W.2d 417, 421 (1966)).

30. 84 Wis. 2d at 655, 267 N.W.2d at 305.

"reasonable" tests.<sup>31</sup>

This concept that, while libel pleadings are to be construed liberally, the court must look to the reasonable meaning of the words, is not new. In 1935 the court said: "While liberal rules of pleading are followed in construing a complaint, the pleader's statement that particular words impute a criminal charge cannot in themselves enlarge the reasonable and natural meaning of the words used."<sup>32</sup>

To adopt a "liberal" rule in defamation cases which does not incorporate the reasonable-meaning-of-the-words tests would ignore a significant distinction between defamation complaints and complaints in most other actions at the motion to dismiss stage. In most other types of actions for tort, the tort consists of some act or failure to act. It is pleaded by generally describing those acts or failures. In liberal construction, the courts forgive inadequacies in pleading such descriptions. They do not forgive inadequacies in the evidence, which is not before them at the threshold pleading stage. Thus, when the courts liberally construe an allegation of negligence in an automobile accident case, they are not construing evidence, but a lawyer's brief description of the claim.

On the other hand, in a libel or slander case, the words, which must be pleaded with particularity,<sup>33</sup> are themselves the essence of the tort. They themselves are the "evidence," and the court is obliged to rule them defamatory or nondefamatory as a matter of law, or "capable" of defamation. Since it is the court's duty to apply a reasonable, ordinary meaning to those words, it would seem erroneous to apply a "liberal" meaning to the words to the extent that it would

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31. In *Schaefer v. State Bar*, 77 Wis. 2d 120, 122, 252 N.W.2d 343, 345 (1977), the court, saying that in liberal construction complainants are "entitled to all favorable inferences which can be drawn from the facts alleged," cited *Rollie Winter Agency, Inc., v. First Cent. Mortgage, Inc.*, 75 Wis. 2d 4, 7, 248 N.W.2d 487, 488 (1977), a case not involving defamation. The page cited referred to "reasonable" inferences. In *Westby v. Madison Newspapers, Inc.*, 81 Wis. 2d 1, 5, 259 N.W.2d 691, 693 (1977), the court cited an earlier case, *Clark v. Corby*, 75 Wis. 2d 292, 301, 249 N.W.2d 567, 572 (1977), for the proposition that the court on demurrer "should recognize any reasonable and favorable inferences which support a cause." *Clark*, also a case not involving defamation, likewise referred to "reasonable" inferences. *Id.* at 301-02 n.15, 249 N.W.2d at 572 n.15.

32. 216 Wis. at 629-30, 258 N.W. at 167.

33. Wis. STAT. § 802.03(6) (1979).



mean going beyond an ordinary, reasonable meaning. Conceivably there might be some elements of a libel complaint which are entitled to "liberal construction" in the popular sense of the term, but it would seem that the meaning of the words themselves, which are before the court, must be measured by an objective scale, not weighted for or against either party.<sup>34</sup>

Defamation need not be expressly stated in order for there to be liability. "One may be libeled by implication and innuendo quite as easily as by direct affirmation. One accused of defamation cannot insist upon a literal reading or his understanding of the language."<sup>35</sup> "Implication" is the understanding which a reader may receive from stated words. As indicated above, the implications must be reasonably drawn. "Innuendo," also used synonymously with "implication," had a different technical meaning in common law pleading of defamation. It was the explanation in a complaint of the defamatory meaning of a communication which is alleged to exist in view of facts not appearing on the face of the publication. The innuendo was accompanied by a statement of the explanatory facts called an "inducement."<sup>36</sup>

In 1962 the Wisconsin Supreme Court abolished the prior distinction between libel *per se* (libelous on its face under some definitions) and libel *per quod* (libelous by reference to extrinsic facts and requiring proof of special damages under some definitions).<sup>37</sup> Today, the term "inducement" is rarely heard, and "innuendo" usually only in the sense of "implication." However, some of the basic concepts of those old terms, although now shorn of artificial pleading requirements, remain valid. Obviously a plaintiff cannot, to resist a motion to dismiss, read libel into nonlibelous words by alleging (or arguing) a conclusory statement that it implies or means something defamatory if the words do not reasonably support that meaning, unless some extrinsic facts are alleged which support

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34. The court decides whether an article is capable of a libelous meaning. "Where there is any *substantial doubt* as to what the meaning of the alleged libelous publication is, it is for the jury to say whether or not the meaning attributed to the language used is the correct one." *Leuch v. Berger*, 161 Wis. 564, 570-71, 155 N.W. 148, 151 (1915).

35. *Frinzi v. Hanson*, 30 Wis. 2d 271, 277, 140 N.W.2d 259, 262 (1966).

36. *W. PROSSER*, *supra* note 2 at § 111.

37. *Martin v. Outboard Marine Corp.*, 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

the meaning.<sup>38</sup>

In *Schaefer v. State Bar*<sup>39</sup> the complaint quoted three statements by the State Bar which the plaintiff alleged to be libelous; following each, she inserted parenthetically the defamatory meaning she ascribed to the statement (the innuendo). The court found that two of the statements were capable of a defamatory meaning when read in context. However, notwithstanding and not bound by the plaintiff's alleged defamatory "meaning," it ruled that the remaining statement was not reasonably capable of a defamatory meaning.<sup>40</sup>

Words of defamation need not be such as would damage plaintiff's reputation in the eyes of an entire community or even the majority. It is enough that a "substantial and respectable minority" would so react.<sup>41</sup> However, it is not enough that the communication would be defamatory in the eyes of a "very small group" not a "substantial minority," or only in the eyes of people with "peculiar" views; nor even if it is considered defamatory by a substantial group if its standards are so "anti-social that it is not proper for the courts to recognize them."<sup>42</sup>

In a Delaware case in 1977,<sup>43</sup> a trial court granted a motion

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38. While written in a libel *per quod* case at a time when special damages had to be pleaded in such cases, authority quoted with approval by the court in *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 476-77, 277 N.W. 177, 181 (1938), is still pertinent for testing the defamation-capability of words:

The general effect of the innuendo is only to explain matter which has been already sufficiently expressed before; the import of the words used it cannot enlarge, extend, or change." Likewise, "if the inducement is wanting the deficiency cannot be supplied by the statement of the facts in the innuendo (quoting 17 R.C.L. 396, § 151).

In *Luthey v. Kronschnabl*, 239 Wis. 375, 378-81, 1 N.W.2d 799, 800, an editorial said that if plaintiff "had attended a Christmas Eve service in any one of the Cranston churches we are sure he would have gotten a lot of good out of it and felt a whole lot better than he did." *Id.* The plaintiff alleged by innuendo that this meant he was "a man of such general lack of integrity and Christian virtue as to require the influence of a church service upon him" . . . *Id.* at 378, 1 N.W.2d at 800-01. The court said the ordinary and natural meaning of the words published was not defamatory and that the innuendo could not alter the sense or supply a meaning which is not there.

39. 77 Wis. 2d 120, 252 N.W.2d 343 (1977).

40. *Id.* at 125, 252 N.W.2d at 346.

41. RESTATEMENT (SECOND) OF TORTS § 559 comment e (1977).

42. *Id.*

43. *Saunders v. Board of Directors, WHYY-TV*, 382 A.2d 257 (Del. Super. Ct. 1978).

for summary judgment, dismissing the action of a prisoner who claimed a television station defamed him by calling him "an alleged F.B.I. informant."<sup>44</sup> The court said that saying a person is an informant of a law enforcement agency does not label him with unlawful or improper conduct, that the "public contempt" must be in the minds of "right thinking persons" or among "a considerable and respectable class of people," and that plaintiff's reputation in prison, where attitudes depart substantially from the outside, was not the standard for protection. The court noted that the published statement was for general consumption by the public and was not directed specifically to the prison community.

The Delaware case is noted in contrast to the facts and result in *Westby v. Madison Newspapers, Inc.*,<sup>45</sup> where the Wisconsin Supreme Court dealt with the attitude of the Madison community toward charges that plaintiffs were "spies" (for the federal government), and "paid informants," accepting pay to "spy on their neighbors."<sup>46</sup> The court noted that the article began with reference to a congressional probe of federal "snooping," permitting the implication that the plaintiffs were engaged in reprehensible snooping; and that, taken in that context and the allegation that the Westbys spied on neighbors who were accused of nothing more than political activism, the word "spy" was capable of being defamatory.<sup>47</sup> The court distinguished lower court decisions from foreign jurisdictions, after observing that they were slander cases and did not involve the publication of words like "spy" or "paid informant" to the community at large.<sup>48</sup> The court said that the most important distinction was that they all involved cooperation with authorities against actual lawbreakers. Noting that the neighbors were not even suspected criminals, the court quoted with approval the trial court's conclusion that, under existing circumstances, "reasonable and right-thinking citizens" could take the publication as defamatory.<sup>49</sup> The court did not hold the publication to be de-

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44. *Id.* at 259.

45. 81 Wis. 2d 1, 259 N.W.2d 691 (1977).

46. *Id.* at 6, 259 N.W.2d at 693.

47. *Id.* at 7, 259 N.W.2d at 694.

48. *Id.* at 8, 259 N.W.2d at 694.

