Statute: EMPLOYER IMMUNITY FROM LIABILITY; DISCLOSURE OF INFORMATION REGARDING FORMER OR CURRENT EMPLOYEES

Fla. Stat. §768.095 (2002)

An employer who discloses information about a former or current employee to a prospective employer of the former or current employee upon request of the prospective employer or of the former or current employee is immune from civil liability for such disclosure or its consequences unless it is shown *by clear and convincing evidence* that the information disclosed by the former or current employer was *knowingly false* or violated any civil right of the former or current employee protected under chapter 760. (Emphasis added.)

Statute: LIBEL IN NEWSPAPER; SLANDER BY RADIO BROADCAST

Cal. Civ. Code §48a(d) (2002)

"Actual malice" is that state of mind arising from hatred or ill will toward the plaintiff; provided, however, that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.

Statute: QUALIFIED PRIVILEGE

La. Rev. Stat. §14:49 (2002)

A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

(2) Where the publication or expression is made in the reasonable belief of its truth, upon, (a) The conduct of a person in respect to public affairs; or (b) A thing which the proprietor thereof offers or explains to the public.

(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

(4) Where the publication or expression is made by an attorney or party in a judicial proceeding.

Statute: ABSOLUTE PRIVILEGE

La. Rev. Stat. §50 (2002)

There shall be no prosecution for defamation in the following situations:

(1) When a statement is made by a legislator or judge in the course of his official duties.

(2) When a statement is made by a witness in a judicial proceeding, or in any other legal proceeding where testimony may be required by law, and such

statement is reasonably believed by the witness to be relevant to the matter in controversy.

(3) Against the owner, licensee or other operator of a visual or sound broadcasting station or network of stations by one other than such owner, licensee, operator, agents or employees.

NOTES TO STATUTES

1. ***The Meaning of "Actual Malice."*** The California definition of "actual malice" starts off with a phrase that sounds very much like common law express malice — "that state of mind arising from hatred or ill will." This language refers to the defendant's attitudes toward the plaintiff. But the remainder of the definition refers to the defendant's attitude toward the truth of the statement — "a good faith belief on the part of the defendant in the truth of the libelous publication." If the defendant has the proper attitude toward the truth, his attitude toward the plaintiff does not matter. This definition reflects modern constitutional law developments in defamation law.

2. ***Moving from Express to Actual Malice.*** Constitutional law developments have shifted some states away from requiring proof of *express malice*, a hostile attitude toward the plaintiff, for defeating qualified privileges to requiring proof of *actual malice*, a disregard of the truth. Shaw v. R.J. Reynolds, decided by the Federal District Court in Florida in 1993, referred to "express malice." As the Florida statute illustrates, the Florida legislature has since changed the nature of the qualified privilege given to employers, referring instead to whether the defendant knew the statement was false.

3. ***Qualified and Absolute Privileges.*** As the Louisiana statutes illustrate, proof of actual malice is required to defeat a qualified privilege. For actions brought as a result of speech covered by an absolute privilege, it appears that no action may be brought. Observe, however, how each absolute privilege is hedged with some condition. The judge's speech must, for instance, occur "in the course of his official duties." The Louisiana statutes are from the Louisiana Criminal Code, but the Reporter's Comment (1997 Main Volume) cites examples of each of these privileges in Louisiana civil torts cases. Compare the difference in treatment of attorneys and parties to litigation on the one hand and judges and witnesses on the other. What might justify this difference?

IV. Constitutionally Required Proof of Fault

A. Introduction

Outside of the context of privileges, the common law of defamation did not require any plaintiff to prove that the allegedly defamatory statement was false or that the defendant carelessly or intentionally defamed the plaintiff. The U.S. Supreme Court's seminal decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), changed defamation law dramatically by describing situations in which a plaintiff must prove falsity, and by adding an element of fault called *actual malice* or, sometimes, *"New York Times actual malice."* Actual malice is different from express malice of the sort

described as "improper motive," or "hatred, ill will, or spite." The following excerpt from a New Mexico case, State v. Powell, summarizes the development of *constitutional defamation law* as it applies to suits by public officials and public figures.

STATE v. POWELL

839 P.2d 139 (N.M. App. 1992)

HARTZ, J. . . .

In [New York Times v. Sullivan, 376 U.S. 254 (1964),] the Supreme Court created a qualified privilege to make defamatory statements relating to the official conduct of a public official. The Court ruled that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80; see Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 n.30 (1984) (Plaintiff must demonstrate "that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement."). Three years after *New York Times* the qualified privilege was extended to defamatory criticism of "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

In adopting the qualified privilege, the Supreme Court recognized "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times,* 376 U.S. at 270. Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988), explains:

> [E]ven though falsehoods have little value in and of themselves, they are "nevertheless inevitable in free debate," Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), and a rule that would impose strict liability on a publisher for false factual assertions would have an undoubted "chilling" effect on speech relating to public figures that does have constitutional value. "Freedoms of expression require 'breathing space.' " (quoting *New York Times,* supra, at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability.

On the other hand, defamation that does not come within the *New York Times* privilege is hardly entitled to protection. As the Supreme Court stated in Garrison v. Louisiana, 379 U.S. 64, 75 (1964):

> Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

B. Defining "Actual Malice," "Public Figures," and "Matters of Public Concern"

The cases that follow describe what actual malice means, how to characterize plaintiffs as public or private figures, and how to characterize defendants' statements as being about matters of public concern or not. They also illustrate the fault rules adopted by the Supreme Court.

Fault requirements adopted by the Supreme Court for defamation law vary depending on whether the case involves a plaintiff who is: (1) a general-purpose public official or public figure; (2) a limited-purpose public official or public figure; (3) a private figure involved in a matter of public concern; or (4) a private figure involved only in matters of private concern. For each of these types of plaintiffs, courts must determine what fault rules apply for recovery of each of three types of damages: presumed, actual, and punitive. It might be helpful to construct a chart with three columns (one for the one for each type of damage) and four rows (one for each type of plaintiff) and fill it in with the fault requirements for each situation as you read each case.

1. Public Officials

The fault requirements imposed on defamation plaintiffs who are public officials arises out of the Supreme Court's interpretation of the U.S. Constitution's First Amendment right to freedom of expression. Defamation plaintiffs in these categories must prove *actual malice* in addition to whatever proof requirements imposed by the common law, including those required to defeat applicable privileges.

These relatively new rules of *constitutional defamation law* gave rise immediately to two issues: Who qualifies as a public official? What does "actual malice" mean? In Rosenblatt v. Baer, the plaintiff, Frank Baer, was supervisor of a county recreation area. The Court discusses how far down the hierarchy of government employees to extend the classification of public official. In St. Amant v. Thompson, the Supreme Court defines and applies the term "actual malice." These cases are based on the Supreme Court's interpretation of the First Amendment to the U.S. Constitution, which restricts the federal government and (because of the Fourteenth Amendment) state governments.

AMENDMENT I: FREEDOM OF RELIGION, FREEDOM OF SPEECH AND PRESS, PEACEFUL ASSEMBLAGE, PETITION OF GRIEVANCES

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ROSENBLATT v. BAER

383 U.S. 75 (1966)

Mr. Justice BRENNAN delivered the opinion of the Court.

A jury in New Hampshire Superior Court awarded respondent damages in this civil libel action based on one of petitioner's columns in the *Laconia Evening Citizen.* Respondent alleged that the column contained defamatory falsehoods concerning his performance as Supervisor of the Belknap County Recreation Area, a facility owned and operated by Belknap County. In the interval between the trial and the decision of petitioner's appeal by the New Hampshire Supreme Court, we decided New York Times Co. v. Sullivan, 376 U.S. 254. We there held that consistent with the First and Fourteenth Amendments a State cannot award damages to a public official for defamatory falsehood relating to his official conduct unless the official proves actual malice — that the falsehood was published with knowledge of its falsity or with reckless disregard of whether it was true or false. The New Hampshire Supreme Court affirmed the award, finding *New York Times* no bar. We granted certiorari and requested the parties to brief and argue, in addition to the questions presented in the petition for certiorari, the question whether respondent was a "public official" under *New York Times* and under our decision in Garrison v. State of Louisiana, 379 U.S. 64; 380 U.S. 941. . . .

We remarked in *New York Times* that we had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included." 376 U.S., at 283, n.23. No precise lines need be drawn for the purposes of this case. The motivating force for the decision in *New York Times* was twofold. We expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that (such debate) may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S., at 270. There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. 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.

This conclusion does not ignore the important social values which underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation. 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, both elements we identified in *New York Times* are present and the *New York Times* malice standards apply.[2]

As respondent framed his case, he may have held such a position. Since *New York Times* had not been decided when his case went to trial, his presentation was not shaped to the "public official" issue. He did, however, seek to show that the article referred particularly to him. His theory was that his role in the management of the Area was so prominent and important that the public regarded him as the man responsible for its operations, chargeable with its failures and to be credited with its successes. Thus, to prove the article referred to him, he showed the importance of his role; the same showing, at the least, raises a substantial argument that he was a "public official."[3]

The record here, however, leaves open the possibility that respondent could have adduced proofs to bring his claim outside the *New York Times* rule. Moreover, even if the claim falls within *New York Times*, the record suggests respondent may be able to present a jury question of malice as there defined. Because the trial here was had before *New York Times*, we have concluded that we should not foreclose him from attempting retrial of his action. We remark only that, as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a "public official."

