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AVE DEFAMATION, *ATQUE VALE* LIBEL AND SLANDER

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Two recent decisions by the Maryland Court of Appeals have brought about substantial changes in the law of libel and slander. The author considers the consequences of these decisions, welcoming the abolition of certain distinctions between written and spoken defamation as well as the adoption of new rules pertaining to recoverable damages. The author, however, expresses reservations as to pronouncements in the decisions that purport to impose new burdens on the plaintiff to establish liability.

No area of the law is "as bewildering in its contradictions, as involved in its reasoning, as mercurial in its changes, as rich in anomalies and anecdotes as the law of libel and slander."[1] The Maryland Court of Appeals has referred to the thickets of the law of libel and described the underbrush as "tangled"[2] and "nearly impassable."[3]

The entry by the United States Supreme Court into the field of defamation has served only to increase the confusion.[4] Bent upon protecting first amendment freedom of expression from the chilling effects of judgments against publishers in substantial amounts, in *New York Times Co. v. Sullivan*[5] the Court established a rule prohibiting liability where the plaintiff is a public official or public

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1. M. ERNST & A. LINDY, HOLD YOUR TONGUE 6 (1932).
2. Fennell v. G.A.C. Finance Corp., 242 Md. 209, 218 A.2d 492 (1966).
3. *Id.* at 218, 218 A.2d at 496. The analogy has recently been expanded in Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350–56 (1975):

> From those seeds the English common law of defamation slowly grew into a forest of complexities, overgrown with anomalies, inconsistencies and perverse rigidities. It became thicketed with brambled traps for innocent defendants, crisscrossed with circuitous paths and dead ends for seriously wronged plaintiffs, and enshrouded in a "fog of fictions, inferences, and presumptions." This perplexing creation of the common law was transplanted into the United States, where its complexities multiplied in the state legislatures and courts, and its inconsistencies grew multifoliate in the variety of soils provided by federalism . . . .
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> . . . .
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> Very little of this labyrinthine forest makes sense when examined closely, and legal writers have had few kind words for it.

4. Prior to 1964, the Supreme Court had repeatedly acknowledged that defamation was a common law area and, as such, the exclusive prerogative of state courts. *See, e.g.*, Roth v. United States, 354 U.S. 476, 483 (1957); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 709 (1931); Robertson v. Baldwin, 165 U.S. 275, 281 (1897).
5. 376 U.S. 254 (1964).

figure, unless he can prove, by evidence of convincing clarity, knowing falsity or reckless disregard of the truth by the defendant.[6] Thus, even where language is clearly false and defamatory, the public official or public figure plaintiff must show a high degree of probability that "the defendant in fact entertained serious doubts as to the truth of his publication."[7]

Expectably, the cases have concerned primarily publications by members of the news media or others intimately involved in discussion of public affairs. While *Sullivan* and subsequent cases established the standards concerning public officials and public figures, only recently did the Court deal with the question of what degree of immunity is to be enjoyed by a publisher where the subject is a matter of public interest, but the plaintiff is simply a private individual caught up in a newsworthy event.[8]

In *Rosenbloom v. Metromedia Inc.*,[9] the Court suggested that such individuals were to be subject to the same stringent standards as those imposed upon public officials or public figures.[10] However, in *Gertz v. Robert Welch Inc.*[11] and *Time Inc. v. Firestone*,[12] the

6. *See also* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6 (1970); Pickering v. Board of Educ., 391 U.S. 563 (1968); St. Amant v. Thompson, 390 U.S. 727 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967); Rosenblatt v. Baer, 383 U.S. 75 (1966); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966); Henry v. Collins, 380 U.S. 356 (1965); Garrison v. Louisiana, 379 U.S. 64 (1964).
7. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
8. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Time, Inc. v. Firestone, 424 U.S. 448 (1976).
9. 403 U.S. 29 (1971).
10. The plaintiff in *Rosenbloom* was a distributor of nudist magazines. He was arrested under obscenity laws as he was delivering magazines to a newsstand. Plaintiff's home and business storage facilities were lawfully searched. The police informed the news media of the arrest and the defendant's radio station then broadcast repeatedly a news report declaring "[c]ity cracks down on smut merchants" and concluding with a description of the plaintiff as "a main distributor of obscene material."

    Subsequent broadcasts related to an effort by the plaintiff to secure injunctive relief against police interference with his business and against further publicity about his earlier arrests. Those broadcasts referred to the plaintiff and his business associates as "smut distributors" and "girlie-book peddlers" and characterized the plaintiff's suit as an effort to reduce pressure on "the smut literature racket."

    Although the plaintiff was a private individual, the public interest in the events in which he was involved was very great. *Id.*
11. 418 U.S. 323 (1974).
12. 424 U.S. 448 (1976).

Supreme Court drew back and took a somewhat different direction. In *Gertz*, which again involved a media defendant and a publication concerning a matter of wide public interest, the Supreme Court announced that private individuals would have a less heavy burden than public officials or public figures insofar as establishing liability for defamation was concerned.[13] The Court did, however, substantially restrict previous common law concepts as to recoverable damages. The Court determined that the first amendment guarantee of free press, as extended to the states by the fourteenth amendment,[14] did not allow presumed general damages or punitive damages, at least in the absence of proof of knowing falsity or reckless disregard of truth by the defendant.

Since *Gertz* and *Firestone* each involved a media defendant, and the articles for which suits were brought dealt with matters of public interest, it was arguable that, in circumstances of purely private defamation, *i.e.*, in cases where there was no public interest in the utterances,[15] the existing common law as to recoverable damages was not changed.

