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DEFAMATION LAW—The Private Figure Plaintiff Must Establish a New Element to Make a *Prima Facie* Showing: *Philadelphia Newspapers, Inc. v. Hepps*

I. INTRODUCTION

The U.S. Supreme Court decision in *Philadelphia Newspapers, Inc. v. Hepps*[1] imposes a new element of proof on private figure plaintiffs[2] in media defamation actions.[3] In *Hepps*, the Supreme Court held that where a newspaper publishes speech about matters of public interest, the plaintiff now bears the burden of showing that the defamatory statements[4] are false.[5] This decision abrogates the common law rule that the defendant bears the burden of proving the truth of the defamatory statements.[6]

This Note first discusses the historical background of distinctions enunciated by the Court in making decisions in defamation cases: the status of the plaintiff, the contents of the defamatory speech, and the status of the defendant. The Note then reviews the U.S. Supreme Court's reasoning in *Hepps* for placing the burden of proof as to falsity on the plaintiff. Finally, this Note considers the implications of *Hepps* on defamation doctrines in the United States generally, and New Mexico specifically.

II. STATEMENT OF THE CASE

Defendant Philadelphia Newspaper, Inc.,[7] owned a local Philadelphia newspaper, the Philadelphia Inquirer (Inquirer).[8] The Inquirer published a series of five articles purporting to link Maurice Hepps, the principle

1. 106 S.Ct. 1558 (1986).

2. Private figure plaintiffs are not public officials, public figures or political candidates. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). *See infra* note 14 for further discussion on private figure plaintiffs.

3. *Hepps*, 106 S.Ct. at 1559.

4. A communication is defamatory if it tends to harm the reputation of a person in the estimation of the community or deters third persons from dealing or associating with the plaintiff. *See* RESTATEMENT (SECOND) OF TORTS § 559, Comment e (1977).

New Mexico case law defines a defamatory statement as one which tends to render the person about whom it is published contemptible or ridiculous in public estimation, exposes him to public hatred or contempt, or causes virtuous men not to associate with him. Bookout v. Griffin, 97 N.M. 336, 339, 639 P.2d 1190, 1193 (1982) (citations omitted).

5. *Hepps*, 106 S.Ct. at 1559.

6. *Id.* at 1560. *See also infra* notes 33-36 and accompanying text.

7. *Hepps*, 106 S.Ct. at 1560.

8. *Id.*

stockholder in a Pennsylvania corporation,[9] to certain named "underworld" figures and to organized crime generally.[10] As a result of the articles, Hepps[11] sued the newspaper owner[12] for defamation in Pennsylvania district court.[13]

In considering the defamation suit, the state court looked to two separate, but related, factors: fault and falsity.[14] Pennsylvania law required a private figure plaintiff,[15] such as Hepps, suing for defamation to bear the burden of establishing the defendant's negligence[16] in its *prima facie* case.[17] Additionally, Pennsylvania followed the common law presumption that a defamatory statement was false.[18] If the plaintiff met his burden by establishing negligence, the defendant then had the burden of proving the truth of the defamatory communication.[19] If successful, the defendant had an absolute defense to the action.[20]

9. Hepps was the principle stockholder of General Programming, Inc., (GPI), a Pennsylvania corporation which franchised a chain of stores selling beer, soft drinks, and snacks. Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304,___, 485 A.2d 374, 377 (1984), *rev'd* 106 S.Ct. 1558 (1986). GPI owned and licensed the trademarks "Thrifty Beverage" and "Brewer's Outlet," and provided management and consulting services to its franchisees. *Id.*

10. The articles discussed a state legislator, described as "a convicted felon" whose actions displayed "a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty." *Hepps*, 106 S.Ct. at 1560 (citations omitted). The stories reported that federal "investigators have found connections between Thrifty and underworld figures" and that "the Thrifty Beverage beer chain . . . had connections . . . with organized crime." *Id.*

11. Hepps sued individually, while the remaining 19 plaintiffs were GPI and some of its franchisees. *Hepps*, 485 A.2d at 377. *See also supra* note 9.

12. Philadelphia Newspapers, Inc., was sued as publisher of the Inquirer. *Hepps*, 485 A.2d at 377. Hepps also sued the reporters who wrote the articles, William Ecenbarger and William Lambert. *Id.*

13. *Hepps*, 106 S.Ct. at 1560.

14. *See infra* note 31 and accompanying text.

15. *Id.* There is no indication in this decision that there was any dispute over the fact that Hepps was a private figure. Hepps was not a public official and did not meet the standards for a public figure as described in *Gertz*, 418 U.S. 323, 351. A general purpose public figure is one who achieves such fame or notoriety in the community that he becomes a public figure for all purposes. *Id.* A limited public figure is one who voluntarily participates or is drawn into public controversies and becomes a public figure for a limited range of issues. *Id.* A public figure invites public attention and comment and usually has access to the media to rebut defamatory statements. *Hepps*, 485 A.2d 374, 382 n.5.

