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THE RISING TIDE OF LIBEL LITIGATION:
IMPLICATIONS OF THE GERTZ NEGLIGENCE RULE

Barry F. Smith*

I. INTRODUCTION

There are good reasons for the dramatic increase in the number of libel suits brought against the news media in the last few years. Such litigation offers potentially high financial returns, and the very media subject to such high judgments amply inform the public of the lawsuits and judgments against them. Some of the more familiar judgments include the $2.05 million award to the president of Mobil Corporation in his suit against the Washington Post for its story that he had funneled millions of dollars in Mobil business to his son; $1.6 million awarded to actress Carol Burnett in her suit against the National Enquirer for a story depicting an incident in which she allegedly had been drunk and rowdy in a Washington, D.C. restaurant; $26.5 million awarded to a former Miss Wyoming in her suit against Penthouse magazine for a fictional account of a sexually prolific woman allegedly portraying her.¹

The trend toward high libel judgments is clear. It has reached the point where leading media lawyers are predicting that one of the next changes the United States Supreme Court will make in libel law will be to set constitutionally required limits on the amount of damages libel plaintiffs may recover.²

Of course, for every libel lawsuit lost by a media defendant in front of a generous jury, several others are either settled out of court or won by the defendants. Professor Marc Franklin of Stanford Law School, in the recently published results of a statistical study he conducted on 291 reported libel suits against the media,³ states that the defendants in the reported cases won about 75 per-

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1. The first two verdicts were reduced by the trial judge and all are on appeal; the third was recently overturned by the Tenth Circuit Court of Appeals at Pring v. Penthouse Int'l., No. 81-1480 (10th Cir. Nov. 5, 1982). See Kupferberg, Libel Fever, 20 COLUM. JOURNALISM REV. 3:36 (1981) [hereinafter cited as Libel Fever].

2. See id. at 40.

cent of the time at both the trial and appellate court levels.4

The final results of those cases notwithstanding, the growth of libel litigation continues in Montana and nation-wide. This article considers the possibility that a significant cause of that growth, as well as one of the biggest problems for journalists and their lawyers, is the “negligence rule” announced by the Supreme Court in 1974 in the case of Gertz v. Robert Welch, Inc.5 The Court struggled with the constitutional requirements of libel litigation for a decade before settling upon the Gertz rule. In effect the rule states that private figure plaintiffs, seeking to recover from media defendants, need prove only a modicum of fault, presumably negligence.6 Gertz, however, did little to explain how the principles of negligence should work in libel litigation, a field in which that standard had been previously all but unknown. The result has been eight years of operating under vague constitutional limits, which in effect may have come to mean no limits at all. Eight years’ experience in implementing the decision has shown the “negligence rule” to be incorrect. Although the rule’s results cannot be termed disastrous, the rule continues to restrain the media and ought to be changed. While Montana unfortunately appears to be at the brink of adopting the Gertz negligence rule, it is still possible for the Montana Supreme Court to better protect the freedom of the media by discouraging oppressive libel litigation.

II. THE GERTZ RULE AND THE FIRST AMENDMENT

A. The Rationale Behind the Rule

The plaintiff in Gertz was an attorney who had represented a family in their controversial suit against a policeman convicted of murdering their son. The defendant’s magazine, American Opinion, a voice for the John Birch Society, published an article accusing Gertz of being a “Communist-fronter” and being an “architect of the ‘frame-up’” of the policeman convicted of the murder, along with other defamatory inaccuracies.7 Gertz sued, taking his case to the Supreme Court to reinstate his jury verdict.

Since the landmark case of New York Times Co. v. Sullivan,8 decided in 1964, public officials suing the media for libel had to prove the defamatory falsehoods were published with “actual mal-

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4. Id. at 802.
6. Id. at 347.
7. Id. at 326.
ice,” that is, with knowledge that the statements were false, or with “reckless disregard” of whether they were false.9 The Court extended this requirement three years later to plaintiffs who were “public figures”10—persons not holding public office who are “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”11

Justice Powell and four other members of the Court did not consider Gertz a public figure, subject to the Times rule, “for all aspects of his life,” nor did this majority consider him a public figure for the subject matter of the defamatory statements. He had achieved “no general fame or notoriety in the community,”12 nor had he “thrust himself into the vortex” of the public issue addressed by the defamatory statements.13

The Court also had to decide whether the Times rule would apply to Gertz because the subject matter of the article in question addressed a topic of public interest. Three members of the Court had held in a 1971 case, Rosenbloom v. Metromedia, Inc.,14 that the Times rule should apply in such matters of public interest: “If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”15 The Gertz majority, however, rejected that holding.