The question arose almost immediately in Maryland. In *Sindorf v. Jacron Sales Co.*[16] and *General Motors Corp. v. Piskor*,[17] two cases dealing with slander uttered in purely private contexts, the court of special appeals held that *Gertz* did not limit application of common law principles in cases of purely private defamation. The court of appeals reached a significantly different conclusion.[18] It determined that, whether or not the constitutional rights of free speech and free press compel the result, as a matter of enlightened state law all private plaintiffs will be subject to the rules announced in *Gertz*. In *Jacron*, the court expressed concern over the intricacies of differing sets of rules for (a) public official and public figure plaintiffs, (b) private individual plaintiffs caught up in mat-

13. *Firestone* followed *Gertz* on the point.
14. *See* Lovell v. Griffin, 303 U.S. 444, 450 (1938).
15. The fact that something appears in the news media does not necessarily establish that it is something of public interest. Certainly any such rule, if established in connection with limitations on rights to recovery, would exalt the press in a way the courts have been most loathe to do. *See, e.g.*, Negley v. Farrow, 60 Md. 158, 177, 45 Am. Rep. 715 (1883): "The fact that one is the proprietor of a newspaper, entitles him to no privilege in this respect, not possessed by the community in general." *Cf.* Jacron Sales Co. v. Sindorf, 276 Md. 580, 592, 350 A.2d 688, 695 (1976).

    Nevertheless, a matter is all the more likely to be private and not of general public interest where its utterance has not been in a newspaper or in a radio or television broadcast.
16. 27 Md. App. 53, 341 A.2d 856 (1975) (remarks by a representative of plaintiff's former employer to plaintiff's new employer).
17. 27 Md. App. 95, 340 A.2d 767 (1975) (employee detained at end of shift in the sight of his fellows for questioning about possible pilferage).
18. Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976).

ters of general or public interest, and (c) private individual plaintiffs in situations not imbued with a general or public interest. To counteract this proliferation of varying sub-species of defamation law, the court of appeals ruled that *Gertz* would apply to all private individual plaintiffs even in cases where the communication complained of was not a matter of general or public interest, and whether or not such a rule was required to conform to the constitutional guarantees of free speech and free press.[19]

The extension of *Gertz* to purely private defamation represents a most positive step in the area of damages. The common law has been plagued by two unsatisfactory concepts of damages. One allows a plaintiff to recover too much; the other allows him to recover too little. General damages, which have been permitted in libel cases[20] and cases of slander *per se*,[21] are whatever the jury

19. It may someday provide an interesting and instructive insight into the counterbalancing exercise known as judicial decision-making, if the Supreme Court should decide that *Gertz* has no application to purely private defamation, leaving the states free to continue application of common law principles, especially those permitting award of speculative presumed general damages. The Maryland Court of Appeals would then, despite what it has said in *Jacron* and *Piskor*, be free to reinstate the old common law rules. It seems unlikely that it would do so, however. It probably will depend on the nature of the particular case in which the question arises.

It is not altogether clear whether the Supreme Court in *Gertz*, in fact, thought that it was laying down rules for all defamation, even purely private defamation involving neither a matter of public interest nor a media defendant. Even less clear is whether, if the Court so intended, it would actually extend *Gertz* to such a situation if a case presenting an appropriate factual background for such a decision were to reach it.

The commentators are not precise or entirely harmonious, though, in general, they appear to take the *Gertz* opinion at face value, as applying to all defamation. *E.g.*, Eaton, *The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1414, 1449 (1975); Rosenberg, *The New Law of Political Libel: A Historical Perspective*, 28 RUTGERS L. REV. 1141, 1173 (1975); Note, 69 NW. U.L. REV. 960, 974–76 (1975). *But see* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199, 216, 217 (1976).

20. There is an unresolved controversy as to whether general damages were recoverable for all libel (whether the defamatory nature of the language was evident on its face or not) or whether, when extrinsic facts were necessary to establish a defamatory meaning for words otherwise innocent or ambiguous, only special damages could be recovered. *See* Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); PROSSER, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79 (1972); Murnaghan, *From Figment to Fiction to Philosophy — The Requirement of Proof of Damages in Libel Actions*, 22 CATH. L. REV. 1 (1972) [hereinafter referred to as Murnaghan]; Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 120–21 (D. Md. 1974), *rev'd on other grounds*, No. 75–1229 (4th Cir., June 10, 1976); General Motors Corp. v. Piskor, 27 Md. App. 95, 117, 119, 124, 340 A.2d 767, 782, 783, 786 (1975), *aff'd in part, rev'd in part*, 277 Md. 165, 352 A.2d 810 (1976). *See also* Picone v. Talbott, 29 Md. App. 536, 544, 349 A.2d 615, 619–20 (1975), which asserts that, for slander also, general damages may be recovered only when the defamation is evident on the face of the language. That would appear to be a case of Homer nodding. Murnaghan, *supra* at 14; General Motors Corp.

chooses to allow, even in the absence of any proof of harm actually suffered.[22] Special damages are recoverable in cases of slander *per quod* or libel *per quod.* Such damages are restricted to pecuniary loss and omit other significant elements of actual damages, particularly the plaintiff's provable loss of reputation, the loss of society of others, and the injury to his feelings demonstrably and foreseeably growing out of the publication.[23]

In the place of these two unsatisfactory measures of compensatory damages, the court of appeals has substituted the superior measure of actual damages, *i.e.*, all provable harm, whether pecuniary or not, reasonably and foreseeably arising from an actionable defamation whether oral or written.

Thus, the court of appeals has effectively eliminated the unwarranted distinction between libel and slander.[24] The distinction is peculiar to the Anglo-American common law and owes its existence to an arbitrary resolution of the seventeenth century problem of how to reconcile separate bodies of defamation law, one (libel) deriving from the Star Chamber, the other (slander) deriving from the activities of the King's judges in assimilating

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v. Piskor, 27 Md. App. 95, 124, 340 A.2d 767, 786 (1975), *aff'd in part, rev'd in part,* 277 Md. 165, 352 A.2d 810 (1976).

21. Those involving charges of (a) crime, (b) unfitness for one's trade, calling or profession, (c) loathsome disease, or (d) unchastity of a female. General Motors Corp. v. Piskor, 27 Md. App. 95, 117, 340 A.2d 767, 782 (1975). The current tidal wave sweeping away all distinctions between the sexes has not expanded the definition of slander *per se* to include imputations of unchastity to a male. Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 125 (D. Md. 1974), *rev'd on other grounds,* No. 75-1229 (4th Cir., June 10, 1976); *cf.* Revisor's Note to MD. ANN. CODE, Cts. & Jud. Proc. Art., § 3-501 (1975), suggesting that failure to extend the definition to protect men constitutes discrimination.