For a more complete discussion of the standards for determining a public official or public figure in New Mexico, *see* Higdon, *Defamation in New Mexico*, 14 N.M.L. REV. 321, 331-32 (1984).

16. In Gertz v. Welch, 418 U.S. 323 (1974), the Supreme Court left it to the states to determine what standard of fault to apply in a private defamation action. The only limitation was that states could not create a scheme that imposed liability without fault. *Id.* at 347. Pennsylvania adopted an ordinary negligence standard. 42 PA. CONS. STAT. § 8343 (a)(7) (1978).

17. In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

42 PA. CONS. STAT. § 8344 (1982).

18. *Hepps*, 106 S.Ct. at 1560. *See infra* notes 32-33 and accompanying text.

19. "Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication . . . ."

42 PA. CONS. STAT. § 8343 (b)(1) (1982). *See also infra* notes 34-35 and accompanying text.

20. *See infra* note 35 and accompanying text.

The parties in *Hepps* raised the issue of whether placing the burden of proof as to falsity on the defendant was an unconstitutional restraint on speech before trial, but the trial court reserved its ruling on the issue.[21] After all the evidence had been presented, the trial court concluded that the Pennsylvania statute, which imposed on the defendant the burden of proving the truth of the statements, was unconstitutional.[22] The trial judge regarded placing the burden on the defendant to prove the truth of the statements a violation of the first amendment, in that it inhibited free expression of speech.[23] The court, therefore, instructed the jury that it was the plaintiff's onus to prove falsity.[24] Following this charge, the jury found for the defendants.[25]

On appeal,[26] the Pennnsylvania Supreme Court reversed the trial court's ruling.[27] The court held that imposing the proof of falsity burden on the defendant did not inhibit free speech or violate the first amendment,[28] and remanded the case for a new trial.[29] The U.S. Supreme Court granted the Inquirer's petition for writ of certiorari,[30] and subsequently reversed the Pennsylvania Supreme Court.[31]

III. DISCUSSION AND ANALYSIS

A. Historical Background

Analysis of defamatory statements is traditionally divided into two issues: 1) whether the person making the statement did so with the requisite degree of fault; and 2) whether the statement is in fact false.[32] At common law, the individual's interest in maintaining a good reputation was considered so significant that defamation was a strict liability tort without consideration of fault.[33] Additionally, common law presumed any

21. *Hepps*, 106 S.Ct. at 1560.
22. *Id.*
23. *Hepps*, 485 A.2d at 382.
24. *Hepps*, 106 S.Ct. at 1560.
25. *Id.* at 1561.
26. 42 PA. CONS. STAT. § 722(7) (1982). This statute allowed Hepps to take a direct appeal from the trial court to the Pennsylvania Supreme Court. The statute reads:

> The Supreme Court shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases . . .
>
> (7) Matters where the court of common pleas has held repugnant to the Constitution, treaties or laws of the United States, or to the Constitution of this Commonwealth, any treaty or law of the United States or any provision of the Constitution of, or of any statute of, this Commonwealth, or any provision of any home rule charter . . . .

27. *Hepps*, 106 S.Ct. at 1561.
28. *Hepps*, 485 A.2d at 387.
29. *Id.* at 389.
30. 105 S.Ct. 3496 (1985).
31. The Court remanded the case for further proceedings consistent with its findings. *Hepps*, 106 S.Ct. at 1565.
32. W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 116 (5th ed. 1984).
33. For a more complete discussion of the development of the common law scheme of defamation, *see generally* Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1352-57 (1975), and Keeton, *Defamation and Freedom of the Press*, 54 TEXAS L. REV. 1221 (1976).

defamatory statement to be false.[34] Thus, if the matter sued on was defamatory, the plaintiff had only to put the statement into evidence and prove the defendant was responsible for uttering or publishing it to others.[35] If the plaintiff proved this *prima facie* case, the defendant could avoid liability entirely by proving the statement was true.[36] These principles were the mainstay of defamation law until 1964, when the United States Supreme Court began grappling with the conflict between the state interest in protecting the reputation of private individuals and the free speech interest protected by the first amendment.[37]

Prior to *Hepps*,[38] the Supreme Court has focused on three categories when considering defamation cases—all of which involve the issue of fault. This section traces the development of these categories. Part One discusses the significance of the status of the plaintiff: public official, public figure, or private figure. Part Two focuses on the analysis of the actual content of the speech: a matter of public interest or private concern. Finally, Part Three discusses the significance of the status of the defendant: media or nonmedia.