The judgment is reversed and the case remanded to the New Hampshire Supreme Court for further proceedings not inconsistent with this opinion.

ST. AMANT v. THOMPSON

390 U.S. 727 (1968)

Mr. Justice WHITE delivered the opinion of the Court.

The question presented by this case is whether the Louisiana Supreme Court, in sustaining a judgment for damages in a public official's defamation action, correctly interpreted and applied the rule of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), that the plaintiff in such an action must prove that the defamatory publication "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 279-280.

On June 27, 1962, petitioner St. Amant, a candidate for public office, made a televised speech in Baton Rouge, Louisiana. In the course of this speech, St. Amant read a series of questions which he had put to J.D. Albin, a member of a Teamsters

[2] It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

[3] It is not seriously contended, and could not be, that the fact respondent no longer supervised the Area when the column appeared has decisional significance here. To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule. But here the management of the Area was still a matter of lively public interest; propositions for further change were abroad, and public interest in the way in which the prior administration had done its task continued strong. The comment, if it referred to respondent, referred to his performance of duty as a county employee.

Union local, and Albin's answers to those questions. The exchange concerned the allegedly nefarious activities of E.G. Partin, the president of the local, and the alleged relationship between Partin and St. Amant's political opponent. One of Albin's answers concerned his efforts to prevent Partin from secreting union records; in this answer Albin referred to Herman A. Thompson, an East Baton Rouge Parish deputy sheriff and respondent here:

> Now, we knew that this safe was gonna be moved that night, but imagine our predicament, knowing of Ed's connections with the Sheriff's office through Herman Thompson, who made recent visits to the Hall to see Ed. We also knew of money that had passed hands between Ed and Herman Thompson . . . from Ed to Herman. We also knew of his connections with State Trooper Lieutenant Joe Green. We knew we couldn't get any help from there and we didn't know how far that he was involved in the Sheriff's office or the State Police office through that, and it was out of the jurisdiction of the City Police.

Thompson promptly brought suit for defamation, claiming that the publication had "impute(d) . . . gross misconduct" and "infer(red) conduct of the most nefarious nature." The case was tried prior to the decision in New York Times Co. v. Sullivan, supra. The trial judge ruled in Thompson's favor and awarded $5,000 in damages. Thereafter, in the course of entertaining and denying a motion for a new trial, the Court considered the ruling in *New York Times*, finding that rule no barrier to the judgment already entered. The Louisiana Court of Appeal reversed because the record failed to show that St. Amant had acted with actual malice, as required by *New York Times*. The Supreme Court of Louisiana reversed the intermediate appellate court. In its view, there was sufficient evidence that St. Amant recklessly disregarded whether the statements about Thompson were true or false. We granted a writ of certiorari.

For purposes of this case we accept the determinations of the Louisiana courts that the material published by St. Amant charged Thompson with criminal conduct, that the charge was false, and that Thompson was a public official and so had the burden of proving that the false statements about Thompson were made with actual malice as defined in New York Times Co. v. Sullivan and later cases. We cannot, however, agree with either the Supreme Court of Louisiana or the trial court that Thompson sustained this burden.

Purporting to apply the *New York Times* malice standard, the Louisiana Supreme Court ruled that St. Amant had broadcast false information about Thompson recklessly, though not knowingly. Several reasons were given for this conclusion. St. Amant had no personal knowledge of Thompson's activities; he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts; he gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words.

These considerations fall short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson. "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further

definition of a reckless publication. In *New York Times,* supra, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In Garrison v. State of Louisiana, 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S., at 74. Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendants' testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not.

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a public officer. Nothing referred to by the Louisiana courts indicates an awareness by St. Amant of the probable falsity of Albin's statement about Thompson. Failure to investigate does not in itself establish bad faith. St. Amant's mistake about his probable legal liability does not evidence a doubtful mind on his part. That he failed to realize the import of what he broadcast — and was thus "heedless" of the consequences for Thompson — is similarly colorless. Closer to the mark are considerations of Albin's reliability. However, the most the state court could say was that there was no evidence

in the record of Albin's reputation for veracity, and this fact merely underlines the failure of Thompson's evidence to demonstrate a low community assessment of Albin's trustworthiness or unsatisfactory experience with him by St. Amant.

Other facts in this record support our view. St. Amant made his broadcast in June 1962. He had known Albin since October 1961, when he first met with members of the dissident Teamsters faction. St. Amant testified that he had verified other aspects of Albin's information and that he had affidavits from others. Moreover Albin swore to his answers, first in writing and later in the presence of newsmen. According to Albin, he was prepared to substantiate his charges. St. Amant knew that Albin was engaged in an internal struggle in the union; Albin seemed to St. Amant to be placing himself in personal danger by publicly airing the details of the dispute.

Because the state court misunderstood and misapplied the actual malice standard which must be observed in a public official's defamation action, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

NOTES TO ROSENBLATT v. BAER AND ST. AMANT v. THOMPSON

1. ***Test for Public Officials.*** *Rosenblatt* considers what degree of fault a plaintiff must prove in a defamation case. A plaintiff who is a public official must prove, in addition to the other elements of a defamation claim, that the falsehood was published with actual malice, knowledge of its falsity or reckless disregard of whether it was true or false. What is the test from *Rosenblatt* for who qualifies as a public official? What is the likely result of applying that rule to Mr. Baer, the supervisor?

2. ***Problem: Public Officials.*** Which of the following individuals is a public official and must therefore prove actual malice in order to recover in a defamation claim? Assume that each plaintiff was defamed by a statement relating to his or her official capacity.

A. An undercover informant for the Department of Inspections who is not paid a salary by the city of Baltimore but whose expenses are sometimes paid? See Jenoff v. Hearst Corp., 644 F.2d 1004 (4th Cir. 1981).

B. A court-appointed attorney for a murder defendant who is not a permanent employee of the government but who was paid for his services in this case out of public funds? See Steere v. Cupp, 602 P.2d 1267 (Kan. 1979).

C. State university print shop director called "congenital liar" by defendant? See Madison v. Yunker, 589 P.2d 126 (Mont. 1978).

D. Discharged firefighter in news broadcast about his firing? See Jones v. Palmer Communications, Inc., 440 N.W.2d 884 (Iowa 1989).

E. Student member of university senate accused of being "campus demagogue"? See Klahr v. Winterble, 418 P.2d 404 (Ariz. Ct. App. 1966).

F. License officer in vehicle licensing bureau whose duties included collecting and accounting for fees collected for licenses? See Hodges v. Oklahoma Journal Publishing Co., 617 P.2d 191 (Okla. 1980).

3. ***Problems: Clear and Convincing Evidence of Actual Malice.*** When proof of actual malice, as described in St. Amant v. Thompson, is required, the evidence must be *clear and convincing*, a higher standard than a simple *preponderance of the evidence.*

Thus, the common law of defamation is altered by adding a fault requirement and requiring proof of that fault by a higher standard.

In Varanese v. Gall, 518 N.E.2d 1177 (Ohio 1988), the former county treasurer brought suit against a newspaper for publication of an election advertisement that was allegedly libelous. The ad charged various acts of misfeasance and nonfeasance in office and characterized the former treasurer as advocating the elimination of various services, including those supporting veterans, the aged, and conservation, as well as the termination of support for 4-H programs. The ad provided footnotes to the allegations, several of which cited the newspaper itself as a source thereof. The plaintiff lost the election. The following evidence was offered by the plaintiff in support of her position that the newspaper had acted with actual malice:

1. The plaintiff alleged that the footnotes in the ad citing the newspaper as a source gave the newspaper serious reason to doubt their veracity, since those articles were actually unsupportive of these charges.
2. The plaintiff alleged that the newspaper could easily have checked the accuracy of the ad by reference to documents either in its possession or readily accessible to it.
3. The plaintiff alleged that a reporter employed by the newspaper attended certain public meetings at which the plaintiff spoke. The reporter would have known from the plaintiff's remarks that the plaintiff had never advocated the positions attributed to her in the ad, such as the elimination of veterans' services.
4. The plaintiff offered portions of a deposition taken of Herbert Thompson, who was the newspaper's general manager at the time the ad in question was published. These excerpts contained statements by Thompson that he did not investigate the accuracy of the ad, did not research the footnotes, and did not discuss the ad with the person responsible for advertising.
5. The plaintiff offered excerpts from the deposition of Robert Curran, the newspaper's editor at the time the ad was published. The plaintiff particularly emphasized Curran's testimony that he saw the ad several days before it was published and remarked to Thompson, the general manager, that the ad was "bullshit." Curran explained that his statement that the ad was "bullshit" was an expression of his concern that if the ad were false, the newspaper would be included in any subsequent lawsuit. He stated that his concern was the newspaper's potential exposure to suit in the event that the ad's charges proved to be untrue.

Does a *former* county treasurer qualify as a public official? Check the footnotes in *Rosenblatt.* Does this collection of evidence demonstrate by clear and convincing evidence that the newspaper acted with actual malice?

In Elder v. Gaffney Ledger, 533 S.E.2d 899 (S.C. 2000), a former police chief sued a newspaper for libel. A newspaper *editorial* suggested that the police chief was being paid off by drug dealers. The police chief offered the following evidence in support of his claim that the editor acted with actual malice:

1. The editor failed to investigate or verify information left by an anonymous caller and admitted that he did not have enough information to publish the information as a story.