22. C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 120 (1935):

> Apart from the occasional traceable money loss recovered as special damages, damages in defamation cases are measurable by no standard which different men can use with like results.

See also C. MAYNE, ON DAMAGES 500 (11th ed. 1946); 4 J. SUTHERLAND, A TREATISE ON THE LAW OF DAMAGES § 1206 (4th ed. 1916); Note, *Libel and the Corporate Plaintiff,* 69 COLUM. L. REV. 1496, 1511 (1969) ("[P]resumptive damages . . . permit an excessive, wholly speculative verdict.").

23. *See* Murnaghan, *supra* note 20, at 2.

> The hypertechnicality of what falls within and what falls without the classification "special damages" is aptly illustrated by the recent holding in *Picone v. Talbott,* 29 Md. App. 536, 544, 349 A.2d 615, 620 (1975), that "there were special damages proven in the nature of medical bills for treatment of a condition which could have been partially attributable to the slander . . . ." Reasonable as that may sound, it flies in the face of two earlier decisions, neither of which is alluded to in the *Picone* opinion: Shafer v. Ahalt, 48 Md. 171 (1878) (a sickness resulting from the utterance of words is not a proper element of special damages); Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 122 (D. Md. 1974), *rev'd on other grounds,* No. 75-1229 (4th Cir., June 10, 1976) (impairment of plaintiff's health excluded from special damages).

24. *"Gertz* . . . [applies] to cases of slander and libel alike . . . ." General Motors Corp. v. Piskor, 277 Md. 165, 171, 352 A.2d 810, 814 (1976).

the law originating in the ecclesiastical courts.[25] The distinction between libel and slander has been recognized as indefensible.[26] The court of appeals is to be commended for having put an awkward anomaly to rest.

Similarly, the many confusions relating to the measure of recovery, depending on whether words are defamatory *per se* or *per quod,* no longer have any substantial relevance or importance.[27] Actual damages will be uniformly recoverable for all actionable defamation, whether spoken or written, and whether or not the derogatory content is unambiguously apparent from the publication itself.

On the damages side, therefore, the court of appeals has done much to hack away the tangled and nearly impassable underbrush. Theoretically, the questionable rules relating to general damages might still have restricted vitality, since *Gertz, Jacron* and *Piskor* all indicate that general damages, as well as punitive damages, still may be recoverable if the plaintiff makes an adequate showing of what has come to be known as "constitutional malice,"[28] *i.e.,* knowing falsity or reckless disregard of the truth by the defendant.

Cases in which plaintiffs have succeeded in making an adequate showing of knowing falsity or reckless disregard of truth are,

25. *See* Cheek v. J.B.G. Properties, Inc., 28 Md. App. 29, 31, 344 A.2d 180, 183 (1975); 1 A. HANSON, LIBEL AND RELATED TORTS 2-4 (1969).

26. Grein v. LaPoma, 54 Wash. 2d 844, 340 P.2d 766 (1959); Prosser, *Libel Per Quod,* 46 VA. L. REV. 839 (1960).

27. Defamation-by-extrinsic-fact is what in recent cases the Maryland Court of Appeals and Court of Special Appeals have come to refer to as libel *per quod* and slander *per quod.* The use of that language is inexact and reflects a misconception. *See* Murnaghan, *supra* note 20. Slander *per quod* was the terminology for oral defamation for which special damages had to be pleaded and proven. Cheek v. J.B.G. Properties, Inc., 28 Md. App. 29, 33, 344 A.2d 180, 184 (1975). Slander *per se* concerned oral statements in the four categories for which general, presumed damages were recoverable, whether or not extrinsic facts were needed to establish the slander. Properly, all libel was libel *per se,* whether or not extrinsic facts were required. Over the years, however, libel *per quod* has come to be a term employed for written words whose defamatory nature can only be shown through extrinsic facts, and the courts have manufactured a requirement that special damages be shown where the libelous nature of the words is not evident on their face. Although such confusion between what is actionable without proof of damages, and what is patently defamatory had not theretofore spilled over from libel to slander, it did so in the recent case of *Picone v. Talbott,* 29 Md. App. 536, 544, 349 A.2d 615, 620 (1975); *cf.* American Stores Co. v. Byrd, 229 Md. 5, 12-13, 181 A.2d 333, 337 (1962). *But see* General Motors Corp. v. Piskor, 27 Md. App. 95, 119, 340 A.2d 767, 783 (1975), *aff'd in part, rev'd in part,* 277 Md. 165, 352 A.2d 810 (1976). Because of the very different meanings which the cases have assigned for different purposes to the term defamation *per quod,* in this article the phraseology is avoided and "defamation-by-extrinsic-fact" is employed.

As is noted subsequently, the distinction between defamation *per se* and defamation *per quod* in the latter day, substantially altered connotations given to those phrases may still play a vital role in developing rules to determine liability.

28. General Motors Corp. v. Piskor, 277 Md. 165, 174, 352 A.2d 810, 816 (1976).

however, extremely rare.[29] If the question is presented to the court in that restricted context, it is to be hoped that the court will recognize the essential identity of general damages and punitive damages and outlaw the former as redundant or perhaps as a denial of equal protection to the defendant.[30]

In contrast to the work of the court in eliminating the unwarranted distinction between libel and slander and in adopting improved rules for recoverable damages, the decisions in *Jacron* and *Piskor* present several uncertainties in the liability area which can be resolved only on a case-by-case basis in the future.

Responding to the statements in *Gertz* that liability without fault may not be imposed on a defamation action defendant, the court established a requirement that negligence be proven by the plaintiff. In doing so, the Maryland court followed the lead of the American Law Institute's Tentative Draft No. 21, Restatement (Second) of Torts (April 5, 1975). In proposed §580B, the ALI Reporter, in dealing with liability for defamation of a private person, has restricted his inquiry to the developments at the Supreme Court level from *Sullivan* through *Gertz*.[31] The Reporter has

29. Out of a legion of cases since *New York Times Co. v. Sullivan* was decided in 1964, only a handful have resulted in ultimate success for plaintiffs: Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Goldwater v. Ginsberg, 414 F.2d 324 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970), *rehearing denied,* 397 U.S. 978 (1970); Field Research Corp. v. Patrick, 30 Cal. App. 3d 603, 106 Cal. Rptr. 473 (1973), *cert. denied,* 414 U.S. 922 (1973); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Sprouse v. Clay Communication, Inc., 211 S.E.2d 674 (W. Va.), *cert. denied,* 423 U.S. 882 (1975).