49. *Id.*

famatory as a matter of law, but said it created a jury issue.<sup>50</sup>

### D. Opinion

Can "opinion" or "comment" be defamatory? It is clear that a defamatory expression of fact may not be immunized merely by labeling it as "opinion," e.g., "In my opinion, Doe murdered his wife." And it is sometimes difficult to determine whether a statement is "pure opinion" or is mixed "opinion" and "fact." But expressions of "pure opinion" do occur, and the common law developed protection against defamation liability for such opinion on a matter of public interest or concern, known as the right or privilege of "fair comment."

The *Restatement (Second) of Torts* and the Wisconsin Supreme Court have referred to this protection as a "privilege,"<sup>51</sup> and it will be discussed below in the section on privileges. However, some old authorities have taken the position that it should not be classed as a "privilege," i.e., an excused defamation, because opinion or fair comment is not defamation at all.<sup>52</sup> This position may be supported by the statement of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*,<sup>53</sup> that there is no such thing as a "false idea."

In *Gertz*, the Court, in a statement not necessary to the decision, said:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.<sup>54</sup>

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50. *Id.* at 8-9, 259 N.W.2d at 694.

51. RESTATEMENT (SECOND) OF TORTS § 566 (1977); see, e.g., *Williams v. Hicks Printing Co.*, 159 Wis. 90, 102, 150 N.W. 183, 188 (1914), stating that: "Conditional privilege as regards newspaper activity does not go beyond fair criticism in respect to the relations of persons to the public and report of facts."

52. See Thayer, *Fair Comment as a Defense*, 1950 WIS. L. REV. 288; *Van Lonkhuyzen v. Daily News Co.*, 203 Mich. 570, —, 170 N.W. 93, 99 (1918).

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

54. *Id.* at 339-40 (footnote omitted).

A number of courts have followed *Gertz* and seem to have accepted federal constitutional protection for pure opinion. Some of the courts have imposed conditions, e.g., that there be no false implication in the opinion; that the author is privy to defamatory facts not known to the reader; or, that the facts on which the opinion is based be known.<sup>55</sup> The *Restatement* position is that an opinion can be defamatory only if the opinion reasonably implies the existence of undisclosed defamatory facts.<sup>56</sup>

Wisconsin has not ruled on this issue since *Gertz*. Wisconsin has ruled that the constitutional protection given the media by *Gertz* in suits brought by "private" figures for allegedly false statements of fact does not apply to a nonmedia defendant.<sup>57</sup> If Wisconsin or the United States Supreme Court should rule that the *Gertz* dictum on "opinion" gives constitutional protection only to opinions by the media, opinions by private individuals which are the subject of defamation charges would have to be considered under the Wisconsin common law privilege of fair comment.

It seems unlikely that the broad dictum in *Gertz*, which categorically protects all ideas, would be read to exclude private persons' opinions. Since the *Gertz* case did not involve opinions, the Court's statement on opinion was unrelated to the facts of the case, and was a general pronouncement. According the right to express opinion to all citizens, not just the media, would also be consistent with the Wisconsin Supreme Court's statement that "every" citizen has the right to comment.<sup>58</sup>

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55. See, e.g., *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977), cert. denied, 434 U.S. 834 (1977); *Church of Scientology v. Czars*, 455 F. Supp. 420, 423-24 (M.D. Fla. 1978). Louisiana followed the *Gertz* statement in affording a constitutional defense to charges of defamation for comment in a review of a restaurant, finding that the facts on which the opinion were based were stated, that the opinion was opinion with no implication of defamatory facts, that the defendant qualified as "media," that the review involved a matter of public interest or concern, and that the statements were made without knowing or reckless falsity. *Mashburn v. Collin*, 355 So. 2d 879 (La. 1977).

56. RESTATEMENT (SECOND) OF TORTS § 566 (1977).

57. *Denny v. Mertz*, 106 Wis. 2d 636, 660-61, 318 N.W.2d 152-53 (1982).

58. "'Every citizen has a right to comment . . .'" *Grell v. Hoard*, 206 Wis. 187, 192, 239 N.W. 428, 430 (1931) (emphasis added) (quoting the rule stated in *Arnold v. Ingram*, 151 Wis. 438, 457, 138 N.W. 111, 119 (1913)).

#### IV. THE DEFAMATORY WORDS MUST BE PUBLISHED AND MUST BE DEFAMATORY OF THE PLAINTIFF

##### A. "Publication" Must Occur

To be actionable for defamation, defamatory words must be "published" — that is, they must be communicated to a third party (one other than the person defamed).<sup>59</sup> The fact that words are addressed to the person defamed does not defeat publication if they are visible to others, or if they are intercepted by a third person and the sender knew or should have known that such interception was likely to occur.<sup>60</sup>

##### B. The Publication Must Identify the Person Defamed

A defamatory article is not actionable unless it identifies the plaintiff as the subject. It is not necessary that he be named; it is enough that he be identified by description or implication. Section 802.03(6) of the Wisconsin Statutes provides:

**Libel or Slander.** In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their applications to the plaintiff may be stated generally.<sup>61</sup>

This statute does not dispense with the need to plead extrinsic facts to show identification of the plaintiff when the words themselves are so ambiguous as not to reasonably point to the plaintiff.<sup>62</sup> The defamatory words must refer to an ascertained or ascertainable person (plaintiff).<sup>63</sup> The words "Bank loaned to death by former cashier" were held to be not

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59. *Ranous v. Hughes*, 30 Wis. 2d 452, 461-62, 141 N.W.2d 251, 255 (1966).

60. Publication occurred when a libelous telegram was delivered to the telegraph company for transmission in *Monson v. Lathrop*, 96 Wis. 386, 71 N.W. 596 (1897); see also *Annot.*, 92 A.L.R.2d 219 (1963) for cases from other jurisdictions, including cases holding that publication occurred, although disclosure to third persons was by plaintiff, when such disclosure was the natural and probable consequence of the receipt of such material.

61. Wis. STAT. § 802.03(6) (1979).

62. *Downer v. Tubbs*, 152 Wis. 177, 180, 139 N.W. 820, 822 (1913), construing Wis. STAT. § 2677 (1911), comparable to Wis. STAT. § 802.03(6) (1979) (held, sufficient identification of plaintiff).

63. *Schoenfeld v. Journal Co.*, 204 Wis. 132, 235 N.W. 442 (1931) ("libelous" headline did not identify plaintiff; he was named in the body of the news article, but construed as a whole, the court said, it was clear that the plaintiff was not charged as indicated in the headline; jury verdict for defendant was upheld).

libelous on demurrer because they failed to identify the plaintiff, even though it was alleged he was the only "former cashier" of the bank since consolidation with another bank.<sup>64</sup>

It is generally stated that defamatory matter referring to a group is actionable by an individual member only if the group is so small that the matter can reasonably be understood to refer to that member or circumstances reasonably give rise to that conclusion.<sup>65</sup> There have been many decisions in other jurisdictions and much conjecture by writers as to what size group triggers actionability. Some Wisconsin cases have found that a plaintiff was not identified even though the group was very small. In *Williams v. Journal Co.*<sup>66</sup> one of the alleged libels was a statement in a news article about "a member of the City Attorney's staff" who had accepted retainers from a railroad.<sup>67</sup> It was alleged in the complaint that, although plaintiff was not named in that article, he was the only attorney for the city known as Special Assistant City Attorney and that he had accepted employment from the railroad.<sup>68</sup> Although the city attorney's staff included only four or five assistant city attorneys,<sup>69</sup> the court said that the plaintiff was not sufficiently identified, that other members of the city attorney's staff might have accepted retainers too and that the article was equally applicable to them.<sup>70</sup>

In *Kassowitz v. Sentinel Co.* the statement in issue was that there were a number of persons employed at a sanitarium "including part-time doctors, who are so-called arrested cases of tuberculosis."<sup>71</sup> The complaint alleged that there were only four part-time doctors employed at the sanitarium, including plaintiff.<sup>72</sup> Citing *Williams*, the court noted that the

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64. *Helmicks v. Stevlingson*, 212 Wis. 614, 250 N.W. 402 (1933). The court observed that the bank was formed in 1905 and that plaintiff had been cashier for only 15 months. The dissenting justice noted that the complaint also alleged that plaintiff was cashier when the bank closed, and felt that that and other allegations sufficiently alleged identification. *Id.* at 617-18, 250 N.W. at 403 (Fowler, J., dissenting).

65. RESTATEMENT (SECOND) OF TORTS § 564A (1977).

66. 211 Wis. 362, 247 N.W. 435 (1933).

67. *Id.* at 367, 247 N.W. at 437.

68. *Id.* at 367-68, 247 N.W. at 438.

69. *Kassowitz v. Sentinel Co.*, 226 Wis. 468, 472-73, 277 N.W. 177, 179 (1938) (supplying facts not mentioned in *Williams*).

70. *Williams*, 211 Wis. at 372, 247 N.W. at 439.

71. 226 Wis. at 471, 277 N.W. at 178.