2. The editor failed to introduce the tape recording made of the anonymous call.
3. The editor had a 1991 conviction for manufacturing marijuana and may have been motivated by his own problems with law enforcement to discredit the plaintiff.
4. The police chief's wife testified that the editor had spoken to her in a "very smart, rude" manner on one occasion and disliked her.

Does this evidence demonstrate by clear and convincing evidence that the newspaper editor acted with actual malice?

4. ***Criticizing the Government.*** Defamatory statements about the government or the governmental unit to which an official belongs are absolutely privileged. The *New York Times* actual malice standard applies only to defamatory statements directed at the official personally. See Rodney A. Smolla, *Law of Defamation* 22-136, §2:112 (2d ed. 2001 and 12/2001 update).

2. Public Figures

Speech concerning public figures is also protected by the *New York Times* actual malice standard. Because public figures may not be public employees, as public officials typically are, a test focusing on the independent importance of their qualifications for and performance in their jobs is inappropriate. Nor do public figures necessarily have "substantial responsibility for or control over the conduct of governmental affairs." Public figure status has been given to entertainers, sports figures, mobsters, authors, *Playboy* centerfold photo subjects, Nobel Prize winners, corporate leaders, and priests, among others, but some people in these categories may not qualify. A public official with sufficient notoriety, such as the President of the United States, may be classified as both a public official and a public figure. In Gray v. St. Martin's Press, the court discusses how someone gets to be classified as a public figure and the distinction between *general purpose public figures* and *limited public figures.* As you read the following cases on public and private figures, determine what requirements would be appropriate for public officials about whom someone has made a defamatory statement unrelated to the official's office or his or her qualifications for or performance in that office.

GRAY v. ST. MARTIN'S PRESS, INC.

1999 WL 813909 (D.N.H. 1999)

McAuliffe, J.

Robert Gray brings this action seeking damages for five allegedly defamatory statements contained in *The Power House, Robert Keith Gray and the Selling of Access and Influence in Washington* ("*The Power House*"), a book authored by Susan Trento and published by St. Martin's Press. The book discusses how members of lobbying and public relations firms influence federal government operations and focuses on Gray as one of the most powerful and well-connected members of that group.

Pending before the court are two motions for summary judgment filed by defendants. In the first, defendants assert that plaintiff is a public figure and must, therefore, demonstrate that they acted with "actual malice" in order to prevail on his defamation claims. . . .

Plaintiff is, at least in Washington, D.C., and nationally in governmental and lobbying circles, both successful and well-known. See, e.g., Affidavit of Robert K. Gray submitted in support of motion for enlargement of time for discovery (dated September 27, 1995), at para. 3 ("I have a national reputation in the area of public relations."). Defendants point out that he has also been the subject of a television documentary and the topic of (or, at a minimum, discussed in) several hundred newspaper and magazine articles. Thus, the only real question before the court concerning plaintiff's status is whether he is a "general purpose public figure" or a "limited public figure."

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court recognized a distinction between these two types of public figures:

> Some [plaintiffs] 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.

Id., at 345. More recently, this court (DEVINE, J.) addressed the legal concepts of "general purpose public figures" and "limited public figures," observing that:

> The designation "public figure" may rest on two alternative bases. First, in some instances, an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. Second, persons of lesser fame may nonetheless qualify as limited public figures if they "thrust themselves to the forefront of particular public controversies." Such limited public figures are subject to the "actual malice" standard only for defamation arising out of the public controversy into which they have thrust themselves.

Fagin v. Kelly, 978 F. Supp. 420, 426 (D.N.H. 1997).

In the wake of the Supreme Court's opinion in *Gertz*, supra, the Court of Appeals for the District of Columbia Circuit summarized the factors that ought to be considered when determining whether a particular person is a general purpose public figure.

> A court must first ask whether the plaintiff is a public figure for all purposes. *Gertz*, as noted above, held that a plaintiff could be found to be a general public figure only after a clear showing "of general fame or notoriety in the community, and pervasive involvement in the affairs of society. . . ." 418 U.S. at 352. He must have assumed a "role of especial prominence in the affairs of society . . ." Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976). In other words, a general public figure is a well-known "celebrity," his name a "household word." The public recognizes him and follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.

Waldbaum v. Fairchild Publications, Inc., 627, F.2d 1287, 1294 (D.C. Cir. 1980).

On the record presently before it, the court cannot conclude that defendants have shown, as a matter of law, that plaintiff is a general purpose public figure. The record does not support the conclusion that plaintiff was a "celebrity" or that his name was a "household word." To the contrary, as plaintiff notes, several editors and other employees at St. Martin's Press who actually worked on the publication of *The Power House* admitted at their depositions that, prior to their involvement with the book, they had never heard of Robert Keith Gray. Nothing presented suggests that the public — in the District of Columbia or nationally — was better informed or more

aware of Mr. Gray's general involvement in the affairs of society. Thus, while plaintiff may be extraordinarily well known in certain Washington, D.C., circles, particularly with regard to his ability to influence public opinion and provide his clients with coveted access to powerful men and women in American politics, defendants have failed to establish that he attained that degree of notoriety or celebrity usually associated with a "general purpose public figure."

It is, however, equally clear that plaintiff has attained the status of "limited public figure." As the Court of Appeals for the Eleventh Circuit has recognized:

> The proper standards for determining whether plaintiffs are limited public figures are best set forth in Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980). . . . Under the *Waldbaum* analysis, the court must (1) isolate the public controversy, (2) examine the plaintiffs' involvement in the controversy, and (3) determine whether "the alleged defamation [was] germane to the plaintiffs' participation in the controversy." *Id.*, at 1297.

Silvester v. American Broadcasting Companies, Inc., 839 F.2d 1491, 1494 (11th Cir. 1988). Here, the "public controversy" relates to familiar and often discussed public issues — the influence of, and access provided to political figures by, powerful Washington, D.C., lobbyists. And, there can be little doubt that plaintiff, one of the more powerful, influential, and successful lobbyists in Washington, qualifies as a central figure in that controversy. Finally, notwithstanding plaintiff's efforts to narrowly circumscribe the scope of the "public controversy" into which he thrust himself, each of the alleged defamatory statements set forth in *The Power House* relates directly to plaintiff's lobbying activities, his access to powerful and influential Washington "insiders," and his demonstrated ability to shape public opinion on various issues of public concern. Accordingly, the court concludes that plaintiff is a limited purpose public figure as to each of the statements at issue in this case. . . .

NOTES TO GRAY v. ST. MARTIN'S PRESS, INC.

1. ***General Purpose versus Limited Public Figures.*** The distinction between general purpose and limited public figures is important because the general purpose public figure must prove actual malice in any defamation case. The limited public figure status only requires proof of actual malice when the defamatory statement is connected to the matter of public concern from which that status arose. Outside that context, the limited public figure is a private figure.

2. ***Problem: General and Limited Purpose Public Figures.*** Apply the test from Gray v. St. Martin's Press, Inc. to the following facts.

A. Jack Kevorkian is the best known and controversial proponent of assisted suicide. Dr. Kevorkian sued the American Medical Association for publishing a letter to the Michigan Attorney General stating that the plaintiff "perverts the idea of the caring and committed physician," "serves merely as a reckless instrument of death," "poses a great threat to the public," and engages in "criminal practice." The AMA also, through its officers, issued a press release alleging "continued killings" and "criminal activities" by the plaintiff. Is Jack Kevorkian a general purpose or limited purpose public figure? See Kevorkian v. American Medical Association, 602 N.W.2d 233 (Mich. Ct. App. 1999).

B. Is a real estate investor a public figure? The real estate speculation and business practices of Gary Waicker had been the subject of newpaper articles and editorials in Baltimore from the late 1970s to the 1990s. One week prior to the article stating that he brought property cheap by exploiting racial bigotry, another local newspaper ran an article on the same subject. Mr. Waicker refused a request for an interview for the article. Is Mr. Waicker a general purpose or limited public figure? See Waicker v. Scranton Times Ltd. Partnership, 688 A.2d 535 (Md. Ct. Spec. App. 1997).

3. Private Figures

In the 1974 case Gertz v. Robert Welch, Inc., the U.S. Supreme Court considered whether the constitutional protection of speech about public officials and public figures should extend to private figures. To protect and thereby encourage speech about public officials and figures, the Court required defamation plaintiffs in these categories to prove a high level of fault on the part of the defendant — actual malice — to recover any type of damages. When a private figure becomes embroiled in a public controversy, there may also be a societal interest in speech about that person. Even when there is no public controversy, the First Amendment might still be interpreted as providing some level of protection to freedom of expression. The issue for the following cases is how much constitutional protection to give to speech about private figures.

Following the *New York Times* actual malice approach, constitutional protection for private plaintiffs is provided by adding a fault requirement. Courts have considered how much fault private defamation plaintiffs must prove to recover damages. Recall that under traditional common law, plaintiffs never had to prove either fault or falsity unless a qualified privilege applied. Consistent with the constitutional interest in protecting speech about matters of public concern, the Supreme Court adopted different fault requirements for private figures involved in matters of public concern and those involved in private matters.