30. *See* Justice Marshall's opinion in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 83 (1971), in which he observed that the effect of permitting an award of general damages "is to give the jury essentially unlimited discretion and thus give it much the same power it exercises under the labels of punitive or exemplary damages." The criminal, *i.e.,* punitive, nature of a libel recovery of general damages is alluded to in *Cheek v. J.B.G. Properties, Inc.,* 28 Md. App. 29, 31, 344 A.2d 180, 183 (1975); *cf.* Murnaghan, *supra* note 20, at 12 n.41. Hence, punitive damages, by themselves, serve the objectives of general damages, and it is inappropriate to allow what are, in effect, two awards for the same thing.

Maryland law is clear that, to support punitive damages, there must be proof of additional considerations over and beyond the evidence necessary to support the recovery of compensatory damages. *E.g.,* Heinze v. Murphy, 180 Md. 423, 429, 24 A.2d 917, 921 (1942): "The allowance of exemplary damages must be justified by circumstances of aggravation." That general rule would be contradicted if the same quantum of proof would permit recovery of compensatory general damages and also punitive damages. To single out defamation defendants for such treatment, contrary to that afforded defendants in all other tort actions, would appear to constitute a denial of equal protection.

That general damages will not be available, even where knowing falsity or reckless disregard of truth is established, is strongly suggested by the Caveat to RESTATEMENT (SECOND) OF TORTS § 621 (Tent. Draft No. 21, 1975). The Institute refrains from taking any position on the matter, despite the language in *Gertz* to the effect that presumed damages as well as punitive damages will be recoverable on a showing of constitutional malice.

31. RESTATEMENT (SECOND) OF TORTS, Forward at vii–viii (Tent. Draft No. 21, 1975).

displayed a love of logic and symmetry, and has attempted to construct a step-by-step approach. Unfortunately, it would appear that he has not considered some things that must be covered by the posited rules.

The Reporter has drawn from *Sullivan* and the cases expanding its doctrine what he believes is an initial rule of liability. In situations where it applies, the Reporter concludes, a plaintiff, *to make out defamation,* must prove (a) knowing falsity and knowledge by the defendant that the language defames the plaintiff, or (b) the substantial equivalent of intent, reckless disregard of these matters. Apparently relying on the similarity between recklessness and gross negligence, the Reporter then moves down two separate flights of stairs as though they were one, concluding that, since negligence is the next step down from recklessness and private individuals are on the step below that occupied by public officials and public figures, negligence must be the appropriate liability requirement in defamation cases by private individuals.

In the first place, this ignores the consideration that *New York Times Co. v. Sullivan* deals, not with a rule as to what constitutes the tort in the first place, but with a privilege defense grounded on the Constitution, applicable where language may be and usually is manifestly defamatory, demonstrably false, and actionable but for the privilege.

In the second place, the Reporter would appear to have taken some liberties with his sources. The cases in the Supreme Court have not as yet been concerned with the problems of seemingly innocent language made derogatory by reference to extrinsic facts or language not on its face pertaining to the plaintiff, but made applicable to him in the minds of readers or listeners by special circumstances known to them.

Even if it might be said that the cases do impose restrictions on such defamation-by-extrinsic-fact, such a consideration would not justify a logical leap to the point where a private plaintiff, even in a case of patent defamation, as a matter of establishing primary liability, must show negligence on the defendant's part in not ascertaining defamatory nature and falsity. The *Gertz* case, dealing with private persons, is essentially unlike *New York Times Co. v. Sullivan.* In bold contradiction to what was the holding in *Sullivan,* the Supreme Court in *Gertz* said that there is no constitutional privilege related to liability, other than a minimal bar against liability without fault — a prohibition against recovery generally applicable with very few exceptions. At most, the risk of liability without fault is confined to cases of defamation-by-extrinsic-fact, where the publisher may not have had any idea that he was defaming.

However, most defamation is apparent from the face of the language. There is no basis for using negligence as a criterion in ascertaining whether liability exists when a defendant calls a plaintiff a thief. The allocation to the judge, not the jury,[32] of the determination of whether words are actionable is strong indication that the question is not one of negligence. Nor does it become liability without fault for a rule of law to say that calling a person a thief is, without more, actionable. Mankind has concluded, over and over again, that such reputation-damaging activity is presumptively wrong, and has placed on the defendant the burden of showing that he had a justifiable reason for such apparently improper conduct. Interestingly, *Firestone,* coming after *Gertz,* appears to accept that a state rule making it wrong to utter words defamatory on their face, even without a determination of negligence, would satisfy *Gertz.* The concern of the *Firestone* majority was solely with the fact that no Florida court had adequately stated that the defamation, discernible from the face of the publications, was a wrong under Florida law. *Firestone* did not hold that a finding of negligence was requisite.

However questionable the ALI foundation for its delineation of the new common law of defamation may have been, the Maryland Court of Appeals apparently accepted the ALI approach. As the Maryland court announced the rule, it would seem to apply to every case. Bearing in mind the nature of the normal defamation action, however, that could hardly have been intended.

It is the usual practice of the pragmatic common law to develop and refine principles on a case-by-case basis. Experience has taught that attempts to go beyond the facts of the instant case, to legislate *in vacuo,* inevitably lead to revisions when future actual fact situations arise to which the broad statements must be applied. Admittedly, the situation prompted by the revolutionary decision by the Supreme Court in *Gertz* and the attempt of the ALI to pontificate, rather than restate the principles announced in actual cases, was unusual. Nevertheless, it should be appreciated that the announcements of rules of liability in *Jacron* and *Piskor* are all *dicta,* and thus tentative, awaiting the test of application in specific cases.[33]

32. *See, e.g.,* Cheek v. J.B.G. Properties, Inc., 28 Md. App. 29, 33, 344 A.2d 180, 184 (1975).