72. *Id.*

allegedly libelous article did not state that *all* of the part-time doctors were arrested cases of tuberculosis — that the ones referred to may have been any one of the four and not necessarily the plaintiff. While the lack of identification was conclusive, the court also went on to find that the article was not libelous *per se*.<sup>73</sup>

In the *Williams* and *Kassowitz* cases, the allegedly defamatory articles indicated respectively that only “one” or “some” members of the small groups were charged with being involved in the alleged defamatory circumstances, not all, leading to the ruling that there was insufficient identification.<sup>74</sup> In *De Witte v. Kearney & Trecker Corp.* the allegedly identifying reference was “the small group of officers of the EIU,” a labor union.<sup>75</sup> The statement in issue indicated misconduct on the part of that group. The court said it was elementary that certainty as to the persons defamed “must appear from the words themselves.”<sup>76</sup> It observed that the complaint alleged that for the entire period of time in question the four plaintiffs were the officers of EIU. It said the word “the” before “small group” denoted the *entire* group or *all* the officers.<sup>77</sup> Therefore, no innuendo was needed to identify the plaintiffs as constituting the small group of officers to whom the writing referred. The plaintiffs were definitely ascertainable, and they each had a cause of action. The court distinguished the *Kassowitz* case, pointing out that there the reference was not to all of the doctors, unlike the case at bar.<sup>78</sup> While in the *De Witt* case a term which encompassed the entire small group was held to be sufficient identification of each of the members of a four-man group, such an all-encompassing term would seem not to provide identification if the group is sufficiently large, although again there could be circumstances which present exceptions.<sup>79</sup>

The question of identification arose again in 1976 in

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73. *Id.* at 473, 277 N.W. at 179.

74. See RESTATEMENT (SECOND) OF TORTS § 564A (1977) comment b, for statement of view that defamation could sometimes exist in those circumstances.

75. 265 Wis. 132, 134, 60 N.W.2d 748, 749 (1953).

76. *Id.* at 137, 60 N.W.2d at 751.

77. *Id.*

78. *Id.* at 138, 60 N.W.2d at 751.

79. RESTATEMENT (SECOND) OF TORTS § 564A comments a & d (1977).



*Giwosky v. Journal Co.*<sup>80</sup> Without deciding whether a series of broadcasts should be considered as one communication, the court did so consider them for demurrer purposes. Although he had been specifically named and identified as an absentee landlord in the series, the court found no identification of plaintiff in various charges stated against "some landlords" and a "few landlords" and "absentee landlords." As to the latter, the court noted the defendant had said that "not all absentee landlords operate this way." As to the former, the court said, plaintiff could not turn a reference to an unnamed "few" into derogation of all.<sup>81</sup>

## V. DEFENSES

### A. *Truth: An Absolute Defense*

Truth is an absolute defense to a defamation claim.<sup>82</sup> Literal accuracy is not required. The defense of truth is available if the statement is "substantially true."<sup>83</sup> It has long been the defamation defendant's burden to plead and prove the defense of "truth," and the Wisconsin court recently reaffirmed that law.<sup>84</sup> However, federal constitutional requirements have some possible impact on this issue, as will be noted below.

### B. *Common Law or Statutory Privileges*

A number of "privileges" have been developed through court decisions and legislative enactments which, in varying degrees and under various circumstances, protect a person from liability for defamation even though he has spoken or written false and defamatory matter. In each instance they represent an effort to allow citizens to engage in communications which are valuable to our society with some reasonable measure of safety from liability for defamation. Some of these privileges are absolute; others are conditional.

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80. 71 Wis. 2d 1, 237 N.W.2d 36 (1976).

81. *Id.* at 14-15, 237 N.W.2d at 41-42.

82. *Schaefer v. State Bar*, 77 Wis. 2d 120, 125, 252 N.W.2d 343, 346 (1977).

83. *DiMiceli v. Klieger*, 58 Wis. 2d 359, 363, 206 N.W.2d 184, 187 (1973). *See also* *Lathan v. Journal Co.*, 30 Wis. 2d 146, 140 N.W.2d 417 (1966); *Meier v. Meurer*, 8 Wis. 2d 24, 98 N.W.2d 411 (1959); *Prahl v. Brosamle*, 98 Wis. 2d 130, 141, 295 N.W.2d 768, 776 (Ct. App. 1980) (where statement was too inaccurate).

84. *Denny v. Mertz*, 106 Wis. 2d 636, 660-61 n.35, 318 N.W.2d 141, 153 n.35 (1982).

While federal constitutional privileges have attracted more attention in the past two decades, these common law and statutory privileges remain vitally important under Wisconsin law. It is not possible to list here all the privileges or all the significant cases or to discuss them fully. A brief overview is provided.

## 1. Absolute Privileges at Common Law

There are a number of "absolute" privileges, so-called because they give complete protection even though the publisher of the defamatory matter has acted maliciously or without honest belief in what was said or written. These privileges have been extended to participants in judicial and legislative proceedings and to certain governmental executive officers of higher echelons.<sup>85</sup>

Thus, a judicial officer has absolute privilege if the matter uttered has some relation to the matter before him.<sup>86</sup> Lawyers, parties and witnesses are likewise protected for their statements and writings in judicial proceedings, so long as they are pertinent and relevant to the proceeding; remote connection is sufficient.<sup>87</sup> This rule (which applies to "quasi-judicial" proceedings as well) requires, however, that there be a "nexus" between a proceeding and the statement.<sup>88</sup> Character information given by a deputy sheriff to a police department in response to a request by a town for information regarding a liquor license applicant, has been held part of a quasi-judicial proceeding and absolutely privileged.<sup>89</sup> Statements made to a

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85. See generally RESTATEMENT (SECOND) OF TORTS §§ 583-592A (1977); W. PROSER, *supra* note 2 at § 114; see also *Ranous v. Hughes*, 30 Wis. 2d 452, 465-67, 141 N.W.2d 251, 257-58 (1966) for reference to executive privilege.

86. RESTATEMENT (SECOND) OF TORTS § 585 (1977); see also Annot., 42 A.L.R.2d 825 (1955).

87. *Spoehr v. Mittelstadt*, 34 Wis. 2d 653, 150 N.W.2d 502 (1967) (pretrial conference).

88. *Converters Equipment Corp. v. Condes Corp.*, 80 Wis. 2d 257, 266-67, 258 N.W.2d 712, 716-17 (1977) (letter sent to recipients not connected with suit, and not as an integral part of proceedings: absolute privilege denied). See also Annot., 36 A.L.R.3d 1328 (1971), regarding communications between attorneys before, after and during proceedings.

89. *Hartman v. Buerger*, 71 Wis. 2d 393, 238 N.W.2d 505 (1976). On the other hand, the meeting of the executive committee of a medical staff of a private hospital, though involving "public interest," is not a quasi-judicial proceeding which gives rise to an absolute privilege. *DiMiceli v. Klieger*, 58 Wis. 2d 359, 365-66, 206 N.W.2d 184,

grand jury in a John Doe proceeding or to a district attorney or his assistant in seeking issuance of a criminal complaint, have been held to be absolutely privileged.<sup>90</sup> A witness whose statements in proceedings were absolutely privileged under the law of defamation, could nevertheless be held liable under a conspiracy charge, provided proper proof be made that there was a conspiracy to injure the plaintiff which met statutory tests.<sup>91</sup>

## 2. Conditional Privileges at Common Law

Many communications are "conditionally privileged." Public policy "recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation."<sup>92</sup> Under common law these privileges have frequently been conditioned on the publisher's having an honest belief in the truth of what he was saying, an acceptable basis for the belief (ranging from good faith or lack of recklessness as to falsity, to a requirement that there be "reasonable" grounds for such belief), an absence of common law malice, e.g., ill will or wanton disregard of the rights of the plaintiff, and publication only to those within the scope of the privilege.<sup>93</sup> Examples of privileged communications are: those to protect the publisher's interest; those to protect interests of another, common interests or family relationships; and communication to a public officer in the public interest.<sup>94</sup>

The Wisconsin Supreme Court has said this type of privilege is "conditional" because the declaration must be "reasonably calculated to accomplish the privileged purpose" and must be made without "malice."<sup>95</sup> In *Ranous v. Hughes* the use of the word "malice" was termed "probably unfortu-

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188 (1973).

90. *Bergman v. Hupy*, 64 Wis. 2d 747, 221 N.W.2d 898 (1974).

91. *Radue v. Dill*, 74 Wis. 2d 239, 246 N.W.2d 507 (1976) (decided on demurrer).

92. *Lathan v. Journal Co.*, 30 Wis. 2d 146, 152, 140 N.W.2d 417, 420 (1966).

93. RESTATEMENT OF TORTS §§ 600-05 (1939). As to substantial minority position adopting reckless disregard test instead of reasonable grounds test as to belief in truth, see RESTATEMENT (SECOND) OF TORTS, Ch. 25, Topic 3, Tit. A, special note preceding § 593 (1977).

94. RESTATEMENT (SECOND) OF TORTS §§ 594-98 (1977).

95. *Hett v. Ploetz*, 20 Wis. 2d 55, 59, 121 N.W.2d 270, 273 (1963).

nate.”<sup>96</sup> The preferred approach was to talk instead in terms of “abuse of the privilege which causes its loss.”<sup>97</sup> The court listed with approval the four conditions enumerated by the then existing *Restatement*<sup>98</sup> which may constitute abuse of privilege, any one being sufficient to cause loss of the privilege. The privilege was deemed abused if defendant: (1) did not believe in the truth of the matter published, or if he did, had no reasonable grounds for that belief;<sup>99</sup> (2) published for a purpose other than that contemplated by the privilege;<sup>100</sup> (3) published to a person not reasonably necessary for accomplishment of the purpose;<sup>101</sup> or (4) included defamatory matter not reasonably believed necessary to accomplish the purpose of the privilege.<sup>102</sup> The court omitted one ground of abuse listed in the *Restatement*<sup>103</sup> because it had no relationship to the facts of the case (the circumstances under which rumors, even though not believed, may be published with privilege).<sup>104</sup> It should be noted that these tests of abuse of privilege did not discard common law malice. In commentary the *Restatement* said that if the publication is made “solely from spite or ill will” it is an abuse and not a proper use of the privileged occasion.<sup>105</sup>

The current *Restatement* has dropped the grounds stated in the prior sections 600 and 601 and has in a new section 600 substituted a new test of abuse of privilege: actual knowledge of falsity or reckless disregard as to truth or falsity.<sup>106</sup> This is the *New York Times* “constitutional malice” test.<sup>107</sup> The *Restatement* proposed this modification because of the *Gertz*<sup>108</sup> ruling that strict liability in defamation is unconstitutional,

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96. 30 Wis. 2d 452, 467, 141 N.W.2d 251, 258 (1966).