Gertz ruled 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.”16 Gertz thus requires private figure plaintiffs to prove no more than a minimal amount of fault (presumably no more than negligence)17 in order to recover against the news media for defamatory falsehoods even when matters of genuine public interest are involved in the statements.18

9. Id. at 280.
11. Id. at 164 (Warren, C.J., concurring in the result).
12. 418 U.S. at 351-52.
13. Id. at 352.
15. Id. at 43.
16. 418 U.S. at 347.
17. See id. at 360 (Douglas, J., dissenting), 366 (Brennan, J., dissenting), 376 (White, J., dissenting).
18. In addition to imposing the fault requirement in private figure litigation, the Court also held that private figure plaintiffs cannot recover punitive damages without showing actual malice, as defined in the Times case, and that actual damages will no longer be pre-
Justice Powell supported the Court's holding by asserting that, although "there is no such thing as a false idea" under the First Amendment, and that the competition of ideas is the proper means for correction in "pernicious opinion," the legitimate interest of the states in "compensating injury to the reputation of private individuals" requires that a rule different from the Times rule apply to them. Private individuals, he said, are more vulnerable to injury because they have less of an opportunity to use the media to counteract false statements than do public figures. Because private individuals have not voluntarily exposed themselves to public scrutiny through seeking office or assuming some role in the public spotlight, the media may not cover the activities of those individuals with the same privilege with which they may cover public figures. Private individuals, he said, "are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."

The states, however, were not given a free rein to develop the rules for libel litigation. The Court imposed its "negligence rule," criticizing Rosenbloom for allowing a state to impose strict liability upon a media defendant. The negligence rule was thus born out of the concern to protect the media from oppressive litigation. That rule, however, was poorly chosen.

B. The Theoretical Weakness of the Rule

The first amendment to the Constitution prohibits "any law 'abridging the freedom of speech, or of the press.'" The Supreme Court said in the Times case that if a state's libel law is not sufficiently strict on the burden of a plaintiff suing a media defendant, the first amendment is violated just as surely as if a criminal statute directly infringing first amendment interests had been passed.

sumed, but must be proved. Id. at 350.
19. Id. at 339-40.
20. Id. at 343.
21. Id. at 344.
22. Id. at 345.
23. Id. at 346.
26. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).
In considering the restrictions the Constitution places upon state libel law, the Court in the *Times* case analyzed three factors. First, the first amendment was written to ensure the free interchange of ideas that is necessary to bring about desired political and social change. Second, some degree of abuse, including factual error and injury to official reputation, must be tolerated by the law in the debate on public issues in order that that debate remain "uninhibited, robust, and wide-open." Third, by requiring critics of official conduct to guarantee the truth of their statements or suffer potentially incapacitating judgments, the existing libel law imposed an unconstitutional form of prior restraint, or in the words of the Court, "self-censorship."

The *Gertz* opinion did recognize the importance of public debate on significant social and political issues, and it supported the tolerance of some abuse to further that debate. Its treatment of the self-censorship issue, however, led to a different result from that in the *Times* case. *Gertz* balanced the need to avoid self-censorship with the "legitimate state interest" of compensating individuals for the damages suffered from the publication of defamatory falsehoods. Because private individuals do not voluntarily expose themselves to the public spotlight, and because they have less access to the channels of public communication, the balance weighed in favor of a less restrictive rule than that announced in the *Times* case for public officials. Because the *Gertz* majority wanted to protect the media from "the rigors of strict liability for defamation," it announced the rule requiring proof of fault.

The *Gertz* opinion lacked any explanation of why self-censorship is any less important an issue merely because private individuals have sued. It argued only that the interest of private individuals in recovering is greater than that of public figures. The opinion also failed to explain how the "negligence rule" would free the media from the "rigors of strict liability," either by referring to any cases employing the negligence standard, or by analyzing how the negligence standard would operate in the context of libel litigation. In short, the Court proceeded on the bald assumption that the media would be less subject to libel judgments, and thus self-censorship would be less of a problem, if they could not be held liable

27. *Id.* at 269 (citing Roth v. United States, 354 U.S. 476, 484 (1957)).
28. *Id.* at 270-72.
29. *Id.* at 279.
30. 418 U.S. at 340.
31. *Id.* at 341.
32. *Id.* at 344-45.
33. *Id.* at 348.
without being shown not to have taken "every reasonable precau-
tion" to ensure the accuracy of published statements. 34

Some lauded the Court for its decision, 35 but criticism was am-
ple and varied. Justice White, dissenting, criticized the new rule
for going too far. It would, he said, require the states to fashion
new rules for the recovery of damages and require definition of the
vague concept of liability without fault, even though these aspects
of the Gertz rule had "not been briefed or argued by the parties
and their workability [had] not been seriously explored." 36

