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# CIVIL LIBEL AND SLANDER IN OKLAHOMA—AN UPDATE

John W. Hager\*

## I. INTRODUCTION

During the years 1963 and 1964, this writer read and analyzed every case on civil defamation decided by the Oklahoma Supreme Court since statehood and published in the *West Reporters*. The results were presented in an article in the *Tulsa Law Journal*,<sup>1</sup> which gave the reader "a survey and sometimes critical analysis of the law of libel and slander in Oklahoma as such law is reflected in the Constitution, the statutes, and the cases, leaving for a later article perhaps some suggested and badly needed changes in our law of defamation."<sup>2</sup> The present article in part fulfills that tentative promise, but its purposes go beyond suggestions for change in the defamation law. As a result of the United States Supreme Court decision in *New York Times Co. v. Sullivan*<sup>3</sup> and decisions of the Oklahoma Supreme Court since 1964, the current state of the law of defamation in Oklahoma must be reexamined and updated.

In order to put the present Oklahoma law of defamation in proper perspective, it is necessary to review briefly the law as it was before the *New York Times* decision and to review the law as it is since that decision and since other significant cases decided by the United States Supreme Court. Before 1964, the Court had stated on a number of occasions that the constitutional freedoms of speech and press did not protect libelous statements.<sup>4</sup> The Court's attitude was summed up by

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1. Hager, *Civil Libel and Slander in Oklahoma*, 2 TULSA L.J. 1 (1965) [hereinafter cited as Hager].

2. *Id.* at 3.

3. 376 U.S. 254 (1964).

4. See *Roth v. United States*, 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Robertson v. Baldwin*, 165 U.S. 275 (1897).

Chief Justice Hughes: "For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws."<sup>5</sup>

During this earlier period, most, if not all, of the states recognized the so-called fair comment concept.<sup>6</sup> However, the states were split on whether fair comment protected a defendant for false statements of fact made about a public official concerning that person's official conduct. The majority of the states took the position that criticism of the acts and conduct of public officials was privileged in the absence of malice provided that no false statements of fact had been made.<sup>7</sup> Oklahoma, by statute, follows the majority view in part by providing that opinions and criticism based on true statements of fact are privileged, although no criticism which falsely imputes crime to a public official is protected.<sup>8</sup> The minority view is well illustrated by a case in which the defendant newspaper published an article which falsely accused the Attorney General of Kansas of official misconduct in connection with a school fund transaction.<sup>9</sup> The Kansas Supreme Court said, "If the occasion be absolutely privileged, there can be no recovery. If it be conditionally privileged, the plaintiff must prove malice, actual evil-mindedness, or fail."<sup>10</sup> Thus, the majority position did not protect false statements of fact at all, while the minority view protected them only in the absence of malice.

The United States Supreme Court had the opportunity in 1941 to decide the constitutional issue of whether the several states can limit

5. *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

6. The doctrine of fair comment protected a person who drew inferences from certain facts and made comments or gave opinions on any matter of public concern based on those facts. The doctrine differed from a conditional privilege in that the latter protected a person making false statements, whereas fair comment required any comments, statements, or inferences drawn to be based upon true occurrences or situations.

7. *See, e.g., Post Publishing Co. v. Hallam*, 59 F. 530 (6th Cir. 1893).

8. A privileged publication or communication is one made:

Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.

OKLA. STAT. tit. 12, § 1443 (1971).

9. *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). This case was discussed with approval by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

10. 78 Kan. at, —, 98 P. at 292. *See also* *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925), adopting the rule in *Coleman*.

the privilege of fair comment<sup>11</sup> but left the issue undecided.<sup>12</sup> Finally, in 1964, the Court faced the constitutional question squarely and held in *New York Times Co. v. Sullivan*<sup>13</sup> that a public official cannot recover damages for a defamatory false statement regarding his official conduct unless he proves that the statement was made with actual malice. The Court defined actual malice in this context to mean either that the defendant made the statement knowing it to be false or that he made it in reckless disregard of its truth or falsity. Three years later the Court extended the rule to public figures.<sup>14</sup>

In 1971, the Court failed to reach a majority opinion on the constitutional issue of the extent of protection afforded to defamation of private citizens by a mass medium defendant.<sup>15</sup> However, three years later in *Gertz v. Robert Welch, Inc.*,<sup>16</sup> the Court, in a 5-4 decision (Justice Blackmun concurring only to attain a "definitive ruling"), held that as long as the several states do not impose liability without fault, they may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private person.

## II. OKLAHOMA CASES

On the average the Oklahoma Supreme Court has decided about one defamation case each year since 1964. Most of these cases are relatively unimportant to the present update as they merely reiterate rules concerning libel and slander which were left unaffected by the United States Supreme Court decisions beginning in 1964. Therefore, the following discussion will focus primarily on the exceptions to the general rules, as well as on some federal cases using Oklahoma law.

### A. *Partnership as a Party Plaintiff*

The issue of whether a partnership can sue in the partnership name for libel which results in damage to the business reputation of the association has not been expressly decided in Oklahoma. However, the Oklahoma Supreme Court has indicated in dicta that a suit by or on behalf of the partnership may be brought for damages accruing to the

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11. *Schenectady Union Publishing Co. v. Sweeney*, 316 U.S. 642, *aff'g* 121 F.2d 288 (2d Cir. 1941).

12. *See Note, Torts: Defaming a Public Official*, 2 TULSA L.J. 79 (1965).

13. 376 U.S. 254 (1964).

14. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

15. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

16. 418 U.S. 323, 354 (1974).

association as a result of a libel of the partnership.<sup>17</sup> Further support for the idea that a partnership is a proper party plaintiff is found in the language of the Oklahoma statutes dealing with actions brought by or against a partnership following its dissolution.<sup>18</sup> As a result of these developments in Oklahoma law, this writer has altered his earlier position on this issue<sup>19</sup> and is now of the opinion that a partnership should be able to maintain an action if it is defamed.

### *B. Standard of Liability for a Private Person Plaintiff*

The United States Supreme Court in *Gertz*<sup>20</sup> permitted the states to have a lesser standard for defamation of a private individual than the standard required for defamation of public officials or of public figures. In those states which have established negligence or something less than knowledge of falsity or reckless disregard of the truth as the standard for liability with regard to private individuals, a problem has arisen in determining who is a public official or a public figure. The Court could have avoided some of the difficulty, and thus produced a more accurate analysis, by setting one standard of liability for public officials and a second standard of liability for all other persons.<sup>21</sup> Prior

17. In *Layman v. Readers Digest Ass'n*, 412 P.2d 192 (Okla. 1966), the Oklahoma Supreme Court held that a libel of a partnership did not libel an individual member of that legal entity. It said, "Since a partnership is a separate legal entity, a libel of the partnership of Layman and Sons is an entirely different thing from a libel of A.H. (Herb) Layman. For damages accruing to the partnership a suit by or on behalf of the partnership might have been brought, but this was not done." *Id.* at 196.