33. In both *Jacron* and *Piskor,* the defendants established the existence of common law qualified privileges. Under long established law, that shifted the burden to the plaintiff to prove falsity, relieving the defendant of the burden of proving truth. *See, e.g.,* Hollander v. Pan American World Airways, Inc., 382 F. Supp. 96, 102, 104 (D. Md. 1973); Orrison v. Vance, 262 Md. 285, 294, 277 A.2d 573,

A general rule that negligence is an essential component of a plaintiff's *prima facie* case in an action for defamation simply will not pass the test of application on a case-by-case basis. Defamation by and large involves an intentional rather than a negligent publication of derogatory material.[34] To say that a man is a thief[35] does not display negligence. It may be done with impunity if (a) the statement is true or (b) the circumstances are privileged, that is to say, where the making of the statement serves an acceptable interest even if untrue. An obvious example of such a qualified privilege occurs when a newspaper accurately quotes a statement in court by one party about another party. The public interest in the administration of justice renders privileged a correct quotation of a remark made in court, even if plainly defamatory and even if untrue.[36]

For present purposes, the crucial consideration is that utterance of words defamatory on their face is an intentional rather than a

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577 (1971); Wetherby v. Retail Credit Co., 235 Md. 237, 242–43, 201 A.2d 344, 347 (1964); Coffin v. Brown, 94 Md. 190, 195, 50 A. 567, 569 (1901); Fresh v. Cutter, 73 Md. 87, 92, 20 A. 774, 775 (1890).

It remains for another day, therefore, to determine whether, absent a privilege, the plaintiff must prove falsity.

Similarly, the existence of the qualified privileges established a burden on the plaintiff to prove something greater than negligence, *i.e.*, actual malice. Jacron Sales Co. v. Sindorf, 276 Md. 580, 599, 350 A.2d 688, 699 (1976). Hence, it was not necessary to the decision of either *Jacron* or *Piskor* to decide whether, in unprivileged situations, negligence must be proven by the plaintiff.

34. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 21, 1975), recognizes that negligence is not the only fault which may be involved when defamation is uttered. Proposed comment *b* to § 580B states: "A person who harms another by publishing a false defamatory communication concerning him may have intended the result, may have been either reckless or negligent in bringing it about, or may have been without fault in this regard." RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 580B, comment *b* (Tent. Draft No. 21, 1975).

1 A. HANSON, LIBEL AND RELATED TORTS 58 (1969), puts it categorically: "Defamation is an intentional tort." *Cf.* H&R Block, Inc. v. Testerman, 275 Md. 36, 48–49, 338 A.2d 48, 55 (1975) (differentiating negligence from such intentional torts as libel, slander and malicious prosecution); Parker v. Brattan, 120 Md. 428, 434, 87 A. 756, 758 (1913) (holding a slander judgment not dischargeable in bankruptcy, because of the exception for "wilful and malicious injuries").

35. Such a statement is clearly defamatory *per se* as charging a crime for which corporal punishment may be imposed. A charge of stealing was assumed to be defamatory *per se* in both *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 583, 350 A.2d 688, 690 (1976) and *General Motors Corp. v. Piskor*, 277 Md. 165, 352 A.2d 810 (1976); *see* Newton v. Spence, 20 Md. App. 126, 129, 137, 316 A.2d 837, 839, 843–44 (1974); Wheatley v. Wallis, 3 H.&J. 38 (1810); but as proof that nothing is certain in defamation, *see* Wolf v. Rodifer, 1 H.&J. 409 (1803) (probably explainable on grounds of variance between pleading and proof). 1 J. POE, PLEADING AND PRACTICE § 176 (6th ed. 1970). The statutorily prescribed form for an action of slander previously contained in MD. ANN. CODE art. 75, § 14, Law of March 6, 1856, ch. 112, [1856] Laws of Md. 139 (repealed 1973) used, as an example, the assertion: "he is a thief," indicating a legislative belief that the words are defamatory.

36. Evening News Co. v. Bowie, 154 Md. 604, 611–12, 141 A. 416, 419 (1928); McBee v. Fulton, 47 Md. 403, 417, 426 (1878).

negligent act, and, in general, negligence considerations would seem properly to play no part in determining liability.

There is, however, one restricted area of defamation (*i.e.*, libel or slander-by-extrinsic-fact) where negligence principles do come into play. It may well develop, as cases are decided one by one and the outline of the principle is pragmatically filled out, that it is only to this restricted area that the court of appeals was addressing itself when it stated that negligence must be demonstrated by the plaintiff.[37] Sometimes words are completely innocent or ambiguous on their face, yet convey a plainly defamatory meaning to some recipients because there are extrinsic facts which impart a special meaning to the words.

The leading case[38] concerning such a situation involved a photograph appearing in the section of a newspaper devoted to social events. A picture was taken at a race meeting of a dashing military type and his charming female companion. The caption for the photograph identified the two persons as engaged to be married. The officer told the newspaper that his companion was his fiancee. In fact, the gentleman had a wife whom he had left at home on racing day. The wife sued on the theory that those in possession of the extrinsic facts that she was occupying a common residence with the "gentleman" and holding herself out as his wife read the article as describing her as a fallen woman, actually living in sin although pretending to be his wife.

In a two to one decision, the English court of appeals held the newspaper liable, even though the publisher did not know and could not reasonably have known the extrinsic facts which rendered innocent words defamatory. The case has been cited for the proposition that a publisher is the guarantor of the accuracy of his statements and is recognized as an instance of liability without fault.[39] There is considerable doubt that the doctrine has received or would receive endorsement from American courts.[40]

37. [The first appellate case to be decided after the court of appeals' pronouncements in *Jacron* and *Piskor* involved defamation-by-extrinsic-fact, and so the remand for trial in accordance with those pronouncements does not extend them to words plainly defamatory on their face. Stephens v. Dixon, 30 Md. App. 56, 351 A.2d 187 (1976). The same considerations apply to *Food Fair Stores, Inc. v. Lascola*, 31 Md. App. 153, 355 A.2d 757 (1976), where the alleged slander concerned ambiguous words not defamatory in and of themselves, without reference to extrinsic facts.

38. Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331, 69 A.L.R. 720.

39. Henn, *"Libel-By-Extrinsic-Fact,"* 47 CORNELL L.Q. 14, 46–47 (1961) [hereinafter referred to as Henn]; Paton, *Reform and the English Law of Defamation*, 33 ILL. L. REV. (Northwestern Univ.) 669 (1939). *See also* Eldredge, *Variation on Libel Per Quod*, 25 VAND. L. REV. 79, 92 (1972), for a discussion of liability without fault in the libel context.

40. Henn, *supra* note 39, at 47 n.150; *see* Reed v. Melnick, 81 N.M. 608, 610, 471 P.2d 178, 180 (1970).

While the question has never been squarely presented in Maryland, there is a strong indication that, where proof of extrinsic facts is necessary to make out defamation, there must be knowledge imputed to the defendant of the defamatory connotation before there can be recovery.[41]

Since the statement contained in *Jacron* and repeated in *Piskor*, that there must be proof of negligence to recover in defamation, was in implementation of the *Gertz* ban on liability without fault, it is a fair conclusion that it is, in fact, only to instances of liability without fault, *i.e.*, defamation-by-extrinsic-fact unknown to the publisher, that the statements of the court of appeals are directed.[42]

41. *See* DeWitt v. Scarlett, 113 Md. 47, 56, 77 A. 271, 275 (1910):

> It can make no difference in principle what may be the words or character employed. If they have acquired, among those to whom they are published, a definite significance, and the publisher is aware of the construction that will be placed upon them, their actionable character must be determined accordingly. On the other hand, words cannot be given any other than their natural and ordinary meaning, unless it be *alleged* and *proved* that they were *used* and *understood* in a different sense. The one who publishes them, or causes them to be published, cannot complain if his words are judged by the sense in which they were used and in which he knew they would be understood, and it must be presumed that he intended them to mean what he knew those to whom they were published would understand them to mean.

Judge Kaufman appears to take the other view, in *Sauerhoff v. Hearst Corp.*, 388 F. Supp. 117, 121–22 (D. Md. 1974), *rev'd on other grounds*, No. 75–1229 (4th Cir., June 10, 1976), a case very similar in its facts to *Cassidy*. Although a summary judgment was awarded to the defendant because no special damages had been proven, the court indicated, in *dictum*, its belief that a published reference to the plaintiff and his girl friend might be defamatory if the plaintiff could show that there were those to whom publication was made who knew the plaintiff was married to someone else. Whether the defendant knew of the existence of the wife was not alluded to as relevant. *See also* Pace v. McGrath, 378 F. Supp. 140, 143 (D. Md. 1974).

42. Before we conclude that *Jacron* and *Piskor* increase the obstacles a plaintiff alleging defamation must overcome to establish liability, we should consider the remarkable approach taken in *Piskor* as to what will suffice to show actual malice to defeat the common law conditional privilege there made out by the defendant. The court stated that an inference of actual malice might be drawn if the jury read the defendant's action as conveying "an imputation of theft," 277 Md. at 174, 352 A.2d at 816. But such an imputation was necessary to establish the tort of defamation in the first place. Therefore, the court's holding would seem to make it easier to establish liability, and thus represents a return to the mistaken *dicta* of some cases that language defamatory on its face would support an award for punitive damages (for which actual malice is normally required). *Cf.* Montgomery Ward & Co. v. Cliser, 267 Md. 406, 298 A.2d 16 (1972); American Stores Co. v. Byrd, 229 Md. 5, 181 A.2d 333 (1962); Simon v. Robinson, 221 Md. 200, 154 A.2d 911 (1959); Shockey v. McCauley, 101 Md. 461, 61 A. 583 (1905); Newton v. Spence, 20 Md. App. 126, 316 A.2d 837 (1974). *But see* Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 661 (D.C. Cir. 1966); A.S. Abell Co. v. Barnes, 258 Md. 56, 265 A.2d 207, *cert. denied*, 403 U.S. 921 (1970); Gambrill v. Schooley, 95 Md. 260, 52 A. 500 (1902); Fresh v. Cutter, 73 Md. 87, 20 A. 774 (1890); Snyder v. Fulton, 34 Md. 128 (1871). It is difficult to reconcile this holding in *Piskor* with the general statement that liability without fault may not be imposed for defamation.

In those rare cases, negligence in ascertaining the true facts or in failing to ascertain that the asserted facts were false, would be a necessary ingredient of the tort if liability without fault were to be avoided. However, in the ordinary case, where, for example, the defendant calls the plaintiff a thief, unless the occasion was privileged it makes no sense to say that the plaintiff, to make out a *prima facie* case, must prove that the utterance was negligent. The utterance is patently a wrongful act, intended to injure the plaintiff.[43]

There is a further consideration which compels the conclusion that defamation of private individuals has not simply become another branch of the law of negligence. Such a development would run directly counter to the principal underlying justification for an action for defamation. The tort serves an important social function by allowing a party whose reputation has been injured to seek vindication through a court determination that the words were unfairly injurious to his reputation. Many plaintiffs want such vindication, even in the absence of demonstrable damages. The valuable consequences of a plaintiff's verdict, even if only for nominal damages, have been widely recognized.[44] If the tort of defamation is converted into a branch of negligence law, nominal damages presumably will no longer be available, since a negligence plaintiff cannot recover at all, however much he has established liability, unless he can show some actual damage.[45]

Another troublesome statement by the court of appeals in *Jacron* and *Piskor* suggests that the plaintiff must now prove falsity in every case.[46] Heretofore it has been a burden imposed

43. The intention would exist whether the defendant meant to blacken the plaintiff's reputation, or, without wishing such a result, uttered words which he knew or should have known would have that consequence.