Others criticized the rule for being too harsh on the media.
Justice Brennan, who had written the Rosenbloom plurality opin-
ion, dissented from the Gertz case, arguing that by departing from
the Rosenbloom "public issue" rule, the Gertz holding would put
on the media "the intolerable burden of guessing how a jury might
assess the reasonableness of steps taken . . . to verify the accuracy
of every reference to a name, picture or portrait." 37

Perhaps the most eloquent criticism of Gertz has come from
Professor David Anderson. He argued that the principles of negli-
gence in a common law context serve a very different function than
negligence as a constitutional "prerequisite." 38 Negligence law
developed to give the judge and jury flexibility to deal with the liabil-
ity question in a variety of cases in which reasonable person stan-
dards may apply—those involving traffic accidents, slips on icy
sidewalks, and the like. Certainty of results in these cases may not
be expected, or even desired. 39 Injecting a reasonable person stan-
dard into libel litigation as a constitutional matter raises quite dif-
f erent questions of application: should juries be allowed to infer
negligence from the mere fact of publication of defamatory false-
hoods; 40 should journalistic standards be set by expert testimony,
or should juries be allowed to measure journalistic conduct by their
own values; 41 must private figure plaintiffs prove negligence by a
preponderance of the evidence, the standard usually applicable in
negligence cases, or must a more demanding standard, such as

34. Id. at 346.
35. See, e.g., Robertson, Defamation and the First Amendment: In Praise of Gertz v.
36. 418 U.S. at 380 (White, J., dissenting).
37. Id. at 366 (quoting Time, Inc. v. Hill, 365 U.S. 374, 389 (1967)).
38. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 460 (1975) [here-
inafter cited as Anderson].
39. Id. at 460 (quoting Green, The Duty To Give Accurate Information, 12 U.C.L.A.
L. Rev. 464, 470-71 (1965)).
40. Id. at 465.
41. Id. at 466.
“convincing clarity,” be applied?"

Gertz announced the negligence rule without answering these questions. Furthermore, because of the conclusory manner in which the rule was announced, the lower courts have little guidance from Gertz as to what principles ought to guide the implementation of the rule, other than that the Constitution requires a standard that makes it harder to recover against the media than did the previous “strict liability” standard.

Not surprisingly, there is no consensus as to the proper application of Gertz, and lawyers and journalists still struggle to perceive its meaning. The following section discusses this problem.

III. COPING WITH THE GERTZ RULE

A. Adoption by the Courts

To escape liability, defamation defendants at common law were required to prove the truth of the defamatory statements at issue. They were also subject to a form of strict liability in which due care and good faith were no defense to claims based on defamatory falsehoods. To recover punitive damages a plaintiff had to show malice, but many jurisdictions presumed malice from the publication of sufficiently defamatory statements. Of course, this law was changed significantly in suits brought by public officials, and later public figures, under the rule of the Times case. Gertz modified the law in suits brought by private individuals against the media, although to a lesser extent.

Even before Gertz, there had been “something of an undercurrent of rebellion against the strict liability rule,” and a number of jurisdictions had held that negligence is a necessary element in a defamation suit. The majority of the courts facing the issue since Gertz have held that proof of negligence is sufficient in suits by private individuals; but some courts have gone further than Gertz 42. That is the proof requirement of “actual malice” under the Times standard. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

43. Anderson, supra note 38, at 467.
45. “The effect of this strict liability is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals.” Id. at 773.
46. Id. at 772. Malice was understood in the sense of spite or improper motive, rather than in the definition in the Times case. Id. at 771-72.
47. Id. at 774.
requires and imposed stricter proof standards on the plaintiffs, such as those imposed in the *Rosenbloom* case.

The courts have also differed somewhat in their articulation of the negligence rules adopted. One court required the plaintiff to show, when the substance of the statement "makes substantial dangers to reputation apparent," that "the defendant knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect." Another court required proof that the defendant "knew or should have known that the defamatory statement was false," but would not allow liability if the content of the statement would not warn a "reasonably prudent editor or broadcaster of its defamatory potential." Another court defined the fault a private individual plaintiff must establish as either "negligent failure to exercise due care, or a great degree of fault such as express or actual malice."

While the first two cases made it clear that the negligence must occur in not discovering the falsity of the statement, the third did not clarify whether the negligence must occur in not ascertaining the falsity or in the act of publishing. Another jurisdiction has held the latter view, that it is the "negligent publication of a defamatory falsehood" that gives rise to liability. This is not just an academic distinction. A rule of negligent publication could have distinct results, such as imposing liability when a reporter did all that was reasonably necessary to try to verify a defamatory story, but the newspaper printed it in spite of unanswerable questions about the facts, or imposing liability when a television story that had been killed because of its incorrect information gets aired when a technician mixes up his instructions and pushes the wrong button. These examples may be bordering more on the strict lia-

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54. For a discussion of this distinction at common law, see PROSSER, supra note 44, at 774-76.
Applying these courts’ holdings to the facts before them raises even more doubts about the rules they announced. In a 1975 Massachusetts case, *Stone v. Essex County Newspapers, Inc.*, an inexperienced reporter covering a criminal trial of a young man accused of the possession of drugs was late for the initial part of the trial and wrongly interpreted a reference to “Mr. Stone” to mean the defendant’s father. He wrote the story accordingly. The father of the young criminal defendant sued the newspaper for libel, despite a retraction published in a subsequent edition.