18. OKLA. STAT. tit. 12, § 1082 (Supp. 1978) provides that "a partnership may sue and be sued in its firm name." Some doubt may be cast on this statutory language as authoritative with regard to whether a partnership can maintain an action in the name of the partnership for libel directed against the business reputation of the association, because § 1082 is found in chapter 18, entitled "Revivor of Actions," and because the section is entitled "Dissolved partnerships." In addition, the rest of the quoted section deals with actions brought by or against a partnership following its dissolution.

19. Whether a partnership has a cause of action for libel of the business association itself is perhaps a moot question, as it would be a very rare instance where a libel damaged the reputation of a partnership without also damaging the reputation of the individual partners. In the latter instance the partners would sue as individuals as they would be the real parties in interest.

As two writers have observed:

At common law, a partnership could neither sue nor be sued in the partnership name. All members had to join as parties plaintiff and be named as parties defendant. Oklahoma follows the common law in actions brought by the partnership (foot note omitted).

. . . It is very doubtful, however, that a partnership could maintain an action for libel directed against the business reputation of the association.

Hager, *supra* note 1, at 9-10.

20. 418 U.S. 323 (1974).

21. Some support for this statement is found in Justice Brennan's dissent in *Gertz*, wherein he said:

[T]he idea that certain "public" figures have voluntarily exposed their entire lives to

to *Gertz* the Court had provided some guidelines as to who is a public official:

It is clear, therefore, that the "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs . . . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply.<sup>22</sup>

Illinois, in applying these guidelines to a nursing home licensed by the state and having wards of the state as patients, held that one is a public official if he is carrying out a function of government or is participating in acts relating to matters in which the government has a substantial interest.<sup>23</sup> Other cases have held as public officials the manager of a community center,<sup>24</sup> a clerk of a county court,<sup>25</sup> an ordinary, off-duty policeman,<sup>26</sup> a candidate for public office,<sup>27</sup> a member of a student senate at a state university,<sup>28</sup> an assistant dean and professor of law at a state university law school,<sup>29</sup> an architect involved in construction of a public building,<sup>30</sup> and a school principal.<sup>31</sup>

The Court in *Gertz* added to its earlier guidelines as to who is a public figure:

Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own,

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public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of lives of "public figures" that are not in the area of public or general concern.

418 U.S. at 364 (Brennan, J., dissenting) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971)).

22. *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966) (footnotes omitted).

23. *Doctors Convalescent Center v. East Shores Newspapers, Inc.*, 104 Ill. App. 2d 271, 244 N.E.2d 373 (App. Ct. 1968).

24. *Brown v. Kitterman*, 443 S.W.2d 146 (Mo. 1969).

25. *Theckston v. Triangle Publications, Inc.*, 100 N.J. Super. 452, 242 A.2d 629 (Super. Ct. 1968).

26. *Gilligan v. King*, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965).

27. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

28. *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (Ct. App. 1966).

29. *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973).

30. *Turley v. W.T.A.X., Inc.*, 94 Ill. App. 2d 377, 236 N.E.2d 778 (App. Ct. 1968).

31. *Reaves v. Foster*, 200 So. 2d 453 (Miss. 1967).

but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.<sup>32</sup>

Dean Prosser applied the definition both to invasion of privacy and to defamation:

A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a "public personage." He is, in other words, a celebrity. Obviously to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes public officers, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person.<sup>33</sup>

The United States Supreme Court has had difficulty in applying its own guidelines for a public figure. Its decision in *Time, Inc. v. Firestone*<sup>34</sup> appears to be factually inconsistent with the result in *Gertz*. Mr. Gertz was an attorney representing a client in a civil action brought against a policeman. He had served briefly as an appointive city housing committee member, had long been active in community and professional affairs, and had published several books and articles on legal subjects. The Court held he was neither a public official nor a public figure. Mr. Gertz's participation in the whole affair related solely to his representation of a private client; he did not discuss the litigation with the members of the press and was never quoted as having done so. He did not thrust himself into the vortex of this public

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32. 418 U.S. 323, 345 (1974).

33. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 118, at 823-24 (4th ed. 1971) (footnotes omitted).

34. 424 U.S. 448 (1976).

issue, nor did he attempt to influence its outcome by engaging the public's attention. Mrs. Firestone stood in a different position. Although, like Mr. Gertz, Mrs. Firestone's alleged defamation came about as a result of having been engaged in civil litigation, she was an active member of the "sporting set," a social group which does have especial prominence in the affairs of society under the Court's test. Because of her special social position, her life received constant media attention. She held several press conferences in the course of her lawsuit. Nevertheless, the Court held her to be a private person in connection with the alleged defamation.<sup>35</sup> If the results in the two cases are inconsistent, the Court's decision in *Gertz* is arguably more in keeping with its own guidelines.

The Oklahoma Supreme Court has had little opportunity to become involved in this public figure, private figure dichotomy. In *Martin v. Griffin Television, Inc.*,<sup>36</sup> the plaintiff Martin owned and operated a commercial pet shop which offered pet grooming, sold pet supplies, and sometimes purchased and sold pets. The court held the plaintiff to be a private individual<sup>37</sup> and compared his position to that of Mr. Gertz in the *Gertz* decision. However, the plaintiff in *Washington v. World Publishing Co.*<sup>38</sup> did not fare so well and, because he had thrust himself into a controversy of public interest, found himself declared a public figure.<sup>39</sup> Mr. Washington was the American Party's nominee for

35. "[R]espondent did not assume any role of especial prominence in the affairs of society . . . and she did not thrust herself to the forefront of any particular public controversy . . ." 424 U.S. at 453.

36. 549 P.2d 85 (Okla. 1976).

37. Here, Martin, as was Gertz, must be characterized as a private individual. Martin was not a public figure for all purposes and in all contexts by achieving pervasive fame and notoriety. He had not become a public figure for a particular issue by voluntarily injecting himself into a particular public controversy; he had not thrust himself into the vortex of a public issue nor attempt to engage the public's attention to influence the outcome of a public issue. Martin was a private individual.