44. Murnaghan, *supra* note 20, at 33 n.115, 35 n.117.

45. *E.g.*, Peroti v. Williams, 258 Md. 663, 671, 267 A.2d 114, 119 (1970): "Actual damages are a prerequisite for liability in negligence cases, and nominal damages, or 'technical liability' do not exist." *See also* Burns v. Goynes, 15 Md. App. 293, 305, 290 A.2d 165, 171 (1972), *cert. denied*, 410 U.S. 938 (1973).

The ALI recognizes in proposed comment *c* to § 569 of Tentative Draft No. 21 that, as a consequence of its establishment of a negligence test for liability, the availability of vindicating relief may be restricted. It lamely suggests as a correction for this undesirable consequence the development of a right to declaratory relief in lieu of the established right to nominal damages for unprivileged defamation. *See* RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 621, at 81–85 (Tent. Draft No. 21, 1975). Perhaps the ALI would have done better to have questioned the validity of a proposed rule that would lead to so unfortunate a result, rather than engage in attempts to legislate entirely new concepts.

46. General Motors Corp. v. Piskor, 277 Md. 165, 171, 352 A.2d 810, 815 (1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 597, 350 A.2d 688, 698 (1975).

The position of ALI Tentative Draft No. 21 on this aspect is, at best, very contradictory. In proposed § 582, it retains the existing language of the Restatement: "The truth of a defamatory statement of fact is a complete defense to

on the defendant to plead and prove truth.[47] Again, the general statement made by the court of appeals must be read in the light of the language in *Gertz*. The Supreme Court stated, in general discussion, that the common law defense of truth is not, standing by itself, sufficient protection for defendants desiring to exercise rights of free speech and free press. The Supreme Court went on to say that, consequently, there must be the restrictions discussed above on damage recoveries, and a requirement that there be no awards on a strict liability basis. It is not, however, appropriate to conclude that the Supreme Court was thereby holding that the burden of proving falsity must be shouldered by the plaintiff.

The common law assigned the burden on the matter to the defendant for the very sensible reason that proof of a negative can be very difficult. Consider the case of a plaintiff objecting to the defendant's accusation that the plaintiff is a thief. It is well established that, although the charge is general, proof of a single instance of larceny will establish the truth thereof.[48] To meet the burden of proving falsity, a plaintiff described as a thief would have to address himself to every transaction in which he had ever been involved and establish that, in each one, he acted in a manner that did not violate the larceny statutes.[49]

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an action of defamation . . . ." In the same breath, however, it eliminates the allocation of the burden on truth or falsity contained in that statement by limiting it to situations where "proof of falsity . . . is not a requirement for a cause of action in defamation." The Reporter recognizes that the requirement that a private plaintiff show negligence, reckless disregard, or knowing falsity in fact places the burden of proving falsity on the plaintiff in all cases. RESTATEMENT (SECOND) OF TORTS § 582, comment *b* (Tent. Draft No. 21, 1975); *id.*, Explanatory Notes at 41. To compound the confusion, the Reporter adds a caveat to proposed § 613, dealing with burden of proof: "The Institutes [*sic*] takes no position as to whether the plaintiff or the defendant has the burden of proving the truth or falsity of a defamatory communication."

47. *E.g.*, Wetherby v. Retail Credit Co., 235 Md. 237, 241, 201 A.2d 344, 346–47 (1964); Hagan v. Hendry, 18 Md. 177, 191 (1862). *See* MD. RULES 342, c.2(h).

48. "Thus, the truth of a charge that another is an embezzler is proved by proof of a single act of embezzlement." RESTATEMENT OF TORTS § 582, comment *b* (1938). Tentative Draft No. 21 proposes some stylistic changes in this language, but leaves the substance unaffected. RESTATEMENT (SECOND) OF TORTS § 582, comment *c* (Tent. Draft No. 21, 1975).

49. That would make for unnecessarily long trials indeed, at a time when docket crowding and precedence of criminal cases make it increasingly difficult for civil matters to be reached at all. To resolve such a situation, the courts would doubtless follow either of two courses, both of which would essentially reallocate the burden on truth or falsity to the defendant:

1. A plaintiff might be allowed to meet his burden simply by a general assertion from the witness stand "that I have never committed a piece of thievery." That would add little to the like denial implicit in his having brought the case in the first place, and would effectively shift the burden to the defendant to develop specific instances of wrong-doing by the plaintiff.

2. A plaintiff would undoubtedly be permitted by interrogatory or deposition to inquire as to any specific instance relied on by the defendant when he called the plaintiff a thief and the judges would probably hold that only those

The Supreme Court could hardly have intended such a result. Wherever defamation is apparent on the face of the words it will be preferable to leave the burden on the defendant to prove truth.[50] Although *Jacron* and *Piskor* state the proposition that the plaintiff must prove falsity flatly, and without apparent restriction, it is to be hoped that subsequent cases, dealing with actual situations of blatant defamation, will limit the rule to the situation of defamation-by-extrinsic-fact. It is that situation which creates the potential for liability without fault that the court of appeals in *Jacron* and *Piskor* was concerned with preventing. It is not unreasonable to shift the burden of proving falsity to the plaintiff in the restricted situation where he already must show that other facts, not contained in the publication, existed and were known both to the defendant and to his hearers or readers, which caused language innocent on its face to convey a defamatory meaning.

Another reason against a general shifting of the burden of proof on truth or falsity from the defendant to the plaintiff is that the independent existence of the tort of defamation would thereupon terminate. The recognized separate action for injurious (but not defamatory) falsehood allows recovery for misstatements of fact which are not defamatory, provided the plaintiff meets the burdens of (a) proving falsity and (b) establishing the existence of

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listed need be dealt with by the plaintiff in his proof of falsity. However, it is extremely questionable whether a rule of law should be adopted, the efficacy of which is entirely dependent on thorough resort by one of the litigants to discovery. Some plaintiffs might lack the wherewithal. Also, what good is discovery to a bank teller described as an embezzler, who, in answer to an interrogatory, is told that the defendant was referring to every single transaction conducted by the plaintiff during his fifteen years with the bank?