The editor knew Mr. Stone and was surprised that this good citizen would be so charged, but did nothing in the 24 hours before the story was published to check it out. The court on appeal adopted the “negligent publication” rule and remanded the case for a new trial under that rule. Few juries would have trouble finding negligent publication under the facts of that case. That aside, however, what purpose is served in awarding damages for a good faith publication once a retraction has been published? Small newspapers that simply cannot afford libel judgments, or libel litigation for that matter, may be forced to have their editors check every reporter’s facts, no matter how unlikely it seems to the editors that a mistake could have been made. That could be a very heavy burden on any medium.

Suppose the reporter had been very experienced, the editor did not know Mr. Stone, the city was very concerned about a rash of drug abuse among its youth, and Mr. Stone and his son had the same name and lived at the same address. If the story reported the full name of the Stone boy and did not tell what his age was, which stories normally include, some people might think it referred to Mr. Stone instead of his son. A judge, unsure of what reasonable minds might conclude about the conduct of the newspaper, would probably turn the case over to the jury for decision. If so, the newspaper might well face substantial damages even if its staff had proceeded with the story with the best of faith and, arguably, the best of journalistic judgement.

In *Taskett v. King Broadcasting Co.*, a 1976 Washington case, the plaintiff was the owner of an insolvent advertising agency that had begun dissolution proceedings. Notice of the proceedings had been sent to all of his creditors, including the defendant televi-

56. Id. at 858, 871, 330 N.E.2d at 168, 175. There was also some question about the plaintiff’s status as a possible public official.
57. 86 Wash. 2d 439, 546 P.2d 81 (1976).
sion station. The plaintiff decided to get away from it all for a month and flew to Mexico with his wife. He sublet his apartment to a friend and, thinking his security deposit on his office would satisfy the rent while he was gone, left the office unoccupied without telling the landlord. An investigative reporter for the television station spoke with the friend in the apartment, the trustee, and some creditors, and also checked the court files. The reporter made a call to a telephone number in Mexico that was on a note in plaintiff's office. The call revealed that the plaintiff had just left his hotel. The subsequent story on the television news strongly inferred that the plaintiff had skipped out on his creditors. When he returned and heard about the story, he sued for libel.

It is difficult to imagine what else the reporter could have done to ensure that the plaintiff had skipped out on his creditors if the sources contacted gave no information about why he left. Should the station have killed the story or held it until the reporter could talk to the plaintiff, even though the story clearly packed substantial public interest, particularly among the plaintiff's several creditors? If a fear of a libel suit for running a segment that was reasonably well-researched causes the station to hold or kill it, the very evil sought to be avoided by all the cases from *Times* to *Gertz*—self-censorship—has reared its ugly head. A station knowing that its conduct may ultimately be adjudged by the standards of "reasonableness" in the minds of a jury, rather than on more objective criteria announced by the judiciary, could well be scared out of running the segment, especially if it is not a large enough operation to budget comfortably for litigation.

In *Taskett* the Washington Supreme Court remanded the case for reconsideration under a standard requiring the exercise of reasonable care in learning the falsity of the statement or in knowing that it would create a false impression in some material respect. The court, in effect, put it in the hands of the jury to decide whether the reporter's methods of investigation were sufficient.

In one curious case, the institution of the fault standard had an apparently harsher effect on the newspaper defendant than did the previous rule of liability without fault. In *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co.*, decided by the Ohio Court of Appeals in 1974, the defendant had published an account of how the plaintiff corporation tore down not only the building it was hired to demolish but the one next to it as well. The company lost

58. *Id.* at 450, 546 P.2d at 85.
a suit by the owner of the adjacent building for damages. When
the judgment against the company was issued by the court, the
defendant newspaper published its story. The errors it made were
an announcement of damages (when no damages had yet been de-
termined), incorrectly adding "Wrecking Co." in the name of the
plaintiff, incorrectly describing the type of building wrongly de-
molished, and incorrectly quoting the long-retired former propri-
tor of the company as having told the judge, "I guess we got car-
ried away." 60

The plaintiff company sued for libel. After discovery, the de-
fendant moved for, and won, summary judgment. Although the ap-
pellate report of the case did not explicitly state the standard of
care applied by the trial court, it is fair to assume from the opinion
that the common law rules of liability without fault were used. The
trial court thus apparently ruled that the statements were not
libelous per se and that there was no evidence uncovered in discov-
ery indicating that the statements had a libelous effect. 61