In addition, the Court adopted different fault standards depending on whether the private figure seeks presumed, punitive, or actual damages. Under the traditional common law, a defamation plaintiff may recover presumed damages without proof of any actual harm in a per se defamation action. A plaintiff may recover actual damages in either a per se or per quod defamation action subject to the normal rules of proof applying to general and special damages discussed in Chapter 12. Punitive damages are awarded not to compensate the plaintiff but to deter or punish the defendant for particularly egregious conduct. Concerned that awarding presumed damages without proof of actual damages or awarding punitive damages might unduly chill freedom of expression, the Supreme Court has held that proof of a higher level of fault is required for a private figure to recover these types of damages in some cases.

When organizing your understanding of the fault rules applying to different combinations of figures and contexts, you may have noticed that the Supreme Court has not yet decided what rules apply in some combinations. Lawyers and courts working on defamation cases must extend the principles derived from what the Court has said to project what rules apply for the undecided combinations. Moreover, rather than say what level of fault is required, the Supreme Court has sometimes said what is *not* required. This further complicates understanding of this topic.

a. Private Figure Involved in an Issue of Public Concern

Khawar v. Globe International, Inc. involves a photojournalist who was defamed in a book about the assassination of presidential candidate Robert F. Kennedy. The court first considers whether the photojournalist was a public or private figure and then applies the constitutional defamation law requirements for the various types of damages. This long case is included not because it is groundbreaking or creates new law. Rather, it offers particularly clear presentations and applications of the rules of constitutional defamation.

KHAWAR v. GLOBE INTERNATIONAL, INC.

965 P.2d 696 (Cal. 1998)

KENNARD, J.

We granted review to decide certain issues concerning the federal Constitution's guarantees of freedom of speech and of the press insofar as they restrict a state's ability to impose tort liability for the publication of defamatory falsehoods. More specifically, we address the definition of a "public figure" for purposes of tort and First Amendment law . . . and the showings required to support awards of compensatory and punitive damages for the republication of a defamatory falsehood. . . .

I. FACTS

In November 1988, Roundtable Publishing, Inc., (Roundtable) published a book written by Robert Morrow (Morrow) and entitled *The Senator Must Die: The Murder of Robert Kennedy* (the Morrow book). The Morrow book alleged that the Iranian Shah's secret police (SAVAK), working together with the Mafia, carried out the 1968 assassination of United States Senator Robert F. Kennedy (Kennedy) in California and that Kennedy's assassin was not Sirhan Sirhan, who had been convicted of Kennedy's murder, but a man named Ali Ahmand, whom the Morrow book described as a young Pakistani who, on the evening of the Kennedy assassination, wore a gold-colored sweater and carried what appeared to be a camera but was actually the gun with which Ahmand killed Kennedy. The Morrow book contained four photographs of a young man the book identified as Ali Ahmand standing in a group of people around Kennedy at the Ambassador Hotel in Los Angeles shortly before Kennedy was assassinated.

Globe International, Inc., (Globe) publishes a weekly tabloid newspaper called Globe. Its issue of April 4, 1989, contained an article on page 9 under the headline: *Former CIA Agent Claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA* (the Globe article). Another headline, appearing on the front page of the same issue, stated: *Iranian secret police killed Bobby Kennedy.* The Globe article, written by John Blackburn (a freelance reporter and former Globe staff reporter), gave an abbreviated, uncritical summary of the Morrow book's allegations. The Globe article included a photograph from the Morrow book showing a group of men standing near Kennedy; Globe enlarged the image of these individuals and added an arrow pointing to one of these men and identifying him as the assassin Ali Ahmand.

In August 1989, Khalid Iqbal Khawar (Khawar) brought this action against Globe, Roundtable, and Morrow, alleging that he was the person depicted in the photographs

and identified in the Morrow book as Ali Ahmand, and that the book's accusation, repeated in the Globe article, that he had assassinated Kennedy was false and defamatory and had caused him substantial injury. . . .

The evidence at trial showed that in June 1968, when Kennedy was assassinated, Khawar was a Pakistani citizen and a free-lance photojournalist working on assignment for a Pakistani periodical. At the Ambassador Hotel's Embassy Room, he stood on the podium near Kennedy so that a friend could photograph him with Kennedy, and so that he could photograph Kennedy. He was aware that television cameras and the cameras of other journalists were focused on the podium and that his image would be publicized. When Kennedy left the Embassy Room, Khawar did not follow him; Khawar was still in the Embassy Room when Kennedy was shot in the hotel pantry area. Both the Federal Bureau of Investigation (FBI) and the Los Angeles Police Department questioned Khawar about the assassination, but neither agency ever regarded him as a suspect.

. . . The jury awarded Khawar $100,000 for injury to his reputation, $400,000 for emotional distress, $175,000 in presumed damages, and, after a separate punitive damages phase, $500,000 in punitive damages. . . .

II. Public Figure

We consider first Globe's contention that the trial court and the Court of Appeal erred in concluding that Khawar is a private rather than a public figure for purposes of this defamation action.

A. Background . . .

In Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 (*Gertz*), the court explained that it had imposed the actual malice requirement on defamation actions by both public officials and public figures because such persons "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (id. at p.344) and because they "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them" (id. at p.345). Concerning the latter justification, the court stated: "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare." (Ibid.)

The court then explained that there are two types of public figures: "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." (*Gertz*, supra, 418 U.S. 323, 345) The court reiterated the distinction in these words: "[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (Id. at p.351.)

The court contrasted these two types of public figures — the all purpose public figure and the limited purpose public figure — with an ordinary private individual: "He [the private individual] has not accepted public office or assumed an 'influential role in ordering society.' [Citation.] He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." (*Gertz*, supra, 418 U.S. 323, 345.) The court declined to impose the actual malice requirement on the recovery of damages for actual injury caused to a private figure by the publication of a defamatory falsehood.

In three later decisions, the United States Supreme Court has applied this form of analysis, similarly concluding in each that a plaintiff in a libel action was a private rather than a public figure.

B. Analysis . . .

Applying the standard here, we note, first, that Globe does not contend that Khawar is a public figure for all purposes but merely that he is a public figure for limited purposes relating to particular public controversies. Globe's main argument appears to be that publication of the Morrow book drew Khawar into public controversies surrounding Kennedy's assassination and that Khawar is therefore an involuntary public figure for the limited purpose of a report on that book. In making this argument, Globe relies on the language in *Gertz*, supra, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, that it is possible for a person "to become a public figure through no purposeful action of his own" (id. at p.345, 94 S. Ct. 2997) and that a person can become a public figure by being "drawn into a particular public controversy" (id. at p.351, 94 S. Ct. 2997). Thus, Globe concedes, at least for purposes of this one argument, that Khawar did not intentionally thrust himself into the vortex of any public controversy.

We find Globe's argument unpersuasive because characterizing Khawar as an involuntary public figure would be inconsistent with the reasons that the United States Supreme Court has given for requiring public figures to prove actual malice in defamation actions. As we have explained, the high court imposed the actual malice requirement on defamation actions by public figures and public officials for two reasons: They have media access enabling them to effectively defend their reputations in the public arena; and, by injecting themselves into public controversies, they may fairly be said to have voluntarily invited comment and criticism. (*Gertz*, supra, 418 U.S. 323, 344-345.) By stating that it is theoretically possible to become a public figure without purposeful action inviting criticism (id. at p.345), the high court has indicated that purposeful activity may not be essential for public figure characterization. But the high court has never stated or implied that it would be proper for a court to characterize an individual as a public figure in the face of proof that the individual had neither engaged in purposeful activity inviting criticism nor acquired substantial media access in relation to the controversy at issue. We read the court's decisions as precluding courts from affixing the public figure label when neither of the reasons for applying that label has been demonstrated. Thus, assuming a person may ever be accurately characterized as an involuntary public figure, we infer from the logic of *Gertz* that the high court would reserve this characterization for an individual who, despite never having voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, nonetheless has acquired such public prominence in

relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.

We find in the record no substantial evidence that Khawar acquired sufficient media access in relation to the controversy surrounding the Kennedy assassination or the Morrow book to effectively counter the defamatory falsehoods in the Globe article. After the assassination and before publication of the Morrow book, no reporter contacted Khawar to request an interview about the assassination. Nor was there any reason for a reporter to do so: Khawar was not a suspect in the investigation, he did not testify at the trial of the perpetrator of the assassination, and, so far as the record shows, his own views about the assassination were never publicized.

Nothing in the record demonstrates that Khawar acquired any significant media access as a result of publication of either the Morrow book or the other book, *RFK Must Die* (1970) by Robert Blair Kaiser, in which, according to Globe, questions were raised about Khawar's activities in relation to the assassination. There is no evidence that either book enjoyed substantial sales or was reviewed in widely circulated publications. . . .

The interview by the Bakersfield television station, which was the only interview in which Khawar ever participated that related in any way to the Kennedy assassination, the Morrow book, or the Globe article, occurred after and in response to the publication of the Globe article. Although this single interview demonstrates that Khawar enjoyed some media access, it is only the media access that would likely be available to any private individual who found himself the subject of sensational and defamatory accusations in a publication with a substantial nationwide circulation. (Globe distributed more than 2.7 million copies of the issue containing the Globe article.) If such access were sufficient to support a public figure characterization, any member of the media — any newspaper, magazine, television or radio network or local station — could confer public figure status simply by publishing sensational defamatory accusations against any private individual. This the United States Supreme Court has consistently declined to permit. As the court has repeatedly said, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).)