97. *Id.* at 468, 141 N.W.2d at 258.

98. RESTATEMENT OF TORTS §§ 600,-01,-03,-05 (1939).

99. *Id.* at § 600-01.

100. *Id.* at § 603.

101. *Id.* at § 604.

102. *Id.* at § 605.

103. *Id.* at § 602.

104. 30 Wis. 2d at 470, 141 N.W.2d at 260.

105. RESTATEMENT OF TORTS § 603 (1939).

106. RESTATEMENT (SECOND) OF TORTS § 600 (1977). Old § 601 is omitted, being covered by § 600; old §§ 602-05 remain in substantially the same form as in the prior (1939) edition.

107. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *infra* Section V.

108. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See *infra* Section V.

and that at a minimum there must be fault on the part of the publisher amounting to at least negligence (at least in those cases subject to the *Gertz* rule). Thus, under *Gertz* restrictions, plaintiffs must in all cases, even unprivileged situations, prove elements which would constitute abuse of privilege (and thus defeat privilege) under the old rules. The result would be that privileged situations would lose their significance. The higher standard proposed in the new rule would distinguish privileged situations from nonprivileged situations, as did the prior law, and give them better protection. In applying the *New York Times* "actual malice" test, the *Restatement* noted that it had been earlier applied by a "substantial minority" of jurisdictions as a common law abuse of privilege test.<sup>109</sup> Recognizing that *Gertz* might not be applied to all cases, or to the fullest extent suggested by the ruling, the *Restatement* did not rewrite all of its conditional privilege rules.<sup>110</sup>

Wisconsin has not applied the *Gertz* fault rules to *all* cases, so the *Restatement's* new abuse of privilege rule, if applied at all by the Wisconsin Supreme Court, would undoubtedly be limited to only those cases covered by *Gertz*, where fault is a required element. In *Calero v. Del Chemical Corp.*,<sup>111</sup> decided after *Gertz*, the court ruled that the case was not subject to a federal constitutional privilege and the "actual malice" standard, but was subject to a common law conditional privilege test.<sup>112</sup> Reverting to the term called "unfortunate" in *Ranous*, it said the proper test to apply to determine whether the nonconstitutional conditional privilege was abused is a question of "express [common law] malice" (ill will, revenge, etc.), distinguishing that kind of malice from constitutional "actual malice."<sup>113</sup> The court commented that in some cases a good faith belief in the truth of the statement is sufficient to establish the privilege, quoting with approval from an older case in which it was said that statements are protected if they are made in good faith belief of truth, are

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109. See discussion, *RESTATEMENT (SECOND) OF TORTS*, Ch. 25, Topic 3, Tit. A, special note preceding § 593, § 593 and other sections there referenced (1977).

110. See *Denny v. Mertz*, 106 Wis. 2d 636, 660-61, 318 N.W.2d 141, 152 (1982); see also *Calero v. Del Chemical Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

111. 68 Wis. 2d at 507, 228 N.W.2d at 748.

112. *Id.* at 498, 228 N.W.2d at 744.

113. *Id.* at 507, 228 N.W.2d at 748.

based on some tangible information and are made from an honest desire to promote public justice, to the proper officer, or to one believed to be the proper officer, even though some more prudent person would not perhaps have believed in the truth of the information.<sup>114</sup> Thus the court pointed out that in some cases of conditional privilege, a recklessness test as to truth has been considered sufficient in testing the defendant's responsibility for the truth of his statement; this test is more favorable to the defendant than the *Restatement's* section 601 negligence test (whether a reasonably prudent person would have believed the facts he communicated).<sup>115</sup> More recently, respecting a defendant held not subject to *Gertz*, the court reiterated the old *Restatement* tests for abuse of conditional privilege which had been set forth in *Ranous*.<sup>116</sup>

There are numerous Wisconsin cases regarding conditional privileges. Some examples of the circumstances in which the issue has arisen are credit reports,<sup>117</sup> communications between persons with common interest<sup>118</sup> and communications to law officers.<sup>119</sup>

### 3. Fair Comment

As noted above, "fair comment" has been treated both as nondefamatory and as privileged defamation. The first *Restatement*<sup>120</sup> treated the common law protection of fair comment as a privilege, setting forth a rule that one could, without defamation liability, (1) criticize activities of another which were of public concern provided (a) the criticism was based on a true or privileged statement of fact or facts other-

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114. *Id.* at 498-99, 228 N.W.2d at 744.

115. RESTATEMENT OF TORTS § 601 (1939).

116. *Denny v. Mertz*, 106 Wis. 2d 636, 663-64, 318 N.W.2d 141, 154 (1982) (quoting *Ranous*, 30 Wis. 2d at 468, 141 N.W.2d at 259 (1966)).

117. *See, e.g., Barker v. Retail Credit Co.*, 8 Wis. 2d 664, 100 N.W.2d 391 (1960).

118. *See, e.g., Hett v. Ploetz*, 20 Wis. 2d 55, 121 N.W.2d 270 (1963) (statements regarding qualifications of a teacher).

119. *See, e.g., Lisowski v. Chenenoff*, 37 Wis. 2d 610, 155 N.W.2d 619 (1968) (privilege not allowed); *Otten v. Schutt*, 15 Wis. 2d 497, 113 N.W.2d 152 (1962) (privilege denied because jury could properly infer from evidence that communication was *not* made for proper purpose of apprehending or punishing one who had committed a crime).

120. RESTATEMENT (SECOND) OF TORTS § 566 (1977) has dropped the "fair comment" section which was in its original publication, considering that federal constitutional protections suggested by *Gertz* have superseded it.

wise known or available to the recipient as a member of the public and (b) represented the actual opinion of the critic and (c) was not solely for the purpose of harming the other; and (2) criticize private conduct or character of another who is engaged in activities of public concern insofar as the private conduct or character affected his public conduct, provided it complied with (a), (b) and (c) above, and in addition was a criticism which a man of reasonable intelligence and judgment might make. Criticism of the public acts of a public man, category (1), did not have to be "reasonable," as was required for a personal attack, category (2).<sup>121</sup> This doctrine was applied to public officers and candidates for office, to management of various institutions, and to literary, artistic and scientific productions and public sports events among other things.<sup>122</sup>

The defense of fair comment has been recognized by the Wisconsin Supreme Court in a number of cases, but in some the court denied the privilege where the criticism was too personal, as opposed to criticism of the person's performance, or was irrelevant to the public matter or appeared malicious.<sup>123</sup> The supreme court said in *Arnold v. Ingram* that the qualified privilege to discuss the relevant demerits of a candidate for office is broader than the defense of fair comment and criticism of a book or play.<sup>124</sup>

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121. RESTATEMENT OF TORTS § 606 (1939); see also *id.* §§ 607-10.

122. *Id.* at § 606 comment a.

123. See, e.g., *Buckstaff v. Viall*, 84 Wis. 129, 54 N.W. 111 (1893) (the defense was not allowed because, rather than being a fair and reasonable comment on the plaintiff's conduct as a senator, the remarks in issue were personal gibes, taunts and insults not properly related to his official conduct); *Pfister v. Milwaukee Free Press Co.*, 139 Wis. 627, 640, 121 N.W. 938, 944 (1909) (defense not allowed because plaintiff not an official, or candidate, nor had he sought and invited "public patronage"); *Arnold v. Ingram*, 151 Wis. 438, 138 N.W. 111 (1913) (privilege allowed); *Stevens v. Morse*, 185 Wis. 500, 201 N.W. 815 (1925) (defense denied; article evinced hatred and contempt; it appeared that object was to humiliate); *Lukaszewicz v. Dziadulewicz*, 198 Wis. 605, 225 N.W. 172 (1929) (the court found the basic facts not to be in dispute, and said that if plaintiff was held up to public ridicule by reason of the comments, it was due not to conclusions in the comments but the undisputed facts. It noted that the basis of the comments might not be a substantial basis for comparing candidates (their war records), but observed it was an old practice, and that: "[I]n a democracy appeals may be made to prejudice as well as common sense." *Id.* at 608, 225 N.W. at 173); *Grell v. Hoard*, 206 Wis. 187, 239 N.W. 428 (1931) (privilege allowed). In *Hoan v. Journal Co.*, 238 Wis. 311, 328, 298 N.W. 228, 236 (1941), the court quoted the RESTATEMENT OF TORTS § 606 (1939) with approval.

124. 151 Wis. at 456, 138 N.W. at 118.