In reversing the judgment and remanding the case for further
proceedings, the appellate court did not merely decide that the
lower court improperly found no genuine dispute of facts under the
summary judgment rule. The announcement of Gertz by the Su-
preme Court changed the posture of the case. The court said that
the record contained factual issues "made material" by Gertz. 62 In
the words of the concurrence:

Gertz requires that the plaintiff in this case should have his day
in court; being a private citizen he should have the opportunity to
prove by a preponderance of the evidence that there was a
libelous article written about him and published, that the article
was false and that the defendant was negligent in the printing of
the article, and that the plaintiff was damaged. 63

Thus, the case presented an anomalous situation in which the
courts rejected any rule of common law that imposed liability with-
out fault, and at the same time reversed the lower court’s finding
that the facts did not support a finding of strict liability, all on the
premise that the new law, speaking in terms of fault, gave the
plaintiff the right to try to prove fault to the jury. Although Gertz
imposed the fault element to give the media a measure of protec-

60. 334 N.E.2d at 496.
61. At common law, statements not ruled libelous per se by the court could not be the
basis for liability absent proof of special damages. See Prosser, supra note 44, at 760, 763.
62. 334 N.E.2d at 499.
63. Id. at 503.
It is difficult to summarize the development of post-Gertz law, other than to say that there is little predictability afforded by that development. There are few guidelines as to what a jury ought to consider in assessing the existence of fault, and thus it will be difficult to determine how a given jury is likely to rule. The variety of negligence rules already announced, such as the negligent publication rule and the rule defining negligence in not learning of a defamatory statement's falsity, are not sufficiently tested in the courts for anyone to know how they will operate in future cases. The interaction of the new fault-oriented law with prior law on liability without fault also poses questions that are difficult to answer, as indicated in the Maloney case. By turning libel litigation involving the media into essentially litigation of "journalistic malpractice," Gertz has forced the media and their lawyers to view the practice of journalism in a new light.

B. Gertz in Montana

Because Gertz ruled on several aspects of libel law, including standards of liability and limitations on damages, it will take some time before the entire scope of the case is assimilated into the courts of the various jurisdictions. Montana has begun this assimilation, and all indications are that it will follow the majority and adopt a negligence standard when squarely presented with the question.

The portions of Gertz concerned with limitations on damages recoverable in libel actions have now been explicitly analyzed by the Montana Supreme Court in reviewing district court rulings on appeal, but it is still something of an open question whether or not the negligence rule will be adopted. The court correctly declined the invitation to decide the question in Granger v. Time, Inc., a case seeking damages from a publisher for allegedly defaming property owners in Butte with an article concerning arson in that city. The court affirmed summary judgment entered on behalf of the defendants because the plaintiffs failed during discovery to uncover evidence showing that the charge of arson was reasonably understood by the article's readers to apply specifically to the plaintiffs. Because of this, the court did not need to go to the extra step and declare what standard of liability would be

66. Id. at 49, 568 P.2d at 539.
appropriate.\textsuperscript{67}

The court did, however, appear somewhat confused by the parties' characterization of the question of the liability standard as a first amendment issue.\textsuperscript{68} The \textit{Granger} opinion said that because that issue "requires a careful balancing of the first amendment freedoms of speech and press, and the personal dignity interests underlying the law of defamation," and because the case was decided on a non-constitutional basis, the liability standard would be decided another time.\textsuperscript{69} The court apparently ignored the fact that the \textit{Gertz} opinion had already engaged in that balancing and had decided that the minimum-of-fault standard is what the first amendment requires.\textsuperscript{70} Whether plaintiffs must meet a higher burden than proof of ordinary negligence is now a matter of state law. By characterizing the issue of the standard of liability a constitutional one, the Montana Supreme Court may have locked itself into an intellectual course that will lead it straight back to the very analysis by which \textit{Gertz} intended to give the states discretion to adopt a tougher standard.\textsuperscript{71}

The later case of \textit{Madison v. Yunker}\textsuperscript{72} is evidence that the court has moved toward the adoption of a negligence rule without exercising the discretion left to the states by \textit{Gertz}. The principal effect of \textit{Madison} was to hold unconstitutional Montana's "retraction statute"\textsuperscript{73}—a law that required plaintiffs to demand a correction of the allegedly libelous matter before suing. \textit{Madison} held\textsuperscript{74} that such a provision violates the provisions of the Montana Constitution requiring the courts of the state to be open to every person and afford remedies for injury to character.\textsuperscript{75}