1. The Status of the Plaintiff: Public Official, Public Figure, or Private Figure

In *N.Y. Times v. Sullivan*,[39] the Supreme Court first acknowledged that the common law treatment of a defamatory statement as a strict liability tort was, in certain circumstances, an abridgment of the first amendment right of free expression.[40] The first category of "circumstances" examined by the Court was statements made about public officials.[41] The Court held that a public official could not recover damages for defamatory statements relating to his official conduct absent a showing that the statement was made with actual malice, that is, knowledge of falsity or reckless disregard for the truth.[42] Justice Brennan, writing for the majority, found that the

34. Eaton, *supra* note 32, at 1353.

35. *Id.*

36. *See* C. GATLEY ON LIBEL AND SLANDER § 351 (7th ed. R. McEven and P. Lewis 1974) (truth is an absolute defense).

Truthfulness was also a defense to an action for defamation in New Mexico. Franklin v. Blank, 86 N.M. 585, 588, 525 P.2d. 945, 948 (Ct. App. 1974). Truth was considered an affirmative defense, however, which was waived if not raised at the first opportunity in defendant's responsive pleading. Eslinger v. Henderson, 80 N.M. 479, 481, 457 P.2d 998, 1000 (Ct. App. 1969).

37. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

38. 106 S.Ct. at 1558.

39. 376 U.S. 254 (1964). *N.Y. Times* was the seminal defamation case. Sullivan, City Commissioner of Montgomery, Alabama, claimed to have been defamed by two errors in a paid advertisement in the N.Y. Times charging the civil rights of Negroes had been violated during 1960 racial disturbances in the South. *Id.* at 256. The jury found the publisher failed to prove the text of the ad was true and awarded Sullivan $50,000. *Id.* The Alabama Supreme Court unanimously reversed the trial decision, but was in turn reversed by the U.S. Supreme Court. *Id.* at 263-65.

40. *Id.* at 279-80.

41. *Id.* at 256.

first amendment required that debate on public issues should be uninhibited and robust, and that such debate could well include vehement and sharp attacks on public officials.[43] Subsequently, the Court extended the fault requirement of actual malice to include defamatory statements made about public figures.[44]

Finally, the Supreme Court considered whether some showing of fault was necessary when the statements concerned private figures.[45] In *Gertz v. Welch*,[46] the Court held that a private figure plaintiff[47] must establish some degree of fault to prove a *prima facie* case,[48] but left the states free to decide just how much fault was required.[49] The only limitation made on the states was that some standard of fault had to be imposed.[50] Today, standards of the various states range anywhere from ordinary negligence to actual malice.[51]

42. *Id.* at 279-80.

43. *Id.* at 270.

44. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), *decided with* Associated Press v. Walker. The Saturday Evening Post accused Wally Butts, the coach of the University of Georgia football team, of fixing a football game with Paul "Bear" Bryant, coach at the University of Alabama. *Id.* at 135. The jury found the article defamatory and awarded damages to Butts. *Id.* at 138. The district court denied defendant's motion for a new trial and the Fifth Circuit Court of Appeals affirmed the decision. *Id.* at 138-39. The U.S. Supreme Court reversed. *Id.* at 161-62.

While seven justices agreed that defamatory statements made about public figures should be protected, the justices could not agree on the exact standards to be used in public figure cases. *Id.* at 153-55, 162-65, 170-74. Justice Harlan, joined by Justices Clark, Stewart, and Fortas, resorted to a balancing test which focused on the status of the plaintiff, the character of the speech, and the conduct of the publisher. *Id.* at 153-55. This constituted a somewhat lesser hurdle for public figure plaintiffs. *Id.* Chief Justice Warren, joined by Justices Brennan and White, insisted the constitutional privilege of *N.Y. Times* should apply equally to defamation of public figures. *Id.* at 162-65 (Warren, concurring). Justices Black and Douglas reiterated their position that public speech about public issues should be absolutely immune from libel action, but acquiesced in the Chief Justice's position to dispense of the issue. *Id.* at 170-74 (Black, concurring & dissenting).

45. *See infra* note 46.

46. 418 U.S. 323 (1974). A John Birch magazine published an article reporting on the murder trial of a police officer, claiming it was part of a nationwide communist conspiracy to discredit law enforcement agencies. *Id.* at 325-26. The plaintiff, the attorney handling a civil claim for damages on behalf of the victim of the police officer's assault, was awarded $50,000 by the jury. *Id.* at 325, 329. The District Court entered judgment n.o.v. for the defendant, concluding the first amendment protected discussion of any public issue. *Id.* at 329. The Seventh Circuit Court of Appeals affirmed. *Id.* at 330. The U.S. Supreme Court reversed the decision and remanded the case for a new trial. *Id.* at 352.