Comment may be caustic and severe when confined to the facts,<sup>125</sup> and yet may not be too hateful or contemptuous.<sup>126</sup> In *Grell v. Hoard*<sup>127</sup> the court said the case was a close one and that in doubtful cases (of comment and criticisms of a public official) "the doubt should be resolved in favor of free criticism and discussion."<sup>128</sup> The court emphasized the right of citizens to express opinions about public officials so long as they were fairly and reasonably based on fact, and it distinguished the actionable charging of an official with disregard for human life from the nonactionable condemning of his work for lack of safety:

Charging a public officer with being inefficient and incapable in the performance of the duties of his office when the charge has some fair and reasonable basis in fact is not libelous. What constitutes efficiency and capability must always be matters of opinion. There are no absolute standards by which the conduct of public officials may be judged. So far as the charge relates to a lack of regard for human life and personal safety, it is not a charge against Mr. Grell personally but a condemnation of the type of ditch which he, as highway engineer, is having constructed in Jefferson county.<sup>129</sup>

#### 4. Statutory Privilege to Report Legislative, Judicial or Other Public Official Proceedings

Section 895.05(1) of the Wisconsin Statutes provides:

**Damages In Actions For Libel.** (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to

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125. *Lukaszewicz v. Dziadulewicz*, 198 Wis. 605, 608, 225 N.W. 172, 173-74 (1929).

126. *Stevens v. Morse*, 185 Wis. 500, 503, 201 N.W. 815, 816 (1925).

127. 206 Wis. 187, 239 N.W. 428 (1931).

128. *Id.* at 193, 239 N.W. at 430.

129. *Id.* at 191, 239 N.W. at 430.



any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.<sup>130</sup>

This statute, which includes long standing common law privileges accorded the reporting of legislative and judicial proceedings, and extends a like privilege to the reporting of all "other public official proceedings," provides an unconditional privilege.<sup>131</sup> Citations to cases concerning this law are readily available in annotations to the statute,<sup>132</sup> cases in other jurisdictions are of value in construing areas not yet covered by Wisconsin decisions, particularly the scope of activities which fall within the meaning of "proceedings."<sup>133</sup>

## 5. Statutory Prerequisites and Other Terms

Section 895.05(2) of the Wisconsin Statutes provides:

Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; other-

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130. WIS. STAT. § 895.05(1) (1979).

131. See *Williams v. Journal Co.*, 211 Wis. 362, 368, 247 N.W. 435, 438 (1933); *Lehner v. Berlin Publishing Co.*, 209 Wis. 536, 539, 245 N.W. 685, 686 (1932).

132. See, e.g., *Williams v. Journal Co.*, 211 Wis. 362, 247 N.W. 435 (1933) (privilege to publish news account of grand jury report even though report improperly filed in court and subsequently stricken from court files); *Finnegan v. Eagle Printing Co.*, 173 Wis. 5, 179 N.W. 788 (1920) (publication of pleadings or other preliminary papers to which the attention of no judicial officer has been called and no judicial attention invited is not privileged).

133. See, e.g., *Porter v. Guam Publications*, 643 F.2d 615 (9th Cir. 1981) (news report of a police bulletin compiling complaints and arrests held privileged as report of an official proceeding).

wise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as his statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.<sup>134</sup>

The notice requirement of this statute applies not only to media defendants, but also to nonmedia defendants whose allegedly libelous statements are published in the press. It has been held not to apply to statements broadcast on radio or television.<sup>135</sup> Notice addressed to a company was not notice to individual defendants even though they were officers of the company and some of the them were named in the notice as persons who made the allegedly libelous statements (later published in the press).<sup>136</sup>

Section 895.052 of the Wisconsin Statutes exempts radio and television from liability for defamation contained in some political broadcasts.<sup>137</sup>

### C. Federal Constitutional Privileges<sup>138</sup>

#### 1. *New York Times* to *Gertz*

The right to make "fair comment" on public officials and candidates has long been recognized. Comment could be harsh, and in doubtful cases, doubt was to be "resolved in

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134. WIS. STAT. § 895.05(2) (1979).

135. See *Hucko v. Jos. Schiltz Brewing Co.*, 100 Wis. 2d 372, 374, 302 N.W.2d 68, 70 (Ct. App. 1981).

136. *Id.* at 375-76, 385-86, 302 N.W.2d at 71, 75.

137. WIS. STAT. § 895.052 (1979).

138. The Wisconsin Supreme Court indicated in the latest *Denny* case that the Wisconsin Constitution provides no greater press protection in defamation law than the federal constitution. *Denny v. Mertz*, 106 Wis. 2d 636, 655-56 n.27, 318 N.W.2d 141, 150 n.27 (1982). This seems inconsistent with statements by the court in *Zelenka v. State*, 83 Wis. 2d 601, 617, 266 N.W.2d 279, 286 (1978) and *Giwoosky v. Journal Co.*, 71 Wis.2d 1, 16, 237 N.W.2d 36, 43 (1976). Justice Abrahamson, in her dissent in *Denny*, 106 Wis. 2d at 672-73, 318 N.W.2d at 158-59, states that Wisconsin's constitutional protections of speech are broader than the first amendment. This important subject is too broad to treat in this limited article.

favor of free criticism and discussion."<sup>139</sup> Officials could not be "too thin-skinned" about critical comment.<sup>140</sup> But the right to "comment" or give opinions did not protect factual misstatements in the majority of American jurisdictions, including Wisconsin. However, starting in 1964, a series of United States Supreme Court decisions significantly altered the law of defamation.

In *New York Times v. Sullivan*<sup>141</sup> it was held that as a matter of first amendment right, even factual misstatements about a public official were immune to libel liability in the absence of "actual malice" — defined as (1) actual knowledge that the statements were false or (2) reckless disregard as to whether or not they were false.<sup>142</sup> The states must, of course, honor this constitutional requirement.

This "constitutional" malice is not proved by showing that defendant did not have a "reasonable belief" in the truth of what he said. The defendant prevails if he had only an "honest belief." Constitutional malice is not proved by showing common law malice (ill will, hatred, etc.).<sup>143</sup> For "reckless disregard" to exist, the defendant must have entertained "serious doubts" as to the truth of the publication.<sup>144</sup> The plaintiff must show a "high degree of awareness of probable falsity."<sup>145</sup> The burden of proving malice is on the plaintiff. It is not a mere preponderance of the evidence test. Malice must be proven with "convincing clarity."<sup>146</sup>

In *New York Times*, the Court said: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>147</sup> The Court said that in such public debate erroneous statements are inev-

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139. *Grell*, 206 Wis. at 193, 239 N.W. at 430.

140. *Arnold*, 151 Wis. at 457, 138 N.W. at 119.

141. 376 U.S. 254 (1964).

142. *Id.* at 280.

143. *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964).

144. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

145. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

146. *New York Times*, 376 U.S. at 285-86.

147. *Id.* at 270.

itable and must be excused if freedom of expression is to have the "breathing space" it needs to survive.<sup>148</sup>

Thereafter the United States Supreme Court extended the *New York Times* protection. In *Curtis Publishing Co. v. Butts*<sup>149</sup> it held that the *Times* rule was applicable in suits by "public figures" as well as by public officials.

The next step under the *New York Times* rationale was the extension of the rule to protect publications concerning matters of public interest and concern, even if the plaintiff was not himself a "public official" or "public figure." A number of lower courts did so, and the United States Supreme Court did so in a fractionated decision in *Rosenbloom v. Metromedia*.<sup>150</sup> A plurality of the Court held that the *New York Times* protection applied whenever the subject of the report was a matter which "is a subject of public or general interest," even though the offended plaintiff was neither an official nor a public figure.<sup>151</sup> The Court had sharply divided views. The basis of Justice Brennan's plurality opinion was this: "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."<sup>152</sup> Decisions before and after *Rosenbloom* which allowed a constitutional privilege in reporting matters of sufficient public interest and concern found that such interest and concern existed in reports about a garbage company with municipal contracts,<sup>153</sup> whether improper preparation of food had caused widespread illness,<sup>154</sup> the hazard of injury posed by a toy,<sup>155</sup> the sale of intoxicants to minors<sup>156</sup> and whether a heating unit

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148. *Id.* at 271-72.

149. 388 U.S. 130 (1967).

150. 403 U.S. 29 (1971).

151. *Id.* at 43-44.

152. *Id.*

153. *Arizona Biochemical Co. v. Hearst Corp.*, 302 F. Supp. 412, 414 (S.D.N.Y. 1969).

154. *Pace v. McGrath*, 378 F. Supp. 140, 144 (D. Md. 1974).

155. *F & J Enters. v. Columbia Broadcasting Sys.*, 373 F. Supp. 292, 297 (N.D. Ohio 1974).

156. *West v. Northern Publishing Co.*, 487 P.2d 1304 (Alaska 1971).

caused a fire,<sup>157</sup> among others.

The issue was re-examined by the United States Supreme Court in *Gertz v. Robert Welch, Inc.*<sup>158</sup> The Court ruled that the extension of the *New York Times* rule in *Rosenbloom* was not required by the federal constitution, and restricted *Times* protection to suits by public officials or public figures. However, it did require that, in suits by "private" plaintiffs, there be at least a finding of "fault" on the part of the defendant rather than the strict liability which existed at common law. It did not rule that that federal constitutional *minimum* protection must be the maximum protection afforded to defamation defendants by states. Rather, the Court concluded, the degree of protection afforded speech on matters involving "private" plaintiffs (so long as it was not less than what *Gertz* required), was within the province of each of the states: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."<sup>159</sup>

The *Gertz* ruling applies at least where the content of the defamatory statement "makes substantial danger to reputation apparent."<sup>160</sup> The Court said: "Our inquiry would involve considerations somewhat different . . . if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential."<sup>161</sup>

The Court also ruled that states may not permit recovery of presumed or punitive damages unless the plaintiff proves the defendant had actual knowledge of falsity or had reckless disregard for the truth. Actual damages would have to be proved in such a case, but they could include, in addition to special damages, damages to reputation, loss of standing in the community, mental suffering and anguish.<sup>162</sup>

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157. *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner the Detroit Free Press Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

158. 418 U.S. 323 (1974).