In its analysis, the court weighed its interpretation of the state constitution's provisions on the right to sue with the requirements of the first amendment as analyzed in \textit{Gertz}.\textsuperscript{76} It quoted at length the \textit{Gertz} case's justifications for the minimum-of-fault rule it adopted.\textsuperscript{77} Although the court's analysis of the state constitution

\begin{footnotesize}
67. \textit{Id.} at 51, 568 P.2d at 541.
68. \textit{See id.}
69. \textit{Id.}
70. 418 U.S. at 347. \textit{See supra} text accompanying notes 14-23.
71. The issue of whether the standard adopted by the states would be better determined judicially or legislatively is beyond the scope of this article, but is certainly well worth consideration.
73. MONT. REV. CODES ANN. \S 64-207.1 (Supp. 1977).
74. 180 Mont. at 63, 589 P.2d at 131.
75. MONT. CONST. art. II, \S 16 (1972).
76. \textit{See} 180 Mont. at 61-62, 589 P.2d at 130.
77. \textit{See} 418 U.S. at 347, 348.
\end{footnotesize}
may have been somewhat peculiar, this kind of balancing was quite appropriate under the circumstances.

What may have been less appropriate was for the court, after making its determination, to proceed to give the district court a dozen paragraphs of "guidance," consisting largely of quotations from Gertz, on the applicable law of libel.78 As is always the risk when a court broadens the scope of an opinion with dicta, this "guidance" did not focus carefully on the issues raised by the Gertz rule. The result may have been an unnecessary and premature step toward adopting a negligence standard without understanding its implications.

The court stated for the district court, in very simple terms, the standards of proof the plaintiff must meet if he were later deemed (1) a private person or (2) a public figure. In the former case, he would be required to prove the falsity of the published material, "fault" on the part of the defendants "in the publication," and actual injury. In the latter case, he could recover only by proof of the elements of malice as defined in the New York Times case.79 The court did not elaborate on whether "fault in the publication" amounted to negligence or some other form of fault. However, by contrasting a simple "fault" standard in cases involving private person plaintiffs with the New York Times "malice" standard in cases involving public figure plaintiffs, the court has all but adopted a negligence standard in Gertz-type cases. At the very least it has made it very difficult, when properly faced with the issue, to adopt a more stringent standard such as that employed in the Rosenbloom case.80 Nonetheless, the Madison court's failure to engage in a more exacting analysis of Gertz and Rosenbloom must not inhibit such analysis when the proper case arises. The court ought to take seriously the discretion accorded it by Gertz and consider the merits of the Rosenbloom rule.

IV. THE CURRENT LITIGATION STATUS

A. The Stanford Litigation Study

The Stanford Law School study involved the analysis of libel suits against the news media reported over a four-year period.81 The study involved cases at the trial and appellate levels in both state and federal courts. It broke down the cases into several cate-

78. See 180 Mont. at 61-67, 589 P.2d at 131-33.
79. Id. at 66, 589 P.2d at 133.
80. See supra text accompanying notes 14-15.
81. Suing Media, supra note 3, at 799.
categories, including procedural stages at which the cases were decided, outcomes before and after certain Supreme Court decisions, outcomes at the various procedural stages, different categories of plaintiffs, the nature of the defamatory statements, and the role of federal and state law in determining the results.

The study concluded, somewhat surprisingly, that recent Supreme Court cases apparently limiting the scope of the definition of "public figure" for purposes of the application of the *Times* privilege had little effect on the outcomes of later cases. Perhaps also surprising was the strong showing of success for media defendants at most levels of litigation. Rulings appealed from the trial court levels were made in favor of the defendants seventy-five percent of the time, and the defendants prevailed in about seventy-five percent of the plaintiffs' appeals. Plaintiffs prevailed in thirty-one percent of all appeals. The plaintiffs obtained "success" on appeal, defined as a ruling concluding the litigation in their favor, in about five percent of the appeals, while the overall success rate for the defendants was sixty-six percent.

The thirty-seven cases on appeal that had reached the trial stage are particularly interesting for the present purposes. Seven of them were dismissed before jury deliberations began. Twenty-four of the remaining thirty were decided by juries and six by judges. Juries found for the plaintiffs in twenty of the twenty-four cases submitted to them, while judges found for the plaintiffs in two out of five. Trial judges upheld seventeen of the twenty plaintiffs' verdicts, reduced two, and granted one judgment notwithstanding the verdict. Eight verdicts, fewer than half of those upheld wholly or in part, were affirmed on appeal. Of the eleven jury verdicts reversed, nine were dismissed, meaning the defendants had to take the cases to the highest courts in the jurisdictions for determinations that the cases should not have gone to the juries or should not have been tried at all.

The study did not provide a breakdown as to which of the jury cases were *Gertz* cases, but it is fair to assume several of them...