50. If the burden remains with the defendant, the prohibition against imposition of liability without fault should modify one common law concept, however. It has been ruled that an unsustained plea of truth, standing alone, without any other evidence of actual malice, will suffice (a) to support an award of punitive damages and (b) to overcome an established qualified privilege. Domchick v. Greenbelt Consumer Servs., Inc., 200 Md. 36, 45–48, 87 A.2d 831, 835–36 (1952). The requirement in *Jacron* and *Piskor* of knowing falsity or reckless disregard of truth to support a punitive damages award should eliminate the use of an unsustained plea of truth as a substitute for actual malice where exemplary damages are involved.

Insofar as the possible destruction of a privilege defense through entering a plea of truth is concerned, it is inconsistent with the prohibition against liability without fault to make it a condition of a defendant's resort to a recognized defense that he thereby creates evidence against himself on the issue of liability. This is especially so since the law generally encourages parties to present their cases without inhibition, by according an absolute privilege against a claim of libel based on any court pleading. Herring v. Citizens Bank & Trust Co., 21 Md. App. 517, 526, 321 A.2d 182, 187–88 (1974); DiBlasio v. Kolodner, 233 Md. 512, 520–23, 197 A.2d 245, 249–51 (1964); Gore v. Condon, 87 Md. 368, 377, 33 A. 261, 262 (1898); Bartless v. Christhilf, 69 Md. 219 (1888); *cf.* Picone v. Talbott, 29 Md. App. 536, 545–47, 349 A.2d 615, 620–21 (1975).

actual damage.[51] If the plaintiff, where words are evidently defamatory on their face, must still meet a burden of proving falsity, there will really be no significance attached to the defamatory character of the falsehood. Provable injury to reputation will be an element of *damages*, but, insofar as *liability* is concerned, the derogatory character of the falsehood will no longer constitute in any way an element of the tort itself.

Since the court of appeals was directing itself to redefining what it manifestly regarded as the continuing tort of defamation, its utterances on the subject should not be construed as eliminating the action by submerging it into the separate tort of injurious falsehood.

The subject of common law privileges was also addressed by the court of appeals in *Jacron*. Commendably, the court recognized that privileged occasions do not exclusively occur where reasonableness of the defendant's conduct alone excuses the publication of defamatory material. The public ends served by the judicial recognition of privileges are somewhat broader,[52] and negligence in their exercise will not destroy them. Actual malice must be shown by a plaintiff to overcome a privilege. Thus, the court of appeals concluded that the common law privileges remain available as defenses despite the casting of a burden of proving negligence on the plaintiff.

It is possible that *Jacron* and *Piskor* may, ultimately, be read as having really only added one more privilege for defendants, and otherwise as having left unchanged the common law rules as to liability for defamation. If, as is here suggested, the *Jacron* and *Piskor* cases should, insofar as rules of liability are concerned, be confined to the situations involving non-apparent defamation, *i.e.*,

51. W. Prosser, Law of Torts § 128 (4th ed. 1971).
For a time it was doubted in Maryland whether injurious falsehood was a separate tort, or only a special form of defamation. *See* Lehigh Chem. Co. v. Celanese Corp. of America, 278 F. Supp. 894 (D. Md. 1968); Hopkins Chem. Co. v. Read Drug and Chem. Co., 124 Md. 210, 92 A. 478 (1914). Later cases have, however, acknowledged the distinct nature of injurious falsehood. Shell Oil Co. v. Parker, 265 Md. 631, 291 A.2d 64 (1972); Beane v. McMullen, 265 Md. 585, 291 A.2d 37 (1972).

52. In *Walker v. D'Alesandro,* 212 Md. 163, 169, 129 A.2d 148, 151 (1957), it was observed: "The basis for immunity from liability by reason of privilege is that a public or social interest is to be served by according the privilege . . . ." *See also* Orrison v. Vance, 262 Md. 285, 292, 277 A.2d 573, 576 (1971): "the policy, behind all defamation privileges . . . [is] 'that some words need saying'." *Stevenson v. Baltimore Baseball Club, Inc.,* 250 Md. 482, 243 A.2d 533 (1968), quotes approvingly a description of qualified privilege:

> If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Id. at 486, 243 A.2d at 536, quoting Toogood v. Sprying, 1 C.M.&R. 181, 193, 149 Eng. Rep. 1044 (1834).

defamation-by-extrinsic-fact, and are read as merely insisting that there be no imposition of liability without fault, one may view the cases as actually creating a privilege. The privilege would allow a defendant to show that he was not unreasonable in his steps leading to publication of language actionable only by reference to extrinsic facts. This would make negligence in such situations an essential ingredient of the cause of action, albeit allocating the burden to the defendant, rather than to the plaintiff, where the court of appeals has asserted it should be. However, that would reduce the immediate appearance created by *Jacron* and *Piskor*, of radical surgery on the slowly built up common law of defamation, to the level of a mere lancing of a painful, but not menacing, boil. Among other things, it would harmonize the shifting of the burden of proving falsity to the plaintiff when the defamation is by extrinsic fact. Whenever the defendant is able to establish that the occasion was privileged, by force of well established, long existing common law principles themselves, the burden of proving falsity shifts to the plaintiff.[53]

CONCLUSION

Jacron and *Piskor* signal a general reexamination of the common law of libel and slander, in the light of three guiding principles:

1. Liability without fault may not be imposed.
2. Compensatory damage awards must be limited to provable harm, but should not exclude non-pecuniary elements of provable harm, such as the injured feelings of the plaintiff.
3. Damages intended to punish, rather than compensate (whether denominated punitive damages or general damages), may not be recovered in the absence of clear and convincing proof of knowing falsity on the part of the defendant, or its substantial equivalent, reckless disregard of truth.

Despite general statements in *Jacron* and *Piskor* to the contrary, it is neither necessary nor prudent, except in the relatively infrequent cases of defamation-by-extrinsic-fact, to impose a burden on the private plaintiff to prove that the publication was (a) false and (b) negligent, as part of his basic attempt to establish commission of the tort. Subsequent cases dealing with defamations evident from the face of the language declared on can be expected to find the tort made out by the proof of publication alone, and to leave the burden of proving truth on the defendant, unless he establishes a conditional privilege, whereupon, under established rules of the common law, the burden to prove falsity will shift to the plaintiff.

53. *See* note 33, *supra*.

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