159. *Id.* at 347.

160. *Id.* at 348 (quoting from *Curtis Publishing Co.*, 388 U.S. at 155).

161. *Id.* at 348.

162. *Id.* at 349-50.

## 2. Post-Gertz Decisions Outside Wisconsin

After *Gertz*, state courts presented with defamation suits brought by plaintiffs who were neither public figures nor public officials had to decide whether they would apply the minimum test of negligence federally mandated by *Gertz* or some higher test, and in some instances, whether *Gertz* applied at all to the case at hand. A number of states, faced with that choice, elected to adopt the *Gertz* minimum negligence standard — generally, a requirement that the defendant knew or should have known, in the exercise of reasonable care, that the publication was false.<sup>163</sup> Several states chose to apply a stricter test than negligence, provided the publication related to a matter of public interest and concern, as was the case in *Gertz*. Some of them, following *Rosenbloom* concepts, used the *New York Times* “malice” test;<sup>164</sup> others chose some variation of the malice test, stricter than negligence.<sup>165</sup>

Does the concept of fault apply to the issue of defamatory meaning, too? Should not a nonnegligent unawareness on the part of the publisher that the publication is defamatory protect the defendant as well as nonnegligent unawareness of falsity? *Gertz* expressly restricted its (minimum) negligence rule to cases where the substance of the defamatory statement makes “substantial danger to reputation apparent.”<sup>166</sup> Obviously, it intended no lesser protection than a negligence standard for a defendant who reasonably was unaware of the danger of defamation (e.g., did not know of some extrinsic facts which supplied defamatory meaning). If that danger is not apparent, would the *New York Times* “actual malice” test still apply, at least in matters of public interest and concern? The Supreme Court has certainly indicated that the media, at least, should have greater protection than a negligence standard with respect to awareness of defamation. It said, in *Time, Inc. v. Hill*:

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163. See, e.g., *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975).

164. See, e.g., *Aafco Heating and Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

165. See, e.g., *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975).

166. *Gertz*, 418 U.S. at 348.

We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.<sup>167</sup>

*Gertz* involved a media defendant, and the Court spoke frequently of the media and stated its "fault" rule in terms of a "publisher or broadcaster of defamatory falsehood."<sup>168</sup> State courts have disagreed as to whether the *Gertz* fault rule should apply to private defendants as well as media defendants.<sup>169</sup> The *Restatement* takes the position that it should, i.e., that the private defendant should have as much protection as the media.<sup>170</sup>

### 3. Wisconsin Decisions after *Rosenbloom*

In two cases after *Rosenbloom* and prior to *Gertz*, the Wisconsin Supreme Court cited the "public interest and concern test" of *Rosenbloom* in giving *New York Times* protection to the defendant. In *Polzin v. Helmbrecht*,<sup>171</sup> after citing the test, the court said that a letter written to the media by the defendant about the plaintiff reporter discussed "a matter of

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167. 385 U.S. 374, 389 (1967).

168. *Gertz*, 418 U.S. at 347-48. Was the Court thereby referring to any writer or speaker of defamation, or was it using the words in their media sense?

169. See, e.g., *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), where the court suggested that the United States Supreme Court should apply *Gertz* for both media and nonmedia defendants but in any event adopted that rule as state law. *Id.* at \_\_\_, 350 A.2d at 694-95. *Contra* *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, \_\_\_, 568 P.2d 1359, 1363-64 (1977), where it was held *Gertz* did not apply for benefit for a nonmedia defendant in the case before the court where there was "no threat to the free and robust debate of public issues . . . ." The court concluded that "*Gertz* does not require application of the constitutional privilege to defamation actions between private parties *insofar as the issues raised here are concerned.*" *Id.* at \_\_\_, 568 P.2d at 1365 (emphasis added).

170. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1977).

171. 54 Wis. 2d 578, 196 N.W.2d 685 (1972).

public concern — the financing of pollution control measures at Mayville,”<sup>172</sup> and that the nonmedia defendant, a critic of the press, was entitled to the same protection as the media would have were it the defendant. In *Richards v. Gruen*<sup>173</sup> the court reaffirmed its adherence to *Polzin*, referring both to the fact that plaintiff had voluntarily involved himself in the matter and that the matter was one of public or general interest.

Following *Gertz*, after the *Rosenbloom* standard was no longer required, the Wisconsin Supreme Court continued to refer to the public interest concept. The first such case was *Calero v. Del Chemical Corp.*,<sup>174</sup> a suit involving a “private” plaintiff who was neither a public official nor a public figure, and a nonmedia defendant, concerning interemployer communications. The court ruled that the case required application of a common law conditional privilege, not the *New York Times* “malice” test,<sup>175</sup> and that the *Gertz* requirements regarding punitive damages did not apply because the case involved a “private” defamation not involving first amendment principles. It cited three factors: “In the case before us there is no matter of general or public interest; there is no public official or public figure; there is no involvement of the media, either broadcast or print.”<sup>176</sup> The court noted that *Gertz* expressly referred to “publishers and broadcasters.”<sup>177</sup> It said in distinguishing and referring to *Polzin* that: “This focus on the media and the ‘matter of public concern’ which the court makes in this passage is the key to the distinction between constitutional and nonconstitutional conditional privileges in defamation law.”<sup>178</sup>

More recently, in *Giwoosky v. Journal Co.*,<sup>179</sup> citing to the *Gertz* pronouncement that states were free to define appropriate standards of liability for defamation of private individuals, the Wisconsin Supreme Court said:

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172. *Id.* at 586, 196 N.W.2d at 690.

173. 62 Wis. 2d 99, 109-10, 214 N.W.2d 309, 314 (1974).

174. 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

175. *Id.* at 500, 228 N.W.2d at 745.

176. *Id.* at 506, 228 N.W.2d at 748.

177. *Id.* at 504-05, 228 N.W.2d at 747.

178. *Id.* at 501, 228 N.W.2d at 745.

179. 71 Wis. 2d 1, 237 N.W.2d 36 (1976).



Art. I, sec. 3 of the Wisconsin Constitution, providing that the legislature shall make no law "to restrain or abridge the liberty of speech or of the press," clearly seeks to protect the right of such news coverage and such editorial comment as to conditions in a community or issues of public concern.<sup>180</sup>

In *Schaefer v. State Bar*, reversing a judgment of dismissal on demurrer, the court said that at trial the State Bar, a nonmedia defendant, would be entitled to protection under an actual malice or reckless or careless disregard test because Mrs. Schaefer had "made this a public issue or matter of public concern."<sup>181</sup>

Of these cases (*Giwosky* did not decide constitutional issues), only *Calero* was found not to be within constitutional protections. Clearly, *Calero* was not a public figure or public official, and the private matter involved was not of public interest or concern. The court distinguished *Calero* from cases involving constitutional protection by noting it had none of the criteria of *New York Times*, *Gertz* or *Rosenbloom*; it did not specify which criterion, or which combination of those criteria, would invoke the application of *Gertz*. Since the court ruled that the case was outside the scope of *Gertz*, it did not decide what fault standards it would adopt were *Gertz* applicable. The court did, however, by repeated reference after *Gertz* to the *Rosenbloom* concept of public interest and concern, suggest that defamation involving matters of public concern would receive more protection than private defamation.

The most recent opinion in *Denny v. Mertz*<sup>182</sup> has answered, for Wisconsin, at least some of the questions raised by *Gertz*, but it also raises some others. Because the case is significant, it warrants detailed discussion. Denny sued Mertz for defamation for a statement he made to *Business Week*, and also sued McGraw-Hill, the publisher of *Business Week* for its republication. Defendants argued that Denny was a public figure, and alternatively that even if he were not, the matter involved was one of public interest and concern, and that the *New York Times* malice test should apply. The court of ap-

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180. *Id.* at 16, 237 N.W.2d at 43.

181. 77 Wis. 2d 120, 125, 252 N.W.2d 343, 346 (1977).

182. 106 Wis. 2d 636, 318 N.W.2d 141 (1982).

peals ruled<sup>183</sup> and the supreme court affirmed<sup>184</sup> that Denny was not a public figure. Clearly he was not a public official. On that basis, the *Times* test was not mandated by the federal constitution.