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83. *Suing Media*, supra note 3, at 821.
84. *Id.* at 802.
85. *Id.* at 803.
86. *Id.* at 804. In the sixth case decided by a judge, the judge struck all defenses of a defendant that refused to reveal a confidential source. That decision was vacated and remanded on appeal. Sierra Life Ins. Co. v. Magic Valley Newspapers, Inc., 101 Idaho 795, 623 P.2d 103 (1980).
87. *Suing Media*, supra note 3, at 805-06.
88. *Id.* at 806.
were. The study did show that at least fifty-three percent of the fifty-one cases "codable" for specific falsity charges (cases in which the issue of falsity and the type of falsity alleged could be determined from the reports) dealt with \textit{Gertz} issues. Twenty-nine percent involved a question of the negligence of the author, and twenty-four percent concerned the reasonableness of relying on an erroneous source.\textsuperscript{89}

If these percentages are representative of the overall percentage of the cases in the study, it could well be that many of the jury cases involved \textit{Gertz} issues. Recall that twenty out of twenty-four juries and only two out of five judges found for the plaintiffs, and that eleven of the nineteen plaintiffs' verdicts appealed by the defendants were reversed, nine of them being dismissed on appeal. To the extent that the element of the jury was added to the \textit{Gertz} cases, the media defendants faced an uncertain obstacle in their defense and often had to take their cases to appellate courts to prevail.

Of course, the existence of defendants' losses is not in itself a measure of failure of the \textit{Gertz} rule, just as the prevalence of defendants' victories on appeal is not a measure of its success. However, the proclivity of the juries in the study to award verdicts to the plaintiffs bodes ill for the media if jury trials in \textit{Gertz} cases become, in the words of one media lawyer, "little theaters."\textsuperscript{90}

As expected, but also somewhat troubling in its degree, was the result that \textit{Gertz} defenses were substantially less successful at the summary judgment and post-trial motion stages than were \textit{Times} defenses. \textit{Gertz} defenses were successful at the summary judgment stage in four cases, compared with twenty-four cases using \textit{Times} defenses, and were successful at the post-trial motion stage in one case, compared with fifteen cases using \textit{Times} defenses.\textsuperscript{91} This underscores even more the likelihood of \textit{Gertz} cases going to trial.

\textbf{B. The Crippling Cost of Libel Litigation}

When a media defendant is sued for libel, the alternatives are most unpleasant: it can either settle for a substantial amount of money or spend a substantial amount of money in litigation, at the end of which a substantial judgment may still have to be paid. Be-

\textsuperscript{89} Id. at 820. Twenty-two percent of the cases were in the "other" category, some of which conceivably were \textit{Gertz} cases.

\textsuperscript{90} Interview with Bruce Sanford, attorney for United Press International (Nov. 16, 1981).

\textsuperscript{91} \textit{Suing Media}, supra note 3, at 823.
cause it increased the burden of plaintiffs attempting to collect damages, *Gertz* may have reduced the risk to defendants at the end of litigation. At the same time, however, it seems to have increased the likelihood and the burden of going through litigation. Because the negligence standard (which more states are adopting than not) increases the likelihood of a judge's turning the case over to the jury, plaintiffs may be less willing to settle at early stages of the litigation. This may be especially true where the cases involve questions about the functions of the editorial process that are relatively unclear and would allow a jury to impose its view of the proper standards.

The high cost of litigation can be particularly burdensome to a media libel defendant, which, because it is in the business of making public statements, may also be put in the business of defending many of those statements in libel suits. Even short of going to trial, legal fees for a media defendant in a single case can easily run into five-figure numbers. Fees for a trial and an appeal, which often is required on a libel case, can become astronomical. One report says the defense of the *Rosenbloom* case cost nearly $100,000. One newspaper with a circulation of between 100,000 and 300,000 reports that during the years 1976 to 1980, it incurred legal fees of more than $165,000 for both litigation and counseling. The fees ranged from a low of $7400 in 1976 to a high of $74,400 in 1980. Even when the defendant carries libel insurance, as some forty to sixty percent of newspapers and broadcasters do, the insurance may not cover legal fees.

Few news organizations, and perhaps only those financially secure and free from significant competition, can afford libel litigation without having to change their news policies. The *New York Times*, for example, may be unique in not carrying libel insurance and refusing to settle libel suits for money (as opposed to retractions), and not many can claim, as does the *Washington Post*, that libel litigation has not changed their editorial practices.