47. *See supra* note 14.

48. *Gertz*, 418 U.S. at 346-47.

49. *Id.* at 347-48. *See also supra* note 15.

50. *Gertz*, 418 U.S. at 347. *See also supra* note 15.

51. Some states established negligence as the necessary degree of fault to be shown when private figure plaintiffs sue media defendants. *I.e.* Utah, Seegmiller v. KSL, Inc., 626 P.2d 968, 978 (Utah 1981), Illinois, Troman v. Wood, 62 Ill.2d. 184, 340 N.E.2d 292 (1975), and Kansas, Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975). Other states require private figure plaintiffs to show gross irresponsibility on the part of media defendants. *I.e.* New York, Ortiz v. Valdescastilla, 102 A.D.2d. 513, 478 N.Y.S.2d 895 (1984). Still other states require private figure plaintiffs suing media defendants to prove actual malice. *I.e.* Michigan, Clark v. American Broadcasting Cos., 684 F.2d 1208 (6th Cir. 1982), *cert. denied* 460 U.S. 1040 (1983), and Texas, Golden Bear Distributing Systems, Inc. v. Chase Revel, Inc., 708 F.2d 944 (5th Cir. 1983).

Thus, the common law treatment of defamation as a strict liability tort was modified to require some degree of fault.[52] For public figures/officials, the plaintiff must show actual malice;[53] for private figure plaintiffs, the degree of fault imposed is determined by the individual state,[54] but must be more than strict liability.[55]

2. The Content of the Defamatory Speech: A Matter of Public Interest or Private Concern

The second "circumstance" considered by the Court was the content of the speech as a factor for determining the fault standard. The courts began distinguishing the existence of a defamatory action based upon the content of the speech, holding that in matters involving a private individual and subjects of public interest, the plaintiff must meet the actual malice standard to make a *prima facie* case.[56] The courts became heavily involved in deciding what statements constituted matters of public interest

52. *Gertz*, 418 U.S. at 346-47.

53. Public officials can recover both compensatory and punitive damages only upon clear and convincing proof of actual malice. *Id.* at 342-43, 348-50. Clear and convincing proof is more than preponderance of the evidence, but less than beyond a reasonable doubt. Addington v. Texas, 441 U.S. 418 (1979). *See also infra* note 54 for a further discussion of compensatory and punitive damages.

54. The private figure plaintiff can recover compensatory damages only by showing some degree of fault by the defendant, with the states determining the degree of fault necessary. *Gertz*, 418 U.S. at 346-47. New Mexico adopted ordinary negligence as the degree of fault necessary to establish liability for private figures defamed by media defendants. Marchiando v. Brown, 98 N.M. 394, 649 P.2d 462 (1982). For further discussion, *see* Note, *Libel Law—New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure*, 13 N.M.L. REV. 715 (1983).

Compensatory damages in a defamation action may be either general or special damages. *See* Keeton, *supra* note 31, at 842. General damages refer to normal and usual losses sustained which can be anticipated when someone's reputation is damaged. *Id.* at 843. Special damages are damages that do not so frequently result from defamatory statements to be recoverable as general damages and may be proven to enhance general damages. *Id.* at 844. Special damages, in some cases, may include pecuniary losses. *Id.*

Gertz also held that private figure plaintiffs must show actual malice, however, to recover punitive damages. *Gertz*, 418 U.S. at 348-50. This holding was modified in 1985 when the Supreme Court ruled that actual malice was not necessary to recover punitive damages when a private figure plaintiff sued on defamatory statements which involved only a matter of private concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 751 (1985).

Punitive damages are those given to the plaintiff over and above compensation for the injuries. *See* Keeton, *supra* note 31, at 9. The purpose of punitive damages is to punish the defendant and deter others from following the defendant's example. *Id.*

55. *Gertz*, 418 U.S. at 347. *See also supra* note 15.

56. Rosenbloom v. Metro Media, 403 U.S. 29 (1971). A distributor of nudist magazines in the Philadelphia area sued a local radio station over broadcasts referring to the distributor's arrest for possession of obscene literature. *Id.* at 33-34. One broadcast described the distributor's motion for injunctive relief as an action by "smut distributors" and "girlie book peddlers" to force the state to "lay off the smut literature racket." *Id.* at 34-35. The jury found for Rosenbloom. *Id.* at 40. The court of appeals reversed the trial court decision on the grounds that *Gertz* applied even though the plaintiff was not a public figure, and thus there was insufficient evidence to show the required standard of negligence. *Id.*

and generally concluded that all human events which were newsworthy could be clasified as matters of public concern.[57] In 1974, though, the Supreme Court abandoned reviewing the content of the statements as a method of determining what speech was protected and instead focused again on the status of the plaintiff.[58]