*Id.* at 89 (footnotes omitted).

38. 506 P.2d 913 (Okla. 1973).

39. Plaintiff's deposition shows the following: he had permitted the use of his law office as the unofficial Tulsa County headquarters of the American Party; he had permitted the use of his office address and telephone number in a newspaper ad soliciting funds for the American Party's presidential candidate, George Wallace; plaintiff was the party's nominee for United States Senator from Oklahoma. In our opinion the trial court did not err, in finding for the purposes of motion for summary judgment, that Washington was a "public figure." Moreover, the public posture of the American Party both then and now on issues of great public interest could hardly be said to be non-controversial. That being true, and though there were no volatile or potentially volatile and imminent confrontations involved here as was the situation on the University of Mississippi campus when General Walker appeared there, nonetheless, it might be said here as was argued in the Walker case that Washington had thrust himself into the "vortex" of controversy and his protection under the libel laws was, therefore, limited.

*Id.* at 916.



United States Senator and allowed his office and telephone number to be used by the local unit of the National American Party, a highly controversial political party. The public figure issue in the *Martin* and *Washington* cases was not difficult to decide. The facts presented in evidence made quite clear that, under the guidelines laid down by the United States Supreme Court, Martin was a private figure and Washington was a public figure.

The Oklahoma Supreme Court had a more difficult time in deciding that issue in the recent case of *Johnston v. Corinthian Television Corp.*<sup>40</sup> The plaintiff was a physical education teacher in the Skiatook, Oklahoma, public schools and coached the grade school wrestling team. The coaching activity was done within the framework of the public school system, although that activity was entirely voluntary on the plaintiff's part. The allegedly false defamatory statements were contained in television newscasts and concerned certain activities that were reported to have occurred in connection with the wrestling team which the plaintiff coached. The trial judge granted the defendant's motion for a summary judgment on the grounds that Johnston was both a public official and a public figure, and that the defendant television station had acted without actual malice under the *New York Times* test. The Oklahoma Court of Appeals reversed on the ground that the plaintiff was a private person under facts analogous to the *Martin* decision and remanded to allow the trial court to apply the negligence test established in *Martin*. The Oklahoma Supreme Court found the plaintiff to be a public official because the position of wrestling coach was of importance in the Skiatook public school system and because the public's interest in this coaching position went beyond the general interest of the public in the performance of all government officials.<sup>41</sup> The im-

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40. 583 P.2d 1101 (Okla 1978).

41. In its unanimous opinion, the Oklahoma Supreme Court held:

Here, there must first be a determination as to whether Johnston shall be considered a private or non-private person for the purpose of this defamation action. We find him to be a non-private person based on his being a public official.

"A person may become a public official within contemplation of the *New York Times* rule in either of two ways. First as that case itself illustrates, he may be an elected official, and the alleged libel must relate to his official capacity. Second, as the Court held in *Rosenblatt v. Baer*, he may be a government employee with such responsibility that the public has an independent interest in his position and performance, and the alleged libel must relate to his official capacity."

*Rosenblatt, supra*, found a supervisor of a county ski resort, who was employed by and directly responsible to county commissioners, to be a public official for federal constitutional protection purposes. The opinion refused to accept as a definition of a "public official" the understanding of the term for a local administrative purpose. Guidelines of the term "public official" are contained in the decision: (1) "at the very least, to those among the hierarchy [*sic*] of government employees who have, or appear to the public to

portance of this decision in the development of the public official issue nationally is in part indicated by the filing of *amicus curiae* briefs by the National Newspaper Association and the Oklahoma Education Association.

In the recent case of *Wright v. Haas*,<sup>42</sup> the plaintiff had written a letter to the editor which was published in the University of Oklahoma newspaper. The defendant's letter was in response to that of the plaintiff and was published a few days after the plaintiff's letter appeared. The court found the plaintiff to be a public figure because he had voluntarily sought publicity to influence public opinion,<sup>43</sup> and it applied the *New York Times* standard.

The *Gertz* case permitted the states to adopt a negligence standard in defamation actions brought by private parties against media defend-

have, substantial responsibility for or control over the conduct of governmental affairs (emphasis added)", and (2) "(W)here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees."

We apply the second standard to Johnston. His position as wrestling coach was of apparent importance in that public school's athletic program for the public to have an independent interest in Johnston's performance as to the method of disciplining a sixth grade boy in conjunction with the grade school wrestling team. This interest went beyond the general interest as to the performance of "all government employees," as indicated by the number of withdrawals of students by parents from Johnston's physical education classes. Though the grade school coaching duties were voluntary, Johnston was operating within the framework of the public school system, an obvious governmental function.

*Basarich v. Rodeghero* was a libel suit brought by high school teachers and coaches against a "newsletter" publisher. That opinion deals with the same issue before this court and reads, in part:

"Plaintiffs are public employees, hired by the school board and paid with public funds. As coaches and teachers in a local high school they maintain highly responsible positions in the community.

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"Public school systems, their athletic programs, and those who run them are consistent subjects of intense public interest and substantial publicity.

\* \* \*

"Public school teachers and coaches, and the conduct of such teachers and coaches and their policies, are of as much concern to the community as are other 'public officials' and 'public figures.'

In present case, the conduct of a coach-teacher and his policies were as much a concern to the community as any other "public official."

Though called a strained application by the Court of Appeals decision, we can think of no higher community involvement touching more families and carrying more public interest than the public school system. This includes the athletic program. *Rosenblatt, supra*, rejected a local understanding of "public official," with its first standard setting forth a *minimal definition* of that term.

*Id.* at 1102-03 (footnotes and citations omitted).

42. 586 P.2d 1093 (Okla. 1978).

43. "Wright voluntarily injected himself into the vortex of the public controversy by writing his letter addressed to the editor with the intent it be published. Wright's letter sought to engage the public's attention to influence public issues." *Id.* at 1096.

ants, but did not require it. The Colorado Supreme Court was the first state after *Gertz* to pass on the question of what the standard should be. In *Walker v. Colorado Springs Sun, Inc.*,<sup>44</sup> the court adopted the position of the *Rosenbloom v. Metromedia, Inc.*<sup>45</sup> plurality opinion and held that when a defamatory statement has been published concerning one who is neither a public official nor a public figure, but the matter involved is of public or general concern, the publisher of the statement will be liable to the person defamed if the publisher knew the statement to be false or made the statement with reckless disregard of its truth or falsity. If the matter is not one of public or general concern, the private person plaintiff need prove only negligence. This bifurcated approach obviously returns us to some troublesome issues. What is a matter of public or general concern? Who decides the issue? Should the decision be left to the media, as was largely true in earlier times? If so, who judges the judges?