Although Globe's primary argument is that publication of the Morrow book made Khawar an involuntary public figure, Globe may be understood to argue further that Khawar's involvement with the Kennedy assassination controversies was not entirely involuntary because, immediately before the assassination, Khawar sought and obtained a position close to Kennedy on the podium knowing that there would be substantial media coverage of the event. For a variety of reasons, this conduct does not demonstrate that Khawar voluntarily elected to encounter an increased risk of injury from defamatory falsehoods in publications like the Globe article.

First, Khawar's conduct occurred before any relevant controversy arose. The controversies discussed in the Globe article related to Kennedy's assassination and the particular theory concerning it that was proposed in the Morrow book. Khawar's conduct in standing near Kennedy at the hotel was not a voluntary association with either of those controversies because the conduct occurred before the assassination and before the Morrow book's publication. Khawar did not know, nor should he have known, that Kennedy would be assassinated moments later, much less that a book would be published 20 years thereafter containing the theory proposed in the Morrow book. We do not disagree with Globe that Kennedy's campaign for his party's

nomination to the presidency may be described as a public issue or controversy, nor do we disagree that Khawar voluntarily associated himself with this public issue or controversy by allowing himself to be photographed with Kennedy at a campaign press conference. But these facts have no legal significance for purposes of this libel action. The subject of the Globe article was not Kennedy's candidacy as such, but rather Kennedy's assassination and the theory put forward in the Morrow book.

Second, even as to the public issues or controversies relating to Kennedy's candidacy, the role in these controversies that Khawar voluntarily assumed by standing near Kennedy on the podium was trivial at best. As the United States Supreme Court has stressed, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." (Wolston v. Reader's Digest Ass'n, Inc., 443 U.W. 157, 167 (1979).) Khawar's conduct in standing near Kennedy foreseeably resulted in his being photographed with Kennedy, but a journalist who is photographed with other journalists crowded around a political candidate does not thereby assume any special prominence in relation to the political campaign issues.

Third, appearing on the podium was not conduct by which Khawar "engaged the attention of the public in an attempt to influence the resolution of the issues involved." (*Wolston*, supra, 443 U.S. 157, 168.) Khawar, who was an admirer of Kennedy, wanted to be photographed with Kennedy because the resulting photographs would have a strictly personal value as souvenirs. Khawar did not anticipate, nor did he have reason to anticipate, that inclusion of his image would make the photographs more newsworthy or would in any way affect the resolution of any public issue related to Kennedy's run for the presidency. In brief, by appearing in close proximity to Kennedy, Khawar did not engage in conduct that was "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue." (Ibid.)

Having concluded that Khawar did not voluntarily elect to encounter an increased risk of media defamation and that before publication of the Globe article he did not enjoy media access sufficient to prevent resulting injury to his reputation, we agree with the trial court and the Court of Appeal that, for purposes of this defamation action, Khawar is a private rather than a public figure. . . .

IV.

A. Actual Malice

The First Amendment to the federal Constitution, as authoritatively construed by the United States Supreme Court, does not require a private figure plaintiff to prove actual malice to recover damages for actual injury caused by publication of a defamatory falsehood. (*Gertz*, supra, 418 U.S. 323, 347.) Rather, in this situation, the individual states may define the appropriate standard of liability for defamation, provided they do not impose liability without fault. In California, this court has adopted a negligence standard for private figure plaintiffs seeking compensatory damages in defamation actions.

There is a different rule, however, for recovery of either punitive damages or damages for presumed injury. The United States Supreme Court has held that to recover such damages, even a private figure plaintiff must prove actual malice if the defamatory statement involves matters of public concern. We agree with Globe that the Kennedy assassination is a matter of public concern.

Because in this defamation action Khawar is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But Khawar was required to prove actual malice to recover punitive or presumed damages for defamation involving the Kennedy assassination. Because Khawar sought punitive and presumed damages as well as damages for actual injury, the issues of both actual malice and negligence were submitted to the jury. The jury found that in publishing the Globe article Globe acted both negligently and with actual malice. Globe challenged both findings on appeal. In this court, Globe contends that the Court of Appeal erred in rejecting its challenges to these two findings. . . .

In this context, actual malice means that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." (New York Times Co. v. Sullivan, supra, 376 U.S. 254, 280.) Reckless disregard, in turn, means that the publisher "in fact entertained serious doubts as to the truth of his publication." (St. Amant v. Thompson, 390 U.S. 727, 731 (1968).) To prove actual malice, therefore, a plaintiff must "demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." (Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511, fn.30. (1984).)

Actual malice is judged by a subjective standard; otherwise stated, "there must be sufficient evidence to permit the conclusion that the defendant . . . had a 'high degree of awareness of . . . probable falsity.'" (Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989).) To prove this culpable mental state, the plaintiff may rely on circumstantial evidence, including evidence of motive and failure to adhere to professional standards. When, as in this case, a finding of actual malice is based on the republication of a third party's defamatory falsehoods, "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient." (Harte-Hanks Communications v. Connaughton, supra, 491 U.S. 657, 688.) Nonetheless, the actual malice finding may be upheld "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports" (ibid.), and the republisher failed to interview obvious witnesses who could have confirmed or disproved the allegations (id. at p.682) or to consult relevant documentary sources.

There were, to say the least, obvious reasons to doubt the accuracy of the Morrow book's accusation that Khawar killed Kennedy. The assassination of a nationally prominent politician, in the midst of his campaign for his party's nomination for the presidency, had been painstakingly and exhaustively investigated by both the FBI and state prosecutorial agencies. During this massive investigation, these agencies accumulated a vast quantity of evidence pointing to the guilt of Sirhan as the lone assassin. As a result, Sirhan alone was charged with Kennedy's murder. At Sirhan's trial, "it was undisputed that [Sirhan] fired the shot that killed Senator Kennedy" and "[t]he evidence also established conclusively that he shot the victims of the assault counts." (People v. Sirhan, 7 Cal. 3d 710, 717 (Cal. 1972).) The jury returned a verdict finding beyond a reasonable doubt that Sirhan was guilty of first degree murder. On Sirhan's appeal from the resulting judgment of death, this court carefully reviewed the evidence and found it sufficient to sustain the first degree murder conviction. (Id. at pp.717-728.) In asserting that Khawar, and not Sirhan, had killed Kennedy, the Morrow book was making the highly improbable claim that results of

the official investigation, Sirhan's trial, and this court's decision on Sirhan's appeal, were all fundamentally mistaken.

Because there were obvious reasons to doubt the accuracy of the Morrow book's central claim, and because that claim was an inherently defamatory accusation against Khawar, the jury could properly conclude that Globe acted with actual malice in republishing that claim if it found also, as it impliedly did, that Globe failed to use readily available means to verify the accuracy of the claim by interviewing obvious witnesses who could have confirmed or disproved the allegations or by inspecting relevant documents or other evidence. The evidence at trial supports the jury's implied finding that neither Blackburn (who wrote the Globe article) nor Globe's editors made any such effort.

Preliminarily, we note that this was not a situation in which time pressures made it impossible or impractical to investigate the truth of the accusation. Kennedy had been assassinated in 1968. In November 1988, when Roundtable published the Morrow book, and in April 1989, when Globe published its article, the Kennedy assassination had long ceased to be an issue that urgently engaged the public's attention. Before publishing an article accusing a private figure of a sensational murder, Globe could well have afforded to take the time necessary to investigate the matter with sufficient thoroughness to form an independent judgment before republishing an accusation likely to have a devastating effect on the reputation of the person accused. But Globe did not do so.

Neither Blackburn nor Globe's editors contacted any of the eyewitnesses to the assassination, some of whom were prominent individuals who could easily have been located. At the trial, for example, Roosevelt Grier, a well-known former professional football player and volunteer Kennedy security aide who was present in the pantry area where Kennedy was shot, testified that after the assassination he had remained active in public life and was not "real difficult to find," but that no one from Globe had contacted him. Frank Mankiewicz, Kennedy's press secretary and a witness to the assassination, testified that in 1989, when the Globe article was published, he was vice-chairman of a public relations firm in Washington, D.C., and was listed in the telephone directory for that city, yet no one from Globe had contacted him. Nor is there any evidence that anyone working for Globe reviewed the voluminous public records of the government investigation of the Kennedy assassination or the Sirhan trial. Indeed, Globe's managing editor, Robert Taylor, conceded during his testimony that Globe made no attempt to independently investigate the truth of any of the statements in the Morrow book. In short, phrasing our conclusion in the language of the United States Supreme Court, "Accepting the jury's determination that [Globe]'s explanations for these omissions were not credible, it is likely that [Globe]'s inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the Morrow book]'s charges." (Harte-Hanks Communications v. Connaughton, supra, 491 U.S. 657, 692.) As the United States Supreme Court added, "Although failure to investigate will not alone support a finding of actual malice, [citation], the purposeful avoidance of the truth is in a different category." (Ibid.) . . .