3. The Status of the Defendant: Media or Nonmedia

A third "circumstance" arguably considered by the Court in determining the necessary degree of fault is the status of the defendant. Although there has not been a U.S. Supreme Court decision directly on point,[59] a question arises on the application of the first amendment protections to media and nonmedia defendants. The majority of the Court's decisions have dealt only with media defendants.[60] The decisions, however, do suggest that the constitutional protections of defamation encompass freedom of speech, as well as freedom of the press, and therefore, imply that the decisions are *not* limited to media defendants.[61] Lower courts generally have concluded the constitutional privilege to defame public officials and public figures extends to media and nonmedia defendants alike.[62]

In summary, prior to the *N.Y. Times* decision in 1964,[63] a statement, if found defamatory[64] was actionable without regard to the fault of the

57. The courts found that false credit reports were the only clear area that was not a matter of public interest. *See* Eaton, *supra* note 32, at 1402.

58. *Gertz*, 418 U.S. at 346.

> The extension of the New York Times test proposed by the Rosenbloom plurality would abridge this legitimate state interest [in enforcing a remedy for defamation of private individuals] to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not—to determine, in the words of MR. JUSTICE MARSHALL, 'what information is relevant to self-government.' We doubt the wisdom of committing this task to the conscience of judges . . . . The 'public or general interest' test for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake . . . .

59. *See infra* note 60.

60. All of the major U.S. Supreme Court defamation decisions prior to *Dun & Bradstreet* dealt with a media defendant. *See* Eaton, *supra* note 32, at 1404 n.228. In *Dun & Bradstreet*, the Court dealt with a credit report issued by a credit reporting agency, which was deemed a nonmedia defendant. *Dun & Bradstreet*, 472 U.S. at 751-53. The Court, however, did not base its decision on the fact that the case involved a nonmedia defendant. Instead, the Court focused on the fact that the speech involved a matter of purely private concern. *Id.* at 761-63.

61. The Court in *N.Y. Times* did not limit application of its privilege to media defendants, but stated that the rule protected "critics of public concern." *N.Y. Times*, 376 U.S. at 256, 264, 268, 273, 279, 283, 292. The majority opinion implied constitutional protection extended to nonmedia speakers as well as the press. *Id.* at 265-66. *See also* Eaton, *supra* note 32, at 1403-08.

62. Eaton, *supra* note 32, at 1416. *See also* Poorbaugh v. Mullen, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), *cert. denied* 99 N.M. 47, 653 P.2d 878 (1982).

63. 376 U.S. 254 (1964).

64. *See supra* note 4.

defendant.[65] In a line of cases since *N.Y. Times*,[66] however, the Supreme Court has substantially modified the requirement of fault.[67] Today, public figures and officials must show the defendant acted with actual malice—with knowledge of falsity or reckless disregard for the truth—in order to make a *prima facie* case.[68] Private figure plaintiffs,[69] on the other hand, must show the degree of fault required by the particular state.[70] The level of fault may range anywhere from negligence to actual malice, but may not be strict liability.[71] Additionally, at one point a distinction was made on the basis of speech content.[72] Although technically abandoned, there is evidence of this distinction becoming pertinent again.[73] Finally, most defamation cases that have come before the Court have involved media defendants.[74] Although still subject to debate, the Court has implied that the degree of fault imposed is determined on the basis of the plaintiff's, not the defendant's, status.[75]

B. The Court's Reasoning in Hepps

In *Hepps*,[76] the Supreme Court for the first time addressed the second of the defamation issues: falsity.[77] At common law, once the plaintiff had made a showing of a defamatory statement made by the defendant, a *prima facie* case had been established—without regard to whether the statement was in fact true.[78] The burden then shifted to the defendant to establish, as an affirmative defense, that the statement was true.[79] In *Hepps*,[80] however, the Supreme Court considered the constitutionality of the placement of this burden for the first time.[81]

In considering this issue, the Court acknowledged there will be instances when the judge and jury are unable to resolve conclusively whether the statement is true or false.[82] In these cases, the burden of proof is dispositive.[83] If the plaintiff bears the burden of showing falsity, there

65. *See supra* notes 32-34 and accompanying text.
66. 376 U.S. 254.
67. *See supra* notes 43, 45-48, and accompanying text.
68. *See supra* note 52.
69. *See supra* note 14.
70. *See supra* note 53.
71. *See supra* notes 15, 49, and accompanying text.
72. *See supra* notes 55-56 and accompanying text.
73. *See infra* notes 105-09 and accompanying text.
74. *See supra* note 59 and accompanying text.
75. *See supra* notes 60-61 and accompanying text.
76. 106 S.Ct. 1558.
77. *Id.* at 1563.
78. *See supra* note 34 and accompanying text.
79. *See supra* note 35 and accompanying text.
80. 106 S.Ct. 1558.
81. *Id.*
82. *Id.* at 1563.
83. *Id.*

will be some cases in which the plaintiff cannot meet the burden despite the fact that the speech is actually false. In these cases, the plaintiff will lose. Similarly, if the defendant bears the burden of showing truth, there will be times a defendant cannot meet the burden despite the fact that this speech is actually true. In which case, the defendant will lose.[84] Thus, under either rule, there will be times when the result in these cases is different than what the result would be if all speech were demonstrably true or false.[85]