Kansas has adopted the negligence standard.<sup>46</sup> The defendant newspaper in that case reported falsely that the plaintiff had pleaded guilty to a charge of cruelty to animals, specifically the starving of pigs. The Kansas Supreme Court reasoned that the communication media have a considerable impact on the life of the individual citizen in reporting judicial proceedings and that the media should be accountable for its negligence in the exercise of that function.

A third permissible approach under *Gertz* is to apply the *New York Times* test of actual malice to all private plaintiffs whether there are issues of general or public concern. Oklahoma has decided to adopt the same position as Kansas and to apply a negligence standard. The Oklahoma Supreme Court said succinctly, "We conclude a reasonable balance between the right of the news media and the right of the private individual is best achieved by the negligence test."<sup>47</sup>

### C. *Malice in Defamation Cases*

Malice is one of the most troublesome words in the legal lexicon because its meaning is derived from the context in which it is used. Nowhere is that statement more true than in defamation cases where malice can be used in four different senses.

In the early law of defamation, malice, in the sense of spite or an

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44. 538 P.2d 450 (Colo. 1975).

45. 403 U.S. 29 (1971).

46. See *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975).

47. *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 92 (Okla. 1976).

improper motive, had to be pleaded and proved by the plaintiff. This pleading of malice became a pure formality, and malice was implied by law from an intentional publication of a defamatory character.<sup>48</sup> Oklahoma, by statute and case decisions, appears to use malice in the sense of spite or an improper motive. The statutory definition of libel speaks of a malicious publication, which implies that the plaintiff must show it as an element of his case.<sup>49</sup> The Oklahoma Supreme Court opinions on the issue of malice as an essential ingredient of the plaintiff's case are unclear.<sup>50</sup> However, the apparent inconsistencies can be synthesized into the rule that the plaintiff must allege malice to plead a prima facie case, but he may prove this element and establish his prima facie case by means of the legal implication of malice. Because the allegation is purely a formality, it would be better to do away with any requirement of pleading or proving malice in this initial sense of the word. Moreover, this requirement would only apply in a defamation action today to a private person plaintiff in a state, such as Oklahoma, which has adopted negligence as the standard of liability for such persons suing a media defendant.

Malice is used in another sense in the *New York Times* rule which defines it as knowing a statement is false or acting in reckless disregard of its truth or falsity. In one of the most important decisions concerning defamation since the *New York Times* case, the Oklahoma Supreme Court held to be unconstitutional those sections of the Oklahoma libel and slander statutes which created the presumption of malice.<sup>51</sup> The Oklahoma Supreme Court held in a 1973 case that a

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48. But the pleading of "malice" tended more and more to become a pure formality, until in 1825 it was held that "malice" would be implied by the law from an intentional publication of a defamatory character, even though the defendant harbored no ill will toward the plaintiff, and honestly believed what he said to be true. In any such sense as this, "malice" becomes a bare fiction.

Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33, 35-37 (1904). See also Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries*, 41 L.Q. REV. 13, 24-26 (1925).

49. OKLA. STAT. tit. 12, § 1441 (1971).

50. See *Harris v. Rich*, 104 Okla. 120, 229 P. 1080 (1924), where the court said, "In all cases of defamation, whether oral or written, malice is an essential ingredient, and must be averred. But when averred, and the language, verbal or written is proved, the law will infer malice." *Id.* at 122, 229 P. at 1081. But see *Craig v. Wright*, 169 Okla. 245, 43 P.2d 1017 (1934), where the court said, "Malice is emphatically no part of a plaintiff's cause of action for libel." *Id.* at 247, 43 P.2d at 1019.

51. Resulting from the constitutional limitation imposed by the *New York Times* case, *supra*, to public officials, by *Curtis Publishing Co.* case, *supra*, to public figures, and now extended to private individuals by *Gertz*, *supra*, we hold the legislative creation of presumed malice under the Oklahoma libel and slander statutes to be unconstitutional. We find the following sections or portions thereof unconstitutional:

12 O.S.1971, § 1443 as to that part which provides:

news reporter did not violate the *New York Times* rule of reckless disregard of the truth or falsity of his statements by failing to advise the public official plaintiff of the specific accusation to be made against him in a newspaper article.<sup>52</sup> The court reasoned that this failure of the reporter was not highly unreasonable conduct constituting an extreme departure from reporting standards and, therefore, was not reckless disregard of the accusation's truth or falsity. Later, in 1977, the court affirmed the trial court's judgment for the defendants on the ground that the plaintiff, a police chief, had not proved actual malice against the defendants, a television station and its news reporter.<sup>53</sup>

The other two senses in which the word malice is used in defamation cases relate to the plaintiff's attempt to overcome a conditional privilege which is not governed by the *New York Times* rule, and the attempt to recover punitive damages.

*Brown v. Skaggs-Albertson's Properties, Inc.*<sup>54</sup> addressed the issue of conditional privilege and involved a private person as the plaintiff and a corporation as the defendant. The United States Court of Appeals for the Tenth Circuit, applying Oklahoma law, affirmed the lower court's decision for the plaintiff and discussed the conditions under

"In all cases of publication of matter not privileged under this section, malice shall be presumed from the publication, unless the fact and the testimony rebut the same."

12 O.S.1971, § 1444 as to that part which provides:

". . . and the plaintiff to recover shall *only* be held to prove that the matter was published or spoken by the defendant concerning the plaintiff." (Emphasis added).

12 O.S.1971, § 1445 which provides:

"An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."

*Martin v. Griffin Television, Inc.*, 549 P.2d 85, 90 (Okla. 1976). This holding was forecast earlier by a law student who wrote: "A state law presumption of malice, such as that contained in sections 1443 and 1445, as well as the case law distinctions between statements of fact and opinion, appears contrary to such a holding." Note, *Libel and Slander: Constitutional Standards Challenge Oklahoma Law*, 26 OKLA. L. REV. 94, 96 (1973).

52. *Washington v. World Publishing Co.*, 506 P.2d 913 (Okla. 1973).

53. *Henslee v. Monks*, 571 P.2d 440 (Okla. 1977). The instruction on malice provided in part:

The burden of proof is on plaintiff to show by clear and convincing evidence that defamatory falsehoods were telecast or published about him with actual malice, and such caused him injury and damage . . . .

By "actual malice" is not meant that either defendant bore him hatred or ill-will, but that defamatory falsehoods were telecast about him either with actual knowledge of their falsity, or with reckless disregard as to whether or not they were false.