Having independently reviewed the record, we agree with the Court of Appeal that the evidence at trial strongly supports an inference that Globe purposefully avoided the truth and published the Globe article despite serious doubts regarding the truth of the accusation against Khawar. In short, we conclude that clear and convincing evidence supports the jury's finding that in republishing the Morrow book's false accusation

against Khawar, Globe acted with actual malice—that is, with reckless disregard of whether the accusation was false or not.

B. NEGLIGENCE

Globe's challenge to the sufficiency of the evidence to support the finding of negligence merits little consideration.

Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence, and evidence that is sufficient to support a finding of actual malice is usually, and perhaps invariably, sufficient also to support a finding of negligence. In any event, we are satisfied that the evidence we previously reviewed, and which we have concluded clearly and convincingly establishes actual malice in the form of reckless disregard, is sufficient also to sustain the finding of negligence. . . .

The judgment of the Court of Appeal is affirmed.

NOTES TO KEWAR v. GLOBE INTERNATIONAL, INC.

1. ***Levels of Fault.*** The court in *Khawar* applies both a negligence test and an actual malice test. For what types of damages must a private figure in a matter of public concern prove actual malice? What choices did the U.S. Supreme Court give to states regarding the level of fault for the other type of damages?

2. ***Proof of Falsity.*** Gertz v. Robert Welch, relied upon by the court in Kewar v. Globe International, Inc., is the key U.S. Supreme Court opinion on private figures involved in matters of public concern. A more recent Supreme Court case, Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), added to that rule, holding that in those cases, the plaintiff cannot recover damages without also showing that the statements at issue were false. This reversed the common law rule that falsity was presumed and truth was a defense to be established by the defendant. In public official and public figure cases, is there a requirement that a defamation plaintiff prove falsity?

3. ***Problem: Classifying Public and Private Figures.*** A newspaper published an article with an erroneous headline, though the body of the story was true:

THREE PLEAD GUILTY IN CATTLE THEFTS

Oxford—Three Mississippi men have pleaded guilty to federal charges of illegally transferring cattle from Alabama to Alcorn and Tippah. Officers said Wilbur Gregory, George L. Whitten and W.L. Tatum, all of Alcorn County, were charged with moving the 112 head of cattle from Red Bay, Alabama, to Mississippi without having the animals tested for brucellosis, a bacterial disease. The three face sentencing November 30, for the misdemeamor crime.

Whitten sued the newpaper for defamation. Is the statement in the headline false? Is Whitten a public or private figure? Is the issue a matter of public or private concern? If the issue is a matter of public concern, was the defamation in the context of that issue? What type of damages is Whitten likely to have suffered? If he is a private figure, what degree of fault must Whitten prove to recover the type of damages he is likely to have suffered? From the article and headline alone, is there clear and convincing evidence of actual malice? Is there evidence of negligence? See Whitten v. Commercial Dispatch Publishing Co., Inc., 487 So. 2d 843 (Miss. 1986).

Perspective: Constitutional Treatment of Media Defendants

While the print and broadcast media are frequently defendants in defamation actions, the U.S. Supreme Court has not decided whether special treatment of the press is appropriate, leaving scholars to debate whether speech by the media deserves special treatment. Professor Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. of Pitt. L. Rev. 91, 120-123 (1987), argued that there should be no special treatment:

> The freedom of speech clause must be regarded as having been premised on the principle that nonmedia speakers and media speakers serve an educative, opinion-shaping function. Otherwise, there would have been no need in the first amendment to include both the freedom of speech and freedom of press clauses. As the Court has observed, the function of providing useful, significant, and desired information cannot be regarded as the exclusive province of the press.
>
> There are other considerations that cut against a media-nonmedia distinction in the constitutional aspects of defamation. If the constitutional fault rules were not regarded as applicable in a nonmedia defendant case, liability without fault would apply. The imposition of such liability on a nonmedia defendant would run contrary to the risk shifting concept underlying strict liability, because nonmedia defendants generally would be less able to pay and shift the costs of judgments entered against them than would media defendants. Yet nonmedia defendants would be held liable more readily than would media defendants because of the natural effects of the enhanced burden imposed on plaintiffs when the fault requirements are made part of the elements that must be proved. Further, a false and defamatory statement published by a media defendant has a greater potential for doing widespread harm to the plaintiff's reputation than does the typical false and defamatory statement by the nonmedia defendant because of the broader circulation the media defendant's statement would get. Nevertheless, if a media-nonmedia distinction were part of the constitutional law of defamation, the nonmedia defendant would be held liable much more readily than would the media defendant. Consequently, a media-nonmedia distinction is fundamentally unsound.

Professor Langvardt also argued that it would be hard to define who was the "media." He feared that the court would use suspect factors to classify specialized publications designed to reach narrow audiences, such as "company newsletters, trade union publications, credit reports, handbills and brochures distributed by a group, and pamphlets handed out by the proverbial 'lonely pamphleteer.'"

b. Private Figure Not Involved in an Issue of Public Concern

A defendant who published a statement about a private person not involving a matter of public concern receives the lowest level of constitutional protection. In Dun & Bradstreet, Inc. v. Greenmoss Builders, the Supreme Court distinguishes between issues that are and are not of public concern and discusses the fault requirement applying to the latter type of cases. When reading *Dun & Bradstreet,*

identify the levels of fault from which a state is free to choose when modifying its law to conform to constitutional requirements. The Supreme Court does not say what state courts must do in cases involving private figures not involved in matters of public concern. Rather, the Supreme Court indicates what state courts are permitted to do only by saying what is not required. Consider also the categories of damages that are not discussed by the Court.

DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS

472 U.S. 749 (1985)

Justice POWELL.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976, to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. [After the trial court granted Dun & Bradstreet's motion for a new trial, and the Vermont Supreme Court reversed, the U.S. Supreme Court granted certiorari to outline the extent of constitutional protections to be given to the defendant's speech.] . . .

In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." Id., 376 U.S., at 271. Noting that "freedom of expression *upon public questions* is secured by the First Amendment," id., at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," id., at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with " 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not," id., at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (opinion of BRENNAN, J.).

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called *American Opinion*, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U.S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." Ibid. In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." Id., at 348-349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U.S., at 348. A State should not lightly be required to abandon it,

> for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . ." Rosenblatt v. Baer, 383 U.S. 75 (1966) (concurring opinion).

Id., at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance. It is speech on "matters of public concern" that is "at the heart of the First Amendment's protection." First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), citing Thornhill v. Alabama, 310 U.S. 88, 101 (1940). As we stated in Connick v. Myers, 461 U.S. 138, 145 (1983), this "special concern [for speech on public issues] is no mystery":

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982).

In contrast, speech on matters of purely private concern is of less First Amendment concern. Id., at 146-147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent. In such a case,

> [t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling.

Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (1977).

While such speech is not totally unprotected by the First Amendment, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances

of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts §112, p.765 (4th ed. 1971). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." Connick v. Myers, supra, 461 U.S., at 147-148. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." Id., at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

NOTES TO DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS

1. ***Private Plaintiff in Matters Not of Public Concern.*** Having been given their freedom to choose a level of fault for presumed and punitive damages, states have taken different approaches in cases involving private plaintiffs in matters not of public concern. The vast majority of states have adopted a negligence standard, while a few have adopted an actual malice standard. New York has adopted a "gross irresponsibility standard" in which the defamation plaintiff must

> establish by a preponderance of the evidence that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

See Chapadeau v. Utica Observer Dispatch, Inc., 341 N.E.2d 569 (N.Y. 1975). See Rodney A. Smolla, *Law of Defamation* 3-41-3.48 §§3.30-3.31 (listing the states in each category).

2. ***Matters of Public Concern.*** To infer what issues the Supreme Court would put in the category of *matters of public concern*, one must focus on the underlying policies to which the Court refers when deciding this question. To what policies does the opinion in *Dun & Bradstreeet* refer? How did those policies affect the outcome in *Dunn & Bradstreet?*

3. ***Statutory Treatment of Media Defendants.*** Although newspapers, magazines, and broadcasters are frequently defendants in defamation actions, the Supreme Court has not decided whether media defendants are entitled to any special constitutional protection. Media defendants nevertheless receive individual attention in state statutes. A California statute applying to libel by a newspaper and slanders by radio, for instance, limits recovery to special damages where the plaintiff has demanded and received a correction from the defendant. When correction was demanded and not given, the plaintiff may seek general, special, and punitive damages. All plaintiffs must prove actual malice to recover punitive damages, with "actual malice" defined as something closer to "express malice" than constitutional "actual malice." See Cal. Civ. Code §48(a)(1), (2), and 4(d).

4. ***Problem: Matters of Public and Private Concern.*** Which of the following contexts in which a private figure was allegedly defamed involves an issue of private concern?

A. Gail Davis alleged that nationally known singer and actress Diana Ross defamed her by saying in a letter, "If I let an employee go, it's because either their work or their personal habits are not acceptable to me." See Davis v. Ross, 107 F.R.D. 326 (S.D.N.Y. 1985).

B. The *Sun* newspaper published a fictitious story about a woman named "Audrey Wiles," living in Australia, who quit her paper route at the age of 101 because an extramarital affair with a millionaire client on her route had left her pregnant. Next to the story was a photograph of the plaintiff, 97-year-old Nellie Mitchell, who had operated a newsstand and delivered newspapers in her community for over 50 years. See Peoples Bank and Trust Co. of Mountain Home v. Globe International Publishing, Inc., 978 F.2d 1065 (8th Cir. 1992).