When faced with such a dilemma, the majority opinion[86] tips the scales in favor of protecting true speech.[87] To ensure that true speech on matters of public interest is not deterred, *Hepps* overrides the common law presumption that defamatory speech is false, in cases involving a private figure plaintiff, a media defendant, and speech of public interest.[88] After *Hepps*,[89] then, the private figure plaintiff suing a media defendant on matters of public interest must now show in the *prima facie* case that the statements are false,[90] along with the requisite degree of fault, to recover damages.[91]

Underlying the Court's decision is the concern that placing the burden of proving truth upon media defendants deters speech on matters of public interest because of the fear that liability will unjustifiably result.[92] Because this chilling effect is antithetical to the first amendment's protection of free speech on matters of public interest, the private figure plaintiff is now required to bear the burden of showing the falsity of defamatory statements.[93]

Additionally, the Court recognizes this decision will protect some speech

84. *Id.* at 1563-64.

85. *Id.* at 1564.

86. *Id.* at 1559. The majority opinion was written by Justice O'Connor, joined by Justices Brennan, Marshall, Blackmun, and Powell.

87. *Id.* at 1564. The dissent, written by Justice Stevens, and joined by Chief Justice Burger and Justices White and Rehnquist, argues, however, that the majority opinion grossly undervalues the strong state interest in protecting private reputations. *Id.* at 1569 (Stevens, dissenting). Stevens argues the concern for protection of truthful statements must make room for a different emphasis when the defamatory statement involves the reputation of a private individual. *Id.* at 1570. The dissent reasons a private individual is more vulnerable to injury and more deserving of recovery. *Id.* In libel suits brought by private individuals, the strong state interest in compensating injuries to private reputations requires that defendants should bear the burden of proof of falsity. *Id.* at 1566, 1569-71.

88. *Id.* at 1564.

89. *Id.* at 1558.

90. The Court does not consider, however, the quantity of proof of falsity that the plaintiff must present to recover damages. *Id.* at 1565 n.4.

91. *Id.* at 1559.

92. *Id.* at 1564. The dissent reasons, though, that the majority has relied on the previously discredited analysis of the content of the speech by protecting the speech simply because it addresses matters of public interest. *Id.* at 1571 (Stevens, dissenting). The dissent would not extend the constitutional protection of defamation to every item of public interest because that would unacceptably abridge the legitimate state interest in protecting private reputations. *Id.*

93. *Id.* at 1564.

which is false, but unprovably false.[94] Earlier Court decisions, however, have affirmed that the first amendment requires the protection of some false speech to promote speech on matters of public interest.[95]

Furthermore, the Court notes, this decision adds only marginally to the burden a plaintiff already bears in defamation cases.[96] The plaintiff must already show a degree of fault,[97] for which the states have set standards ranging from negligence to actual malice.[98] As a practical matter, evidence offered by a plaintiff to show actual malice—knowledge of the falsity of a statement or reckless disregard for its truth—will often include evidence of the falsity of the defamatory statements.[99] When showing negligence, a plaintiff will generally discuss fault to show the defendant knew or should have known the statement was false.[100]

The *Hepps* Court, addressing the issue of falsity for the first time, recognized that, in cases where the statement is unable to be shown conclusively as true or false, the burden of proof is dispositive.[101] In order to ensure that true speech on matters of public interest is protected, the Court abrogates the common law presumption that defamatory speech is false in cases involving a private figure plaintiff, a media defendant, and speech of public interest.[102] The Court recognizes the decision may protect speech which is false, but unprovably so; but affirms that sometimes the first amendment requires protection of some false speech to promote speech on matters of public concern.[103] After *Hepps*,[104] then, the private figure plaintiff suing a media defendant on matters of public interest must now show that the statements are false, along with the requisite degree of fault, to recover damages.[105]

C. *Implications of the* Hepps *Decision*

1. The Impact of *Hepps* on a National Level

Public Interest. The *Hepps* Court bases its opinion on the fact that this speech involved a matter of public interest and thus, was more deserving

94. *Id.*

95. *Id.* at 1564-65. The Court cites *Gertz*, 418 U.S. at 341 ("the First Amendment requires that we protect some falsehood in order to protect speech that matters") and *N.Y. Times*, 376 U.S. at 372 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)), ("to provide 'breathing space' for true speech on matters of public concern, the Court has been willing to insulate even demonstrably false speech from liability . . . .").