"Reckless disregard" means an awareness of the probable falsity of defamatory statements, or serious doubts as to the truthfulness of statements, in spite of which awareness or doubt, the defamatory falsehood is published or telecast.

*Id.* at 444 n.6. The jury's verdict read:

The plaintiff has not proved defamatory falsehoods made with "actual malice" by clear and convincing evidence, and our judgment is in favor of defendants against the plaintiff.

*Id.* at 444 n.5.

54. 563 F.2d 983 (10th Cir. 1977).

which the defendant's conduct destroys a conditional privilege. The court found a conditional privilege to exist when the communication is made in discharge of a public or private duty, as in the instant case of furtherance of legitimate business interests.

The court held that this privilege can be destroyed by the defendant if the communication is made for purposes outside the privilege or if it is made with malice. The court was willing to infer malice without evidence of an intent to injure the plaintiff if there was an unreasonable failure to investigate the truth of the communication. However, the defendant's failure must go beyond negligence and rise to the level of recklessness.<sup>55</sup>

If the United States Supreme Court extends the *Gertz* reasoning to all publishers, and not just to media publishers as was the fact in the case, the conditional privilege will lose its significance in most states. *Gertz* permitted a state to elect either a standard of negligence or the actual malice standard of *New York Times* or something in between. Both negligence of the defendant (under the majority view at common law) and malice destroy the conditional privilege. Thus, proof by the plaintiff of conduct required to overcome the constitutional standard of malice will also serve to establish the abuse of the common law conditional privilege.

In any event, whatever the fate of the conditional privilege may be where a private person plaintiff sues a nonmedia defendant as in the *Brown* case, a recent Oklahoma Court of Appeals decision<sup>56</sup> made clear that conditional privilege is no longer a viable defense when a private person sues a media defendant. In that case the plaintiff sued a television station for defamatory broadcast. The Oklahoma Court of Appeals affirmed the trial court's grant of the defendant's motion for a summary judgment on the ground that reasonable minds, applying the

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55. Communications, then, in furtherance of legitimate business interest are privileged, but the privilege is qualified being subject to the communication being within the bounds of the privilege. If it is made for purposes outside the privilege or with malice, the privilege is lost.

. . . . Malice in the sense of ill will and an express design to inflict injury was not present, but it can consist of an unreasonable and wrongful act done intentionally, without just cause. Malice may be inferred in the situation where the defendant has no reasonable basis for believing that the statement is true. This would be the case where there had been a failure to make an adequate investigation.

. . . Simple negligence would not, however, be enough to establish implied malice. It must rise to the level of recklessness.

*Id.* at 986 (citations omitted).

56. *Benson v. Griffin Television, Inc.*, 49 OKLA. B.A.J. 1150 (June, 1978).

standard of ordinary care for the business of television broadcasting, could not reach a conclusion other than that the defendant had exercised due care. The defendant station argued that a conditional privilege exists for the news media as long as the falsehoods were published or broadcast in good faith about news events, because such a publication fulfills a moral or social duty. The plaintiff argued that the negligence standard adopted in the *Martin* case precluded any conditional privilege.

The court reaffirmed the negligence standard adopted in *Martin* when a private party sues a media defendant. The court rejected the establishment of a conditional privilege which could only be destroyed by proof of malice. There is no conditional privilege for a media defendant; it will be liable if it fails to exercise that degree of care which is used by reasonably prudent persons engaged in media dissemination of news.<sup>57</sup>

The final sense in which malice is used in defamation cases occurs in an attempt to recover punitive damages. This aspect of malice will be discussed hereafter when other types of damages are considered. Let it suffice for the moment to note that the Court in the *Brown*<sup>58</sup> case

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57. The Kansas cases have established a common law qualified privilege for the news media based on the lengthy analysis in *Coleman v. MacLennan, supra*. As stated in *Gobin v. Globe Publishing Co.*, a post-*Gertz* case, "[e]ven though a statement complained of be false, if it is qualifiedly privileged, it must be made with malice before it is actionable." The effect of the qualified privilege in Kansas is to rebut the common law inference of malice based only on falsity. Since malice is not required for a private person to recover under *Martin* the effect of the adoption of the Kansas position, when combined with *Martin*, is to convert the qualified privilege into an absolute defense unless the private plaintiff can plead and show malice or reckless disregard for the truth. The consequence is to place on the private plaintiff the same burden shouldered by a public official under *New York Times Co. v. Sullivan*.

The Restatement of the Law, Second, Torts (A.L.I. 1977) supports the balancing process developed by *Martin*. See §§ 594 and 595. In an identical comment to these two sections the drafters remark as follows on the effect of *Gertz* on the conditional or qualified privilege:

Another significant consequence of all of this is that the courts will now find it necessary to reassess the circumstances under which it is appropriate to grant a conditional privilege. If a proper adjustment of the conflicting interests of the parties indicate that a publisher should be held liable for failure to use due care to determine the truth of the communication before publishing it, a conditional privilege is not needed and should not now be held to apply. The conditional privilege should be confined to a situation where the court feels that it is appropriate to hold the publisher liable only in case he knew of the falsity or acted in reckless disregard of it.

49 OKLA. B.A.J. at 1151 (June, 1978) (citations omitted).

The Oklahoma Supreme Court affirmed this position by stating, "We hold there is no longer a 'conditional privilege' available, either by statute or common law, as a defense to a public defamation plaintiff." *Wright v. Haas*, 586 P.2d 1093, 1097 (1978). The case is interesting also in that the plaintiff, a public figure, sued the defendant for alleged defamation via a newspaper without joining the newspaper as a defendant.