C. A man alleged that he was defamed by a woman claiming he was the father of her child. See King v. Tanner, 539 N.Y.S.2d 617 (N.Y. Sup. Ct. 1987) (finding that DNA testing showing "99.993% certainty" that the man was the father constitutes complete defense based on truth).

D. Texas Beef Group alleged that "The Oprah Winfrey Show" had defamed beef by "falsely suggesting that U.S. beef is highly dangerous because of Mad Cow Disease and that a horrible epidemic worse than AIDS could occur from eating U.S. beef." See Texas Beef Group v. Winfrey, 11 F. Supp. 858 (N.D. Tex. 1998).

Statute: LIBEL OR SLANDER

Mich. Stat. Ann. §600.2911(2)(b), (6), & (7) (2002)

(2)(b) Exemplary and punitive damages shall not be recovered in actions for libel unless the plaintiff, before instituting his or her action, gives notice to the

defendant to publish a retraction and allows a reasonable time to do so, and proof of the publication or correction shall be admissible in evidence under a denial on the question of the good faith of the defendant, and in mitigation and reduction of exemplary or punitive damages. For libel based on a radio or television broadcast, the retraction shall be made in the same manner and at the same time of the day as the original libel; for libel based on a publication, the retraction shall be published in the same size type, in the same editions and as far as practical, in substantially the same position as the original libel; and for other libel, the retraction shall be published or communicated in substantially the same manner as the original libel.

(6) An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

(7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

Statute: PREREQUISITES TO RECOVERY OF VINDICTIVE OR PUNITIVE DAMAGES IN ACTION FOR LIBEL

Ala. Code §6-5-186 (2002)

Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication unless (1) it shall be proved that the publication was made by the defendant with knowledge that the matter published was false, or with reckless disregard of whether it was false or not, and (2) it shall be proved that five days before the commencement of the action the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days, in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter.

NOTES TO STATUTES

1. ***Statutory Treatment of Public and Private Figures.*** The Michigan statute reflects the Supreme Court's classification scheme that first identifies the type of person (public or private) and, if private, the type of matter or concern (public or private). Are the fault requirements in the Michigan statute sufficient to meet the requirements of the U.S. Constitution? Are the Michigan requirements more rigorous than required?

2. ***Statutory Treatment of Punitive Damages.*** Some statutory limitations on punitive damages may be more stringent than required by the U.S. Supreme Court's interpretation of the First Amendment. Which barriers to recovery of punitive damages by a private plaintiff in a matter of private concern created by the Michigan and Alabama statutes are mandated by the First Amendment?

CHAPTER 17

ALTERNATIVES TO LITIGATION

I. Introduction

The problems tort litigation addresses are complex. The cost of litigation is sometimes high, and its results are unpredictable. For these reasons, among others, it is understandable that both plaintiffs and defendants have often sought either to replace it or to change it. This chapter examines the main approaches to providing alternatives to litigation. They typically involve eliminating the need to adjudicate fault and are usually intended to reduce the overall costs of administration.

II. Replacing Litigation with Insurance Systems

A. In General

Workers' compensation statutes are the oldest and most widespread substitute for litigation. While litigation still occurs with respect to claims that workers make under this system, it does provide no-fault compensation for very large numbers of workplace injuries. The main idea of the system, to avoid litigation over fault and to provide swift compensation, has been applied in other fields as well, such as automobile-related injuries and injuries suffered from the use of vaccines or from terrorist attacks.

B. Workers' Compensation

About a century ago, a movement to create what were then called workmen's compensation laws became successful across the United States. In 1979, the Sixth Circuit described this history:

> The dominant purpose of the movement to adopt workmen's compensation laws . . . was to provide social insurance to compensate victims of industrial accidents

> because it was widely believed that the limited rights of recovery available under the common law at the turn of the [twentieth] century were inadequate to protect them.
>
> The so-called "unholy trinity" of judicially-created employer defenses, assumption of the risk, contributory negligence and the fellow servant rule, were developed and strictly enforced as legal rules in the last half of the nineteenth century. The result, according to Deans Prosser and Wade, was recovery in less than a quarter of work-related accidents, as injured workmen subsidized economic growth.
>
> Employers generally opposed the movement for "reform"; labor generally favored it. Workmen's compensation laws were adopted as a compromise between these contending forces. Workmen were willing to exchange a set of common-law remedies of dubious value for modest workmen's compensation benefits schedules designed to keep the injured workman and his family from destitution.

Boggs v. Blue Diamond Coal Co., 590 F.2d 655, 658-659 (6th Cir. 1979).

All states now have statutes that require most employers to obtain insurance that will provide benefits to workers who suffer workplace injuries. An injured worker receives benefits regardless of whether the employer was at fault and regardless of whether the worker was at fault. The amount of benefits is usually controlled by statutes or administrative rules that specify how much will be awarded for a particular injury. This benefit to workers is balanced by a very important benefit to employers: the statutes immunize the employers from tort liability. Where there are disputes about eligibility or the size of an award, administrative agencies, rather than courts, are the initial decision makers.

Contemporary issues in workers' compensation often involve whether or not an injury is covered by the system. Fryer v. Kranz involves an attempt to withdraw a workplace injury from the workers' compensation system so that the defendant employer would be subject to a typical tort lawsuit. In contrast, Cunningham v. Shelton Security Service, Inc. represents an effort to obtain workers' compensation coverage for a worker's fatal heart attack.

FRYER v. KRANZ

616 N.W.2d 102 (S.D. 2000)

MILLER, C.J.

In this intermediate appeal, because the employee has shown there is no genuine issue of material fact as to whether employer's conduct was intentional in order to except it from workers' compensation coverage, we hold that the circuit court improperly denied the employer's motion for summary judgment.

In 1996, Clint Kranz was remodeling a building in Watertown, South Dakota, to convert it into a casino. He employed workers, including Kathy Fryer, to help with the project. As part of the cleanup, he wanted to remove grout and other residue from the ceramic tile floors. Cleaning the tile proved difficult, so he purchased muriatic acid for the job. Muriatic acid, also called hydrochloric acid, is a strong, highly corrosive chemical. The product label warned that for proper use, the acid should be diluted, the vapors are harmful when the acid is used improperly, and the product is for exterior use only. These warnings were not readable when Fryer used the chemical because the label was covered with "cement stuff."

To show Fryer how to clean the tile, Kranz poured the undiluted muriatic acid on the floor, saying "This is how we use it." Kranz said he had used the product several

times. He did not warn Fryer about any dangers, although he did say the acid is "corrosive and smells really bad," and "try not to breathe it." Fryer was told to wear protective gloves. Also, a small oscillating fan was positioned nearby to circulate the air, with more fans set up in the doorways to ventilate the building.

Over the course of three to four weeks, Fryer regularly cleaned with the acid. It produced a "green cloud" when poured on the floor. The vapor made her feel nauseated, lightheaded, and she coughed when she breathed it. She thought, nonetheless, that the fumes were no more toxic than those from products like fingernail polish remover or "white-out." Yet she "complained a lot about it." She told Kranz, "It makes me feel weird. It makes me light-headed. I hate this shit." Kranz responded, "Well, when that happens, then you need to take a break and you need to go get some air." He had her continue to use the product.

On November 12, 1996, Fryer used the muriatic acid to clean a very small room where there was no ventilation. The fumes overcame her. Lightheaded and nauseated, she could not continue. She ran across the alley to a bathroom in another building and vomited. When Kranz knocked on the door, Fryer assured him that she "was fine." She did not immediately seek medical attention, but as the day progressed, she suffered chest pains, breathing problems, and her skin "hurt real bad." Later in the day, she was admitted to the hospital where she remained for four days. She continues to suffer health problems.

Fryer brought a personal injury action against Kranz in circuit court. . . . Kranz moved for summary judgment. The court denied the motion, concluding that there were material issues of fact on whether [Kranz] committed an intentional tort. We granted intermediate appeal. . . .

Workers' compensation covers employment-related accidental injury of every nature. No matter what form employer conduct takes, be it careless, grossly negligent, reckless, or wanton, if it is not a "conscious and deliberate intent directed to the purpose of inflicting an injury," workers' compensation remains the exclusive remedy. 6 Larson's Workers' Compensation Law (MB) §103.03 at 103-6 (November 1999). Even when an employer's acts entail "knowingly permitting a hazardous work condition to exist, knowingly ordering a claimant to perform an extremely dangerous job, [or] wilfully failing to furnish a safe place to work," still they come within the ambit of workers' compensation. Id. at 103-6 (November 1999) & 103-7 (May 2000).

In the workers' compensation scheme, exclusivity serves two important values: (1) it maintains "the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability," and (2) it minimizes "litigation, even litigation of undoubted merit." Larson, supra, §103.05[6] at 103-44 (May 2000). Exclusiveness imparts efficiency to the workers' compensation system. "Every presumption is on the side of avoiding superimposing the complexities and uncertainties of tort litigation on the compensation process." Id.

When an employer intends to commit injury, as opposed to negligently or recklessly committing it, then the rationale for embracing workers' compensation disappears. Accordingly, when an employer intentionally causes a work-related injury, workers' compensation law allows an exception to the exclusive remedies for employee work-related injuries:

> The rights and remedies herein granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment,

> shall exclude all other rights and remedies of such employee, his personal representatives, dependents, or next of kin, on account of such injury or death against his employer or any employee, partner, officer or director of such employer, except rights and remedies arising from intentional tort.