The next question the court considered was what protections were to be afforded McGraw-Hill, in view of *Gertz*. The court elected not to require greater protection for the defendant than the minimum required by *Gertz*, i.e., a negligence standard; it also ruled, per *Gertz*, that presumed or punitive damages could be awarded against McGraw-Hill only on proof that it had acted with "actual malice" (the *New York Times* test).<sup>185</sup> Finally, it ruled that *Gertz* did not provide any constitutional protection to a nonmedia defendant, and that Mertz would be held to liability under the common law of the state — strict liability unless a conditional privilege applied.<sup>186</sup>

In deciding Denny was not a public figure, the court considered, using tests from *Gertz*, whether Denny had thrust himself into a "public controversy" so as to influence its outcome and whether his status gave him access to the media. The court said that the *nature* and *impact* of the controversy, and the *interest* in it, has a bearing on whether it is a "public controversy."<sup>187</sup> It said that the general subject matter involved, stockholder disputes at Koehring Company, was newsworthy but "did not have an impact outside of those immediately interested in the Koehring corporation."<sup>188</sup> It found also, that while Denny deliberately involved himself in the stockholder dispute, he did not have such media access as would justify designating him a public figure, and that by the time the reporter involved talked to him, the controversy had ended. Further, it said, contacts with the reporter concerning the article may not themselves transform him into a public figure — that he could not be made into a public figure by the

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183. *Denny v. Mertz*, 100 Wis. 2d 332, 302 N.W.2d 503 (Ct. App. 1981).

184. *Denny*, 106 Wis. 2d at 650, 318 N.W.2d at 148. The court referred to this as the "principal issue." *Id.* at 639, 318 N.W.2d at 142.

185. *Id.*

186. *Id.* at 661-64, 318 N.W.2d at 153-54.

187. *Id.* at 649-50, 318 N.W.2d at 147.

188. *Id.* at 650, 318 N.W.2d at 148.

very publication which defames him.<sup>189</sup>

Justice Abrahamson, dissenting, concluded that Denny was a public figure — that he had thrust himself to the forefront of a public controversy to influence the resolution of the dispute. She stated that the majority had erred in relying too heavily on an analysis of the substantive nature of the controversy and then concluded that it was not of public interest or concern: "Instead of analyzing the substantive nature of the controversy, the majority should have asked whether the Koehring controversy was an existing publicly debated dispute into which Denny had involuntarily thrust himself before the alleged defamation occurred. It was."<sup>190</sup> She stated that even if the controversy had ended a few weeks before the story, Denny would not cease to be a public figure with respect to the controversy in the short span of a few weeks. She added that the majority had misread *Gertz* in indicating that a person had to have media access to be a public figure, pointing out that the *Gertz* Court had merely said that public figures "usually" enjoy greater access which provides justification for less protection.<sup>191</sup>

Having decided Denny was a private individual, the court next considered what standard of liability it should set for an action brought by private individuals against the news media, recognizing that *Gertz* mandated that there could be no liability without fault. The court noted that the majority of jurisdictions which had set standards pursuant to *Gertz* had adopted a negligence standard, and that a few states had adopted a higher standard, some an actual malice standard if the defamation involved a matter of public concern. The court

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189. *Id.* at 649-51, 318 N.W.2d at 147-48. In *Schaefer*, 77 Wis. 2d at 125, 252 N.W.2d at 346, the issue before the court was whether, at the demurrer stage, certain words were defamatory. The court, however, commented that at the trial, plaintiff would have to prove actual malice or a reckless or careless disregard for the truth because "Mrs. Schaefer has made this a public issue or matter of public concern . . . ." *Id.* This language, and the supporting citations, suggested both that Mrs. Schaefer had "public figure" status, and that the publication involved "public concern" issues, although the court did not expressly describe her as a "public figure." The public issue in which she had been involved, the opinion indicated, was the probate of her husband's estate, in which problems had arisen, leading to newspaper articles.

190. *Denny*, 106 Wis. 2d at 668, 318 N.W.2d at 156 (Abrahamson, J., dissenting).

191. *Id.* at 669, 318 N.W.2d at 157.

considered persuasive the argument for a negligence standard set forth in a 1975 Illinois case<sup>192</sup> and agreed with its reasoning. It felt a negligence standard in a suit by a private individual alleging defamation by the media was sufficient protection for the freedom of the press guaranteed by the Wisconsin Constitution and that the public policy balance favored such a standard.<sup>193</sup>

In the dissenting opinion, Justice Abrahamson said a due care standard might arguably represent a fair balance and that she "could be persuaded" to accept it in cases involving a truly "private person" if the majority had not so narrowly construed "public figure."<sup>194</sup>

The court then proceeded to consider the application of *Gertz* to the individual defendant Mertz. It said the United States Supreme Court had never ruled whether the minimum standards governing defamation actions by "private persons" set forth in *Gertz* applied to all defendants, or just media defendants.<sup>195</sup> It reaffirmed its holding in *Calero*<sup>196</sup> that the *Gertz* restrictions would not apply to a "purely private" communication between individuals, and refused to extend *Gertz* to the nonmedia defendant, Mertz.<sup>197</sup> The Wisconsin court recognized that some courts in other jurisdictions had held that the *Gertz* protections applied to protect all defendants, nonmedia as well as media, and that this was the *Restatement* position, but it did not read *Gertz* as requiring that, nor did it

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192. *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292, 296-99 (1975). It should be noted that the Illinois court, in adopting a negligence standard, qualified the test by restricting it to a "defamatory publication whose substantial danger to reputation is apparent." *Id.* at \_\_\_\_, 340 N.E.2d at 299. In so doing, the Illinois court was reflecting what the United States Supreme Court had said in *Gertz*, 418 U.S. at 348. The court was undoubtedly referring to situations where a statement not defamatory on its face is made so because of extrinsic facts not known to the defendant. The court appears to suggest that such a circumstance might demand a higher test. See also *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 566, 297 N.W.2d 500, 506 (1980) ("For fault to exist the defendant must know or have reason to know of the libel.").

193. *Denny*, 106 Wis. 2d at 654-56, 318 N.W.2d at 150-51.

194. *Id.* at 670, 318 N.W.2d at 157 (Abrahamson, J., dissenting).

195. *Id.* at 660, 318 N.W.2d at 152.

196. 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

197. 106 Wis. 2d at 660-61, 318 N.W.2d at 152-53. The court noted that in *Polzin v. Helmbrecht*, 54 Wis. 2d at 586, 196 N.W.2d at 690, it had held that critics of the media were entitled to the same level of protection against actions for defamation as was the media, but said that was not an issue in the *Denny* case. 106 Wis. 2d at 660, 318 N.W.2d at 152.

consider it good policy to so hold.<sup>198</sup>

Justice Abrahamson said in her dissent that it is unclear from the language and reasoning of the majority opinion whether the common law of defamation is being adopted for all nonmedia defendants, irrespective of the nature of the plaintiff (public official, public figure or private person), or is restricted to cases of a *private* person suing a nonmedia defendant, the situation held to exist in *Denny*.<sup>199</sup> Stated another way, will the court refuse to give the protection of the *New York Times* "actual malice" test to a nonmedia defendant in a suit by a public official or public figure? Certainly authority demonstrates that the nonmedia defendant is entitled to that protection.

While the United States Supreme Court has said it has never decided whether the *New York Times* "actual malice" test applies in suits by public officials or figures against nonmedia defendants,<sup>200</sup> many courts, including the United States Supreme Court,<sup>201</sup> have applied it. I am unaware of any

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198. *Denny*, 106 Wis. 2d at 660-61, 318 N.W.2d at 152-53. Justice Abrahamson disagreed with the decision of the majority that the *Gertz* restrictions should not apply in a suit against a nonmedia defendant. Among other things, she contended that the differing treatment violates the equal protection and freedom of speech guarantees of the state constitution, that it raises the difficult question of identifying which defendants are media defendants and which are not, and that the decision would add complexity to a field already renowned for its complexity. She noted that in *Denny*, while the majority refused to apply the negligence standard for Mertz, it did appear that he might be entitled to a conditional privilege which would result in a comparable standard. *Id.* at 674-75, 318 N.W.2d at 159 (Abrahamson, J., dissenting). Justice Heffernan, in his concurring opinion, joined Justice Abrahamson's dissent with respect to the application of standards to media and nonmedia defendants. *Id.* at 665, 318 N.W.2d at 155 (Heffernan, J., concurring).

199. *Id.* at 671-72, 318 N.W.2d at 157-58.

200. *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979).

201. *St. Amant v. Thompson*, 390 U.S. 727 (1968). In *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494 (1971), the Wisconsin court citing *St. Amant* said, "The *Times-Sullivan* rule is not confined to news media and free press but also applies to private individuals and free speech in some cases." *Id.* at 183, 188 N.W.2d at 499. *St. Amant* was a suit by a deputy sheriff against a nonmedia defendant who had been a candidate for the senate. In *Calero*, 68 Wis. 2d at 505, 228 N.W.2d at 747, the court distinguished *St. Amant* from *Calero* on the ground that the allegedly defamatory statements by the candidate for public office (*St. Amant*) about the deputy sheriff were in the constitutional arena, quoting the United States Supreme Court's emphasis on the stake of the people in public business and the conduct of public officials. (The Wisconsin court also noted that the statements were made in a televised speech.) The United States Supreme Court made the quoted policy statement in reference to the definition of "reckless disregard." Its application of the actual malice

case refusing so to apply it. The Wisconsin Supreme Court has itself applied the *New York Times* "actual malice" test in several cases against nonmedia defendants where the plaintiff was a public figure or public official or the matter was one of the public interest or concern, although those precise terms have not always been used.<sup>202</sup>

It was argued by defendants in *Denny* that the court should apply the actual malice test under a *Rosenbloom* concept, even if the plaintiff was not deemed a public figure, because a matter of public interest and concern was involved. By citing both (1) cases which apply an actual malice test to private plaintiff suits in matters of public interest and concern, and (2) those which apply a negligence test in private plaintiff suits, and then choosing the latter in suits against the media, the court may have intended to state an absolute position on all private plaintiff suits, whatever the subject matter of the defamation. However, as in *Calero*, the publication in *Denny* did not involve public issues. The court, in deciding the "public figure" question, had found the issues to be not of general public concern. (The court of appeals, too, had said it "was not a matter of public controversy or concern."<sup>203</sup>) The court did not disavow any of its language in prior cases in which it related the *New York Times* "actual malice" protection to communications involving public interest and concern.