58. 563 F.2d 983 (10th Cir. 1977).

held that the defendant's act must rise to the level of recklessness to destroy a conditional privilege on the grounds of malice and that the same standard would apply to the award of punitive damages.<sup>59</sup>

#### D. *Truth as a Defense*

Assuming that the plaintiff has made out a prima facie case, the defendant may escape liability by establishing that what was communicated was true . . . . Truth is a complete defense if the defendant can show that the imputation is substantially true. Generally, the defendant need not show the literal truth but must establish that what was communicated was basically true as to the "sting" of the libel. Truth is generally a total defense regardless of the motives.<sup>60</sup>

In his earlier article, the author, because of the equivocal language of the Oklahoma Constitution, the statutes, and the case decisions, expressed some doubt whether Oklahoma regarded truth as a total defense regardless of the motives of a defendant. The Oklahoma authorities seemed to require the defense of truth to be coupled with good motives and justifiable ends, that is, under circumstances that would make the communication privileged. The author speculated that the rule in Oklahoma, although not clearly enunciated, was that truth alone, without good motives or justifiable ends, is an absolute defense.<sup>61</sup> This speculation has proved to be true. In *Hetherington v. Griffin Television, Inc.*,<sup>62</sup> the court said, "Contrary to the defendant's assertion, truth is an affirmative defense. The burden of proving truth rests upon the defendant."<sup>63</sup> The inference to be drawn from the court's opinion is that the defendant must prove the truth of its statement, and, when it has done so, it has a valid defense. The *Hetherington* decision followed one by the Oklahoma Supreme Court in which Justice Lavender, speaking for the court, upheld the trial court's instruction to the jury on truth which read in part:

The first issue for you to determine in this case is whether the statements about the plaintiff contained in plaintiff's exhibit nine (9) are true or false. The defendant has the burden of proof on this issue and if you find said statements are true then it will not be necessary for you to consider the remaining

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59. *Id.* at 987.

60. Yasser, *Defamation As A Constitutional Tort: With Malice For All*, 12 TULSA L.J. 601, 606 (1977) [hereinafter cited as Yasser].

61. Hager, *supra* note 1, at 19-22.

62. 430 F. Supp. 493 (W.D. Okla. 1977).

63. *Id.* at 498.



issues in this case and you must return a verdict for the defendant.<sup>64</sup>

Seemingly, the court felt constrained to hold as it did because of certain statutory provisions which state that the defendant has the burden of proving that defamatory statements made by it against the plaintiff are true.<sup>65</sup>

As the *Martin* case<sup>66</sup> involved a private individual suing a media defendant and adopted a negligence test as a standard of liability,<sup>67</sup> the decision based upon the statutes seems a correct one because the *New York Times* test of actual malice was not involved. However, it is submitted that in any case which requires the application of the *New York Times* standard of liability (plaintiff public official, plaintiff public figure, or plaintiff private person seeking presumed or punitive damages),<sup>68</sup> the Oklahoma statutes are inapplicable, and truth ceases to be an affirmative defense. On the contrary, proving the alleged defamatory communication to be false will become an essential part of the plaintiff's allegations and proof. No United States Supreme Court case specifically so holds. But if a plaintiff must meet the *New York Times* standard of showing that the defendant either knew its statement was false or acted in reckless disregard of its truth or falsity, inferentially

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64. *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 94 (Okla. 1976).

65. OKLA. STAT. tit. 12, § 304 (1971) provides: "In the actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and may prove the same, and any mitigating circumstances, to reduce the amount of damages, or he may prove either." Section 1444 provides in part: "As a defense thereto the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as defamatory was true." OKLA. STAT. tit. 12 § 1444 (1971).

66. 549 P.2d 85 (Okla. 1976).

67. See notes 44-47 *supra* and accompanying text.

68. The author will not discuss in this article the question of whether a plaintiff must plead the category into which he falls, or whether a defendant would raise the issue (where the plaintiff considers himself to be a private person). In a recent case, a federal court tangentially touched on this issue when it said:

The elements of the plaintiff's case involve showing what the defamatory matter was, that it was broadcast, published or spoken of the plaintiff, the failure of the broadcaster to exercise ordinary care and that damage flowed from the defamatory broadcast. Additionally, the plaintiff's case would include the showing of actual malice in support of any effort to recover presumed damages or punitive damages.

*Hetherington v. Griffin Television, Inc.*, 430 F. Supp. 493, 498 (W.D. Okla. 1977) (citations omitted). The case, however, clearly involved a private person suing a media defendant.

The Oklahoma Supreme Court touched briefly on the matter when it said:

It is not plead [*sic*] in plaintiff's amended petition that he was or was not a "public figure" as that term is defined in *Curtis Publishing Company v. Butts*, *supra*. But the admission by Washington that he was, at the time of publication of the news article in question, in fact, such a figure seems tacitly implied from the language in the first sentence in the last paragraph of the amended petition just preceding the prayer which reads: That defendant published said article with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

*Washington v. World Publishing Co.*, 506 P.2d 913, 915 (Okla. 1973).

the plaintiff must prove that the statement was false. In such a situation where the *New York Times* standard is required, the affirmative defense of truth has now become a part of the plaintiff's prima facie case.

### E. *Per Se* Defamation

The problem of what kind of damages can or must be pleaded, and the per quod/per se dichotomy have, from very early times, been inextricably and unfortunately tied together in a seemingly insolvable Gordian knot. The United States Supreme Court could prove to be the modern day Alexander the Great in severing this knot. Slander per quod at common law required proof of special damages; slander per se did not.<sup>69</sup> The common law courts distinguished between the two kinds of slander (unlike the distinction between the two kinds of libel, discussed hereafter) merely as a procedural matter having to do with what kind of damages a plaintiff could or must plead. The reasoning was that, if a plaintiff suffered a slander per se, there must have been some damage to his reputation because of the seriousness of the slander, and the court will presume it even though the plaintiff was unable to plead any actual injury or to prove it by direct evidence.

No Oklahoma statute<sup>70</sup> defines slander per se, and doubt was cast by the Oklahoma Supreme Court in *Findley v. Wilson*<sup>71</sup> on whether Oklahoma agrees substantially with its common law definition. In

69. Slander is actionable per se only if the slanderer says that the plaintiff: (1) committed a crime of moral turpitude; or (2) has venereal disease or something equally loathsome or communicable; or (3) is somehow unfit or not to be trusted in her occupation; or (4) is not chaste.

Yasser, *supra* note 60, at 605.

70. OKLA. STAT tit. 12, § 1442 (1971) provides:

Slander is a false and unprivileged publication, other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted or punished for crime.
2. Imputes in him the present existence of an infectious, contagious or loathsome disease.
3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.
4. Imputes to him impotence or want of chastity; or,
5. Which, by natural consequences, causes actual damages.

Any first year law student will recognize that the first four of these instances listed, with certain changes, are merely declaratory of what finally came to be slander per se at common law. With this knowledge of what constituted slander per se at common law, a reasonable interpretation of the statute would be that the legislature intended the first four paragraphs to constitute slander per se and thus actionable without allegation and proof of special damages, and intended that actual damages must be alleged and proved in the situation in paragraph five.

71. 115 Okla. 280, 242 P. 565 (1926).