Quite clearly, the media in rural states such as Montana do

92. See *supra* notes 48 and 49.
94. *Suing Media, supra* note 3, at 800, n. 13. Insurance may have reimbursed some of the fees. Premiums were $3000 each year with a $10,000 deductible in 1976, rising to $20,000 in 1980.
not own resources comparable to the metropolitan news organizations. Yet smaller media organizations are not immune to large judgments. Libel litigation can be deadly to smaller and less financially secure news organizations. For instance, the 38,000 circulation Alton Telegraph, a southern Illinois daily, has had to seek the protection of a bankruptcy court to save it from having to sell its assets as part of a $9.2 million judgment. Reporters of the newspapers turned up evidence that a local contractor had ties to the underworld, but could not substantiate the facts and did not run the story. The contractor’s business lost its credit when the reporters sent a memo to the Justice Department of what they uncovered. A successful libel suit followed.99

The owners of the prize-winning The Texas Observer related the effects of a libel suit against that newspaper a few years ago. They discussed candidly how the suit forced them to spend all their energy on fund-raising activities to pay for the litigation, while important stories, including a “solid” one on illegal business practices in Dallas, went unreported.100

The editor of the 6000 circulation Gadsden County Times of Quincy, Florida, recently discussed the suit against his newspaper by a state senator for stories reporting corporate fraud. He said that even though the insurance company has paid the legal fees, the drain on time and resources because of the suit has made him reluctant to write further investigative stories.101

By being forced into a business environment in which planning for libel suits is as much a part of fiscal analysis as budgeting for newsprint, ink, or television equipment, the news media may be unique in having to figure as a cost of doing business the cost of exercising a constitutional right. The first amendment, of course, says nothing explicitly about the press being immune from the expense of libel litigation costs and judgments, and that probably was not the intent of the language. Yet the constitutional prohibition of self-censorship decreed by the Times case102 and reaffirmed by Gertz103 must include within its scope any burden that unreasonably inhibits robust reporting of important public affairs. The Court in the Times case said that a rule requiring critics of official conduct to guarantee the truth of their factual assertions “on the pain of libel judgments virtually unlimited in amount” leads to the

99. Libel Fever, supra note 1, at 36.
100. Selective Impact, supra note 84, at 41.
101. Libel Fever, supra note 1, at 39.
102. 376 U.S. at 279.
103. 418 U.S. at 340.
constitutionally unpalatable result of self-censorship. As the Stanford litigation study has shown, a statistically high number of media defendants do not ultimately suffer the "pain of libel judgments," but they have to spend thousands of dollars to avoid those judgments.

Litigation costs from an ever-increasing number of lawsuits have become like a gadfly on the first amendment rights of the news media. The lifeblood of the first amendment is the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." That lifeblood runs cold when its exercise is too expensive.

A carefully designed study following up the Stanford study could provide the courts empirical evidence of how the media have been rendered substantially less robust by libel suits against them. Although the courts may be on the verge of further limiting the amount of damages recoverable against the media in libel suits, the courts must be shown that the present state of the law also fosters an intolerable amount of litigation.

C. The Value of the Rosenbloom Rule

The three-judge plurality in the Rosenbloom case, made up of Justices Brennan, Burger, and Blackmun, extended the Times requirement of the proof of actual malice whenever the matter reported on concerns the "public or general interest." Part of the rationale for that rule was the following:

The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . 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.

Some media lawyers feel that the Rosenbloom rule would restore

104. 376 U.S. at 279.
105. Suin Media, supra note 3, at 802.
108. See supra text accompanying note 2.
109. 403 U.S. at 43.
110. Id. at 43-44 (footnotes omitted).
111. See supra note 73.
some of the robust investigative journalism that has been missing from the work of the media the last few years.

Perhaps the most troublesome criticism of the Rosenbloom rule is its relegating to the judiciary the task of determining what issues are and are not in the "general or public interest." Justice Brennan, dissenting in Gertz, supported this result as merely causing the judges to perform "one of their traditional functions."112 Perhaps there would be problems in applying this rule, but under the rubric of the "political and social change" sought to be encouraged by the first amendment,113 the courts could develop standards for the proper application. Courts are much better qualified to apply a legal principle such as this than juries are to apply the general concept of negligence to the field of journalism, in which few, if any, generally recognized standards of practice exist.114

V. Conclusion

The rule of the Rosenbloom case provided a much more effective approach to the "self-censorship" problem recognized by the Supreme Court since the Times case in 1964. Gertz too hastily discarded that rule in favor of its rule requiring private individual plaintiffs to prove fault on the part of media defendants allegedly guilty of libel. The experience of the courts has shown that the Gertz rule, as a question of negligence, is very difficult to apply.

Because the Rosenbloom rule ostensibly makes it harder for plaintiffs to recover against the media for libel, its replacement of the Gertz rule probably would discourage much of the litigation the media now face. That would reduce the exorbitant costs of libel litigation now paid by the media to more acceptable levels. Smaller news organizations, such as those prevalent in Montana, could thus function under significantly less pressure.

112. 418 U.S. at 369.
113. See supra note 94.
114. See supra text accompanying notes 37-67.