May the Wisconsin Supreme Court still adopt a higher standard than negligence in a suit by a "private" plaintiff, at least for a media defendant, in a case where the publication truly relates to vital matters of general public concern? If, as decided in *Denny*, a negligence standard is constitutionally mandated for the media defendant in a matter not of public concern, would it not be appropriate to apply a more protective standard where the press undertakes to write about highly important public issues, even though the plaintiff who is involved in the matters turns out not to meet the strict tests

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test, however, was predicated on the definitional determination that the plaintiff Thompson, a deputy sheriff, was a public official. 390 U.S. at 730.

202. See *Schaefer*, 77 Wis. 2d 120, 252 N.W.2d 343 (1977); *Richards*, 62 Wis. 2d 99, 214 N.W.2d 309 (1974); *Polzin*, 54 Wis. 2d 578, 196 N.W.2d 685 (1972); *Dalton v. Meister*, 52 Wis. 2d 173, 182-83, 188 N.W.2d 494, 499 (1971) (where Dalton, an assistant attorney general, was referred to as a "public figure").

203. *Denny v. Mertz*, 100 Wis. 2d 332, 341, 302 N.W.2d 503, 508 (Ct. App. 1981).

of a "public figure"? Certainly circumstances can be posed which would seem to justify such a policy consideration, and, as has been noted, the Wisconsin Supreme Court has repeatedly made the distinction, for constitutional purposes, between private and public subject matter.<sup>204</sup>

As Justice Abrahamson has pointed out, a less restricted definition of "public figure" might serve, too, to better balance the respective rights. The literal *Gertz* definitions of "public figure," geared to the facts of that case, do not necessarily fit all cases or the common or logical concepts of a "public figure." One example is the requirement that the public figure be involved in a "public controversy." It would seem there might be equally good constitutional and policy reasons for protecting speech about voluntary participants in a vitally important public matter, even though there is yet no "debate."<sup>205</sup> That the *Gertz* definitions should have some flexibility is demonstrated not only by logic but by the comment of the *Gertz* Court itself. After discussing some general characteristics of public figures, it described its statements as "generalities" and noted they might not "obtain in every instance."<sup>206</sup>

The comment of the Wisconsin Supreme Court that a person may not be made into a public figure by the very publication which defames him<sup>207</sup> understandably is aimed at preventing a defendant from "bootstrapping" a public figure defense by publicizing something which is inherently a private

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204. These questions and others were posed in an amicus brief in *Denny*. The court did not specifically address the ultimate question of a matter of true public concern in its opinion. It may have rejected positions concerning such issues without comment, or it may have considered it unnecessary to reach them.

205. Assume, for example, that an explosion is admittedly imminent at a nuclear power plant, and a private industry expert arrives, holds press conferences, and proceeds to work on the dangerous problem. Should not the press have as much protection in writing about that situation, including the expert in whose hands public safety lies, (even though there is not a present "controversy" in the sense of debate), as it does in writing about an unimportant activity of a public official, or about the "public figure" in a public controversy involving relatively unimportant issues? Prior decisions of the Wisconsin court would seem to indicate that such a matter would be within the scope of constitutional protection. In any event in such a situation, should the press not have more protection than when, as in *Denny*, it writes about a matter which the court considers has minor impact on, or interest for, the public?

206. *Gertz*, 418 U.S. at 345.

207. *Denny*, 106 Wis. 2d at 647, 318 N.W.2d at 146 (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)).

matter about a private person, and then claiming "public figure" protection. However, conversely, it would seem clear that a media defendant should not be penalized because it was the first to publicize a matter which inherently fits all the "public controversy" tests. Such a rule would protect only those who follow up with subsequent stories. If facts exist which will constitute a public controversy once disclosed and a person is sufficiently involved in it to qualify as a public figure, the first news article to be published ought to be equally protected with later ones.

## VI. BURDEN OF PROVING TRUTH OR FALSITY

The defendant's burden to prove the truth of the publication, if the defense of truth is relied on, has existed under a law which imposed strict liability for defamation (except in privileged situations). As discussed above, federal cases have injected a constitutional requirement of "fault" into all defamation actions subject to the rule of those cases — a requirement that the plaintiff must prove the defendant was at fault regarding the truth or falsity of his statements (the degree of fault varying, depending on the circumstances, from negligence to actual knowledge of falsity).

A number of courts have either indicated or ruled that if the plaintiff is a public official or public figure subject to the *New York Times* rule, the plaintiff must also prove *that the publication was in fact false*, in addition to proving it was made with malice.<sup>208</sup> Should a "private" plaintiff also have the

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208. See, e.g., *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975) (Powell, J., concurring) (where Justice Powell said: "It is fair to say that if the statements are true, the standard contemplated by *Gertz* cannot be satisfied."); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (where the Court noted it had held in *New York Times* that a public official could recover "only if he establishes that the utterance was false and that it was made with [actual malice] . . ."); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, —, 366 N.E.2d 1299, 1309, 397 N.Y.S.2d 943, —, *cert. denied*, 434 U.S. 969 (1977) (Breitel, J., concurring) (where the court expressly imposed on a plaintiff judge the burden of proving the falsity of the charges as well as constitutional malice. The concurring judge concurred "on the constraint of the controlling Supreme Court cases" although he felt they put an undue burden on the plaintiff, calling it "virtually impossible for a plaintiff to prove, as in the case at bar, that he is not 'corrupt' or 'probably corrupt.'"). See also *Simonson v. United Press Int'l*, 500 F. Supp. 1261, 1266 (E.D. Wis. 1980) where plaintiff judge had burden of proving *both* falsity and malice on the part of the defendant. The RESTATEMENT (SECOND) OF TORTS § 613 (1977) expresses no opinion as to the extent to which constitu-



burden of proof regarding falsity? If the plaintiff is subject to the *Gertz* minimum constitutional requirements, it is not clear whether federal constitutional law requires that burden; if not subject to *Gertz*, state law would control. In 1981 the United States Supreme Court granted certiorari in *Wilson v. Scripps-Howard Broadcasting Co.*,<sup>209</sup> a case which squarely presented the issue as to whether, in a case governed by *Gertz*, a private plaintiff had a federal constitutional burden of proving falsity. The trial court had imposed the burden of proof on the defendant, verdict was for the plaintiff and defendant appealed. The court of appeals reversed, ruling that the plaintiff, who had the burden of proving negligence as to falsity, also had the burden of proving the statements were false. Unfortunately for determination of the issue, after the case reached the United States Supreme Court, the writ of certiorari was dismissed, on stipulation.

In a footnote in *Denny v. Mertz*,<sup>210</sup> the Wisconsin Supreme Court broadly reaffirmed the law of Wisconsin that a defamation defendant has the burden of proving the defense of truth, rather than a plaintiff having the burden of proving falsity. It did so in responding to a contrary holding by the Maryland Court of Appeals in *Jacron Sales Co. v. Sindorf*.<sup>211</sup> The Wisconsin court made no distinction in the footnote between McGraw-Hill, the media defendant, to which it applied the *Gertz* negligence rule, and Mertz, the "private" defendant, and did not discuss possible federal constitutional impact on the burden issue.<sup>212</sup> In *Scripps-Howard*, the federal court of appeals had required the private plaintiff who was subject to *Gertz* to carry the burden "[a]s a matter of federal First Amendment law."<sup>213</sup> The federal court observed that in some cases, where the trier of fact is unable to determine the truth or falsity of a

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tional law has affected the common law burden.

209. 642 F.2d 371 (6th Cir. 1981), *cert. dismissed per stipulation*, 102 S.Ct. 984 (1981).

210. 106 Wis. 2d at 661 n.35, 318 N.W.2d at 153 n.35.

211. *Jacron Sales Co. v. Sindorf*, 276 Md. 580, \_\_\_, 350 A.2d 688, 698 (1976).

212. *Denny v. Mertz*, 106 Wis. 2d 636, 660-61, 318 N.W.2d 141, 153 (1982). The footnoted statement is in a portion of the opinion devoted to Mertz, but it is general in its terms. Whether the court would apply the traditional burden test in suits by public officials or public figures, or to media defendants in private plaintiff cases, is not specified.

213. *Scripps-Howard*, 642 F.2d at 376.

fact, he must render the decision against the one with the burden of proof and that this could permit what is forbidden by *Gertz* — a finding of liability on a presumption of fault, without proof of fault.<sup>214</sup>

## VII. CONCLUSION

In this article, I have endeavored to give an overview of the defamation law of Wisconsin. Compressing a book-sized subject into an article has necessarily resulted in omissions of some subjects, inadequate treatment of others and uneven emphasis. If the result produces some confusion, the writer pleads in partial defense the words of Dean Prosser:

[T]here is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. The explanation is in part one of historical accident and survival, in part one of conflict of opposing ideas of policy in which our traditional notions of freedom of expression have collided violently with sympathy for the victim traduced and indignation at the maligning tongue.<sup>215</sup>

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214. *Id.* at 375.

215. W. PROSSER, *supra* note 2 at § 111 (footnote omitted).