*Findley* the court defined slander per se as meaning taken alone, in itself, or by itself; and held that words which expose a person to public hatred, contempt, or obloquy, or tend to deprive him of public confidence, or injure him in his occupation are slanderous per se. The court in that case did not have occasion to decide whether the following hypothetical facts would constitute slander per se: plaintiff is defamed orally which clearly is slander; he neither alleges nor proves special damages; the defamation is plain and unambiguous (the usual test for libel per se), but the slander does not fall within one of the first four instances listed in the Oklahoma statutory definition of slander.<sup>72</sup> An Oklahoma Court of Appeals case addressed the same situation posed by the hypothetical facts, and the court held that, although the slander was defamatory on its face and plain and unambiguous, the plaintiff did not show slander per se because he did not show any of the four common law instances of slander per se, as listed in the statute.<sup>73</sup>

As opposed to slander, all libel was actionable at common law without the necessity of pleading and proving special damages.<sup>74</sup> The distinction made between libel per se and libel per quod at common law determined whether the plaintiff had to plead colloquium, inducement, or innuendo.<sup>75</sup> Colloquium was the pleading of facts to show why the libel was defamatory of the particular plaintiff when the plaintiff was not identified specifically in the publication. Inducement was the pleading of facts to show why the publication was libelous when the defamatory meaning could be established only by reference to facts not apparent upon the face of the publication. Innuendo was the pleading of facts necessary to show the defamatory meaning of a word or phrase which was slang or was capable of either an innocent or a defamatory meaning. However, several states, including Oklahoma, began to change the common law so that a libel per quod, like a slander per quod, required allegation and proof of special damages. In a 1973 case

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72. OKLA. STAT tit. 12, § 1442 (1971). See note 70 *supra*.

73. The words said to have been spoken by defendant's agent were, we think, defamatory on their face in that they have a clear tendency to injure plaintiff's reputation. By natural import they diminish the esteem, respect, and confidence in which she is held by others. This would, had the publication been written, be actionable without proof of damages.

But it was not written and so—because they neither charge a crime, impute disease or sexual irregularity, nor tend to injure plaintiff in respect to any known office or calling—it matters not how grossly defamatory or insulting the words may be they are actionable only upon proof of "special damages."

*Standifer v. Val Gene Management Servs., Inc.*, 527 P.2d 28, 31 (Okla. Ct. App. 1974).

74. The *Restatement (Second) of Torts* has adopted this view of the common law. See RESTATEMENT (SECOND) OF TORTS § 569 (1977).

75. See Yasser, *supra* note 60, at 605 n.25 for a good discussion of this point.

the Oklahoma Supreme Court made clear that a writing not libelous per se was not actionable without an allegation of special damages.<sup>76</sup> "The distinction between libel per se and libel per quod introduces into the law of libel complications unparalleled in the law of slander."<sup>77</sup> The complications arise in part because the various states do not agree upon the test for libel per se. Is it libel per se when a plaintiff is not identified specifically in the libel?—when the libel is plain on its face without the necessity of pleading inducement or innuendo, but the libel does not meet one of the categories of slander per se?—when the libel meets one of the categories of slander per se but is not plain on its face?

Oklahoma follows the common law in regarding a libel as per se and dispensing with the necessity of pleading and proving special damages only when it is not necessary to plead and prove extrinsic facts or interpretations to establish the defamatory meaning. Unlike some other states, however, Oklahoma does not require that the plaintiff be named or otherwise identified in the publication for the communication to be libelous per se. Whether an article is a libel per se and whether it has application to a particular party plaintiff are entirely distinct questions.<sup>78</sup> The Oklahoma Supreme Court has not had to decide whether special damages must be proved if the libel is shown by extrinsic facts to fall into one of the four classes of slander per se.<sup>79</sup> A federal court, presumably using Oklahoma law, did touch on the issue when it said:

In support of its connection that the evidence is insufficient to support the award of money damages, general and special, appellant contends that the most that was proven was

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76. "The established rule for determining the validity of a petition in a libel suit is that where a writing is not libelous per se, recovery is dependent on allegation of special damages." *Haynes v. Alverno Heights Hosp.*, 515 P.2d 568, 569 (Okla. 1973). This had been the "established rule" in Oklahoma for some time. See Hager, *supra* note 1, at 16-17.

77. C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS IN TORTS* 1013 (3d ed. 1977).

78. Whether an article is of a libelous character per se, and whether it has application to a particular party plaintiff, are entirely distinct questions, and should not be confused. The answer to the first question is to be found in the article itself. The answer to the second question is to be found in the proof supporting proper allegations in the complaint. Those proofs may consist of either the article itself, or of extrinsic evidence. *Fawcett Publications, Inc., v. Morris*, 377 P.2d 42, 50 (Okla. 1962) (quoting from *National Ref. Co. v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir. 1927)) (emphasis added).

79. "An exception to the libel per quod rule is that if the statement could have been slander per se if spoken, proof of special damages is not required." J. HENDERSON, JR. & R. PEARSON, *THE TORTS PROCESS* 843 (1975). "Libel per quod, however can be magically transformed to libel per se if it turns out that the defamatory statement as illuminated by extrinsic facts falls within one of the four classes of slander actionable per se." Yasser, *supra* note 60, at 606. For the four classes of slander per se, see notes 69-70 *supra*.

libel per quod so as to *require* proof of special damages. As we have pointed out above, the defamation in suit imputed the commission of a crime; so even if it were to be regarded as libel per quod, the exception applicable in a slander case, and cases imputing the commission of an offense would apply and would support the plaintiff's claims for general damages.<sup>80</sup>

### F. Damages

If a plaintiff has a case of defamation per se, whether libel or slander, and therefore does not have to plead and prove special damages, he may nevertheless do so if he has suffered such damages. Punitive damages are not limited to cases of defamation per se. These two statements are borne out in a federal court opinion in Oklahoma where the court held that one who is liable for per se defamation is liable for both general and special damages, and that punitive damages may be recovered in cases of defamation per quod.<sup>81</sup>

The United States Supreme Court could do away with the troublesome per se/per quod dichotomy by either of two extreme measures. It could follow the view of Justice Black<sup>82</sup> and hold the first amendment freedoms of speech and press to be absolute. Under this position, all defamation actions, civil and criminal, would be unconstitutional and would disappear from our legal system. Alternatively, the Court could hold that in every defamation action, regardless of the status of the plaintiff or the defendant, the plaintiff must prove actual malice as defined in the *New York Times* case.<sup>83</sup> The Supreme Court is not likely to take either position. The exact constitutional status of damages and the

80. *Brown v. Skaggs-Albertson's Properties, Inc.*, 563 F.2d 983, 988 (10th Cir. 1977) (emphasis in original).