96. *Hepps*, 106 S.Ct. at 1565.

97. *See supra* note 50 and accompanying text.

98. *Gertz*, 418 U.S. at 347.

99. *Hepps*, 106 S.Ct. at 1565.

100. *Id.*

101. *See supra* notes 81-84 and accompanying text.

102. *See supra* note 87 and accompanying text.

103. *See supra* notes 93-94 and accompanying text.

104. 106 S.Ct. 1558.

105. *See supra* note 90 and accompanying text.

of protection than speech of purely private concern.[106] As noted previously, however, Supreme Court decisions long ago seemed to abandon the "matter of public interest" distinction.[107] The Court in *Hepps*[108] clearly looks to the content of the speech as one of its tests,[109] and seems to be returning to a form of "matter of public interest" standard.[110]

If the Court is returning to the previously discussed "public interest"[111] distinction, it could prove very difficult for the Court. As acknowledged in the earlier decisions facing this issue, the problems are enormous in determining what are matters of public concern.[112] Morever, in again returning to this standard, the *Hepps* Court offers no guidance in the opinion about what constitutes matters of public interest.[113]

Defendant Status. The *Hepps* decision is narrow and applies only to media defendants.[114] The *Hepps* Court does not address what standards would apply if a private figure plaintiff sued a nonmedia defendant.[115] Arguably, the same policy considerations protecting the speech of media defendants, such as the encouragement of debate on important matters, should protect the speech of nonmedia defendants.[116] If the Court believes the first amendment protects and encourages open debate on matters of public concern, it should not matter in what forum the debate occurs; whether in a local newspaper article or in a speech on the street corner.

The failure of *Hepps* to address the nonmedia defendant issue may reflect disagreement in the Court as to this issue. Justice O'Connor, mindful of the Court's limitations, also simply may be indicating to the readers that the extent of the holding is limited to media defendants.[117]

106. *See supra* notes 91-92 and accompanying text.

107. *See supra* note 57 and accompanying text.

108. The Court also focused on the content of the speech in the earlier case of *Dun & Bradstreet*, where the Court modified its ruling that a showing of actual malice was necessary to recover punitive damages. *Dun & Bradstreet*, 472 U.S. at 763. *See supra* note 53.

109. Justice O'Connor, in the majority opinion, says one of the forces to be considered is whether the speech at question is of "public concern." *Hepps*, 106 S.Ct. at 1563.

110. *Id.* at 1563-64. *See also supra* notes 55-56 and accompanying text.

111. *See supra* notes 55-56 and accompanying text.

112. For a discussion of the difficulties courts had in determining what was speech of public concern under the *Rosenbloom* standard, *see* Eaton, *supra* note 32, at 1402.

113. The Court never discusses why the matters discussed in the Inquirer articles are matters of public concern, but simply states that this is so. *Hepps*, 106 S.Ct. at 1563.

114. *Id.* at 1565 n.4.

115. *Id.* Justice O'Connor specifically declines to "consider what standards would apply if the plaintiff sues a nonmedia defendant . . . ." (citations omitted).

116. *Id.* at 1564. The concurring opinion, written by Justice Brennan and joined by Justice Blackmun, also adheres to the principle that the rule announced in *Hepps* should apply to both media and nonmedia defendants. *Id.* at 1565-66.

In addition, in *Dun & Bradstreet*, five members of the Court (White, Brennan, Marshall, Blackmun, and Stevens), agreed the rights of media defendants are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. *Dun & Bradstreet*, 472 U.S. at 773, 783-84.

117. *See supra* note 113 and accompanying text.

While arguments will continue to be made that the *Hepps* ruling should apply to both media and nonmedia defendants, this issue is clearly unresolved by the Court at this time.

2. Substantive and Procedural Implications of *Hepps* in New Mexico

The New Mexico Court of Appeals declared the standards enunciated in New Mexico relating to defamation actions apply to suits involving both media and nonmedia defendants.[118] The New Mexico Court of Appeals reached this conclusion even though no U.S. Supreme Court decision has directly ruled on this issue.[119] The *Hepps* decision, refusing to extend its ruling to nonmedia defendants, raises further questions as to the validity of the New Mexico Court of Appeals conclusion. This will no doubt continue to be the state of the law in New Mexico, until the New Mexico Supreme Court or the United States Supreme Court acts further on this question. What is clear, however, is that when a private figure plaintiff sues on a matter of public interest, truth is no longer an affirmative defense; rather, falsity is an element of the plaintiff's case-in-chief.[120] Accordingly, the New Mexico law stating truth is available as a defense to a defamation action[121] is no longer valid. In addition, because the private figure plaintiff suing on matters of public interest now bears the burden of proof as to falsity of the statements, the plaintiff must also plead falsity in his complaint.[122]