81. It is settled law that one who is liable for a per se libel or slander is liable for both general and special damages. General damages are defined as all actual damages which naturally and necessarily flow from the wrongful act. Special damages, on the other hand, are actual damages which naturally, but not necessarily, flow from the wrongful act.

. . . . [T]imely objections were made to instructions on punitive damages, apparently on the theory that punitive damages are not recoverable for defamations not actionable per se. . . . We have found no case or comment to the effect that punitive damages are not recoverable in defamations per quod in the discretion of the jury based upon a specific finding of malice and special damages.

*M.F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167, 172-73 (10th Cir. 1968) (citations omitted).

82. Black, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 557, 558 (1962).

83. See Yasser, *supra* note 60, at 625-26, arguing for this approach.

per se/per quod dichotomy today is not clear. The *Restatement (Second) of Torts* provides:

Although special damages need not be proved if the communication is actionable per se, the Constitution is now held by the Supreme Court to require proof of "actual injury" to the plaintiff, at least if the defendant did not have knowledge of the falsity of the statement or act in reckless disregard as to its truth. The constitutionality of the common law rule that nominal damages may be recovered for a defamatory communication that is actionable per se, even in the absence of proof of harm to reputation, is now somewhat uncertain.<sup>84</sup>

An Oklahoma statute<sup>85</sup> which did not deal with nominal damages as in the *Restatement* above, but which did provide for a minimum judgment of not less than one hundred dollars with no proof as to loss or damage was held unconstitutional by the Oklahoma Supreme Court.<sup>86</sup> This holding is arguably correct because the statute was so broad as to include all defamation cases. And certainly the decision is correct as applied to the facts in the case. There the plaintiff was a private person suing a media defendant and was required only to prove negligence, whereas "*Gertz* constitutionally requires the New York Times standard of actual malice where the defamed party is a private person for the recovery of presumed damages."<sup>87</sup> Could not the statute, however, be constitutional as applied to all situations not governed by the decision in *Gertz*, such as a private person plaintiff suing a private person defendant who has not used the media for his defamatory statements? "[A]pparently in defamation actions against the media tried pursuant to the *New York Times Co.* standard, presumed and punitive damages might still be awarded."<sup>88</sup> If presumed damages are to be allowed at all, may not a legislature establish a small minimum for such presumed damages?

### III. OKLAHOMA STATUTES

Most tort actions in Oklahoma, as elsewhere, are creatures of the common law and thus are not governed by statutes. However, this is not true of libel and slander in Oklahoma because these actions are

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84. RESTATEMENT (SECOND) OF TORTS § 569, comment C. (1977).

85. OKLA. STAT. tit. 12, § 1446 (1971).

86. *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976).

87. *Id.* at 93.

88. H. ZUCKMAN & M. GAYNES, MASS COMMUNICATIONS LAW 73 (1977).

authorized and regulated by specific statutes.<sup>89</sup> These statutes are confusing and rife with unanswered questions. One source of confusion is that the statutory language defining civil libel is exactly the same language used to define criminal libel.<sup>90</sup>

Whatever may have been the motive of the Legislature in making the criminal and civil definitions of libel identical, the definition *supra* has created troublesome problems for the trial and appellate courts, some of which problems the Oklahoma Supreme Court has resolved to the satisfaction of no one, unless it be a winning party. Inherent in the definition are other problems which continue to disturb law students, law professors, attorneys, trial judges, and perhaps even Supreme Court justices who may one day be called upon for definitive resolutions of problems inherent in the statutes.<sup>91</sup>

Since that statement was made, the Oklahoma Supreme Court has had to make some definitive resolutions of problems inherent in the statutes, primarily because of the *New York Times* case and its progeny. The sections concerning a presumption of malice have been declared unconstitutional.<sup>92</sup> The section concerning what a plaintiff must prove to establish a prima facie case has also been declared unconstitutional.<sup>93</sup> The statute providing for a minimum judgment in favor of a successful plaintiff also has been struck down.<sup>94</sup> Thus, the effectiveness and validity of the statutory regulation of defamation seems certain to continue to be called into question.

#### IV. CONCLUSION

The Oklahoma Legislature has several options regarding the statutes on libel and slander. It can (1) do nothing; or (2) repeal all the statutes, leaving to the Oklahoma judiciary the task of developing the law of defamation as new cases are decided by the United States Supreme Court and as new problems develop; or (3) revise the statutes soon to reflect the decisions of the Oklahoma Supreme Court declaring certain sections or portions thereof unconstitutional; or (4) wait to re-

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89. OKLA. STAT. tit. 12, §§ 1441-1447.5 (1971).

90. Compare OKLA. STAT. tit. 12, § 1441 (1971) with OKLA. STAT. tit. 21, § 771 (1971).

91. Hager, *supra* note 1, at 3.

92. See note 51 *supra* and accompanying text. See also OKLA. STAT. tit. 12, §§ 1443, 1445 (1971); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976).

93. See note 51 *supra* and accompanying text. See also OKLA. STAT. tit. 12, § 1444 (1971); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976).

94. See notes 85-86 *supra* and accompanying text. See also OKLA. STAT. tit. 12, § 1446 (1971); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976).

wise the statutes until certain questions left unanswered by the United States Supreme Court have been addressed by that body. This writer expects that the legislature will choose to do nothing at this point, which does not imply criticism of the legislature. In its relatively short annual sessions, it has many pressing problems, and there seems to be no large constituency pressing for reform of the defamation statutes.

The preferable legislative choice would be to repeal all statutes relating to defamation and to leave to the Oklahoma courts the task of developing a cohesive, fair body of defamation law. The many areas of the law of torts do not lend themselves as well to codification as do some other fields of law. The Oklahoma Legislature seems to have recognized the general truth of that statement because defamation is one of the few areas of tort law regulated by statute.<sup>95</sup> Further, under the statutory title "Torts,"<sup>96</sup> there are fewer sections than under almost any other title in the entire body of Oklahoma's statutory law. There have been many profound changes in the law of civil libel and slander in Oklahoma since 1964. Many other changes will be forthcoming, either as a result of United States Supreme Court decisions or as a result of decisions from what this writer considers to be an excellent Oklahoma Supreme Court.

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95. Another notable exception is misrepresentation or deceit. *See* OKLA. STAT. tit. 76, §§ 2-4 (1971).

96. OKLA. STAT. tit. 76, §§ 1-22 (1971).