The *Hepps* Court notes its decision adds only *marginally* to the burden the plaintiff must already bear.[123] Whether this is actually true remains to be seen. The Court reasons that evidence offered by the plaintiff as to the publisher's fault will generally also encompass evidence of the falsity of the statements.[124] As the dissent points out, however, a plaintiff can demonstrate negligence, such as in the manner in which the material was gathered, without showing either truth or falsity.[125] In these instances, the plaintiff will have an additional burden of proving falsity.

118. Poorbaugh v. Mullen, 99 N.M. 11, 20, 653 P.2d 511, 520 (Ct. App.), *cert. denied* 99 N.M. 47, 653 P.2d 878 (1982).

119. *See supra* note 58 and accompanying text.

120. *See supra* note 90 and accompanying text. However, truthfulness will still be an affirmative defense when private figure plaintiffs sue on matters of purely private concern. *Hepps*, 106 S.Ct. at 1559. *See also* N.M. Unif. Jury Instructions—Civil 13.1006 (1986).

121. N.M. STAT. ANN. § 38-2-9 (1978). The statute will still be valid, though, when a private figure plaintiff sues on a matter of private concern; in these cases, *Hepps* does not apply and truthfulness is still an affirmative defense for the defendant. *Hepps*, 106 S.Ct. at 1559. *See also* N.M. Unif. Jury Instructions—Civil 13.1013 (1986).

122. J. COUND, J. FRIENDENTHAL & A. MILLER, CIVIL PROCEDURE CASES AND MATERIALS 419 (3d. ed. 1980).

123. *See supra* note 95 and accompanying text.

124. *See supra* notes 96-99 and accompanying text.

125. *Hepps*, 106 S. Ct. at 1568 n.5.

Moreover, the *Hepps* majority gives no guidance as to the quantity of proof of falsity a private figure plaintiff must present to recover damages.[126] Arguably, the plaintiff could deny the truth of the articles and this issue would go to the jury.[127] If the plaintiff did no more than this, it is unclear if the jury would consider that the plaintiff had established the burden of proof as to falsity. If the standard for this burden is a preponderance of the evidence,[128] a private figure plaintiff may indeed carry a heavier burden because of the *Hepps* decision.

IV. CONCLUSION

Common law presumed that defamatory statements were false.[129] Therefore, a plaintiff did not have to prove that statements were false to recover in a defamation action.[130] Rather, the defendant could show the statement was true, which constituted an absolute defense.[131] The decision in *Hepps* is important because it abrogates this common law principle.[132] In so doing, the Court reasoned that the first amendment requires free and open debate on matters of public concern and that putting the burden of falsity on the defendant discourages such debate, contrary to the first amendment.[133] Accordingly, the *Hepps* Court shifted this burden of falsity to the plaintiff.[134]

It is clear that, at least in cases where a private figure plaintiff sues a media defendant on statements made about matters of public concern, the plaintiff is now required to show the falsity of the statement in the *prima facie* case.[135] Yet the *Hepps* case still leaves unanswered questions. What will be the actual increased burden plaintiffs will bear due to this decision?[136] What will be the quantity of proof that juries will require plaintiffs to present?[137] Will the ruling in *Hepps* apply to nonmedia defendants as well?[138] If the Court in fact is returning to a public interest

126. *See supra* note 89 and accompanying text.

127. A summary judgment motion is granted if there is no genuine issue as to any material fact. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2553 (1986). The standard for granting a summary judgment motion mirrors the standard for a directed verdict. *Id.* In defamation cases, then, presumably the fact that a plaintiff denied that the defamatory statement was true would be enough evidence to create a genuine issue as to the falsity of the statement. *Id.* This issue would then be one on which a directed verdict would not be granted and it would go to the jury. *Id.*

128. *See* Higdin, *supra* note 14, at 334.

129. *See supra* note 33 and accompanying text.

130. *See supra* note 34 and accompanying text.

131. *See supra* note 35 and accompanying text.

132. *See supra* notes 87-90 and accompanying text.

133. *See supra* notes 91-92 and accompanying text.

134. *See supra* note 90 and accompanying text.

135. *See supra* note 90.

136. *See supra* notes 95-99, 119-22, and accompanying text.

137. *See supra* note 89.

138. *See supra* notes 112-14 and accompanying text.

distinction, what factors are courts to consider in analyzing the content of speech?[139] The answers to these questions will be addressed in future defamation actions in courtrooms across this country.

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139. *See supra* notes 110-11 and accompanying text.