SDCL 62-3-2.

Only injuries "intentionally inflicted by the employer" take the matter outside the exclusivity of workers' compensation coverage. Harn v. Continental Lumber Co., 506 N.W.2d 91, 95 (S.D. 1993). "The worker must also allege facts that plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of employer's conduct." Jensen v. Sport Bowl, Inc., 469 N.W.2d 370, 372 (S.D. 1991) (citations omitted). Even when an "injury is a probable . . . result, [workers'] compensation is still the exclusive remedy." Id. The intentional tort exception is narrowly construed.

The statement of our law regarding the substantial certainty standard was summarized in *Harn*:

> The substantial certainty standard requires that the employer had actual knowledge of the dangerous condition and that the employer still required the employee to perform. Substantial certainty of injury to the employee should be equated with virtual certainty to be considered an intentional tort . . . . If an employee worked under such conditions where the employer actually knew of the danger and that injury was substantially certain (virtually certain) to occur, and such injury did occur, the employer should not escape civil liability for placing the employee in such a dangerous position. That is the type of conduct the intentional tort exception deters.

506 N.W.2d at 100.

Fryer asserts that Kranz knew she would be injured. When she complained to him about the fumes making her feel lightheaded, he replied: "Well, when that happens, then you need to take a break and you need to go get some air." Fryer stresses that Kranz used the word "when" rather than "if." To Fryer, it is notable that, although Kranz had joined Fryer in working with the acid before she complained, he sent her back to the small room alone. This, she argues, shows that her adverse reaction was inevitable and that Kranz knew it. She claims Kranz knew because she had been harmed previously, though not as seriously, by the fumes when they made her light-headed and nauseated.

"The intentional tort exception to workmen's compensation is fact specific." *Harn*, 506 N.W.2d at 99. A comparison of the present facts to the factual bases of our prior cases is necessary to appreciate the allegations proffered by Fryer. Our cases thus far have described actions that do not constitute an intentional tort. This fact results from our narrow construction of the intentional tort exception.

Most recently, in *Harn*, work was being done in an old sawmill because a new sawmill was having technical difficulties. During this work transfer, no one bothered to check whether the anti-kickback device was in place, and Harn was injured when a piece of lumber flew back out of the machine and struck him. There we held that disengaging the safety device may have made the injury probable or highly probable, but that was still not deemed to be substantially certain. . . .

Comparing the facts in prior cases to the instant action, Kranz's conduct was no more egregious than the other employers'. His supervision of Fryer may have been

negligent, reckless, or even wanton, but there is simply no showing that he intended to injure her.

Even when viewed in a light most favorable to Fryer, the evidence at most proves that Kranz knew the acid vapor irritated her. Fryer contends that muriatic acid, "when used in a small, unventilated space, . . . simply can not be used without causing illness." But this was the first time the acid had been used by Kranz or any of his employees in a small, unventilated space; she has not shown in any manner that Kranz knew her injuries were virtually certain to occur.

Based on Fryer's prior experiences with the acid, Kranz knew that it caused her to become light-headed and nauseous. However, that information alone does not automatically make it virtually certain that she would be overcome by the fumes on this occasion. Indeed, the fact that she suffered no severe adverse effects on prior occasions lends credence to Kranz's position that he was not certain it would cause injury.

Moreover, the notation that Kranz personally suffered ill effects from the acid supports the opposite idea that he did not know how injurious the fumes could be. Had he purposely intended to injure his employees by exposing them to the noxious fumes, it is simply not rational to believe that he would have also knowingly and deliberately exposed himself to the fumes by helping his employees clean the grout. Nor is it any more rational to assume that he knowingly and deliberately inflicted upon himself the medical claims, damages, time setbacks, and lawsuits that his employees' exposure to the acid would entail. Larson, supra, §103.05[6] at 103-41 (May 2000).

Under these circumstances, perhaps Kranz should have known that the fumes might cause injury, or even that they would probably or likely cause injury. However, that level of knowledge was still insufficient to show intent to injure under our standard. Kranz showed that no genuine issue of material fact existed as to his intent. To overcome Kranz's motion for summary judgment, Fryer needed to show that Kranz knew with virtual certainty that such exposure would cause illness, yet still required her to work. This she failed to do. . . .

To decide this case differently would blur the line between cases involving only negligent or reckless conduct and those involving true intent to injure. In *VerBouwens*, Justice Wollman foresaw the dire results of such an outcome:

> If the "intentional tort" exception was expanded as plaintiffs request, the focus would be upon the degree of risk of injury and the state of knowledge of the employer and the employee regarding the dangerous conduct or condition which caused the injury. This result undermines the balance of interests maintained by the worker's compensation system. First, it would thwart the goal of the system to provide employers relative immunity from liability at law. Second, it would deny many employees the swift and certain compensation they now receive under the system. The system originally required employees to surrender their right to a potentially larger recovery in a common law action for the wilful or reckless misconduct of employers, in return for expeditious recovery under worker's compensation. Employees disappointed with worker's compensation recovery would be encouraged to seek additional compensation in a common law action, increasing the role of the courts in resolving . . . accident disputes.

334 N.W.2d at 877 (Wollman, J., concurring specially) (quoting Shearer v. Homestake Mining Co., 557 F. Supp. 549, 555 (D.S.D. 1983)). . . .

Although Kranz's conduct was clearly negligent, probably reckless and possibly wanton, it does not amount to an intentional act. Therefore, the denial of Kranz's motion for summary judgment is reversed, and the case is remanded with directions that the trial court enter summary judgment in his favor.

NOTES TO FRYER v. KRANZ

1. ***Rationale for Workers' Compensation Schemes.*** Without explicitly making the connection between the policy and the rule, the court in Fryer v. Kranz concluded that the rationale for the workers' compensation system disappears when an employer intentionally injures an employee. Given the stated rationale, should a case with facts like those in Fryer v. Kranz be covered by workers' compensation, or should the employee be allowed to sue?

2. ***Problem: Intentional Tort Exclusion from Workers' Compensation.*** Would the intentional tort exception to workers' compensation exclusivity be available to the injured worker in the following situation? Alan Zimmerman was injured while employed at Valdak Car Wash, when his right arm was torn from his body. The injury occurred while he was using an industrial centrifuge extractor, a laundry machine that uses centrifugal force to spin dry towels. He was not assigned to work in the area where the machine was located and there was a clear warning on the machine to "keep your hands out of the machine." Under normal conditions, a person operating the extractor would wait until the towels were dry, pull the brake to stop the internal drum, open the lid, and remove the towels. The extractor had an interlock system to prevent the lid from opening before the drum stopped spinning. When Zimmerman was injured, the interlock system had been inoperative for months. Employees were opening the lid and reaching in for the towels while the drum was still spinning.

Valdak's management knew the interlock was inoperative but failed to repair it. Valdak's manager did not have it repaired because it would have shut down the machine and the car wash for approximately an hour and a half. According to an affidavit of Steven Akerlind, an owner of an equipment company that had serviced the extractor, he had told Valdak's manager that the extractor was substantially certain to injure someone. Some Valdak personnel had warned other employees that if they put their arm in the machine, they could lose it.

See Zimmerman v. Valdak Corp., 570 N.W.2d 204 (N.D. 1997).

CUNNINGHAM v. SHELTON SECURITY SERVICE, INC.

46 S.W.3d 131 (Tenn. 2001)

ANDERSON, C.J.

In this workers' compensation case, the estate of the employee, Robert W. Cunningham, Sr., has appealed from a chancery court judgment dismissing a claim for death benefits filed against the employer, Shelton Security Service, Inc. The employee, who worked as a security guard for the employer, died of heart failure while performing his duties at a store. At the close of the employee's proof, the trial court granted the employer's motion to dismiss on the basis that the emotional stress experienced by the employee the night of his death was not extraordinary or unusual

for a security guard. The Special Workers' Compensation Appeals Panel, upon reference for findings of fact and conclusions of law, found that there was sufficient evidence of causation to warrant a trial and, thus, reversed the trial court's dismissal. Thereafter, the employer filed a motion for full Court review of the Panel's decision. We granted the motion for review to consider whether the trial court erred in dismissing the employee's claim on the basis that his heart failure did not arise out of the employment because it was not caused by a mental or emotional stimulus of an unusual or abnormal nature, beyond what is typically encountered by one in his occupation. After carefully examining the record and considering the relevant authorities, we agree with the Panel and reverse the trial court's judgment.

Robert W. Cunningham, Sr. ("employee") was employed by Shelton Security Service, Inc. ("employer") as a security guard. On May 9, 1991, the employee began working as a guard assigned to the Little Barn Deli and Market on Clarksville Highway in Nashville. He died of heart failure on March 5, 1992, while performing his duties at the store.

At trial, Mishie Lynn Taylor, a night clerk at the store, testified that in the early morning hours of March 5, 1992, three young men entered the store. The employee, Robert Cunningham, Sr., who was performing his duties as a security guard, asked the young men to leave because they were attempting to shoplift. Taylor stated that the suspected shoplifters "talked back" to the employee and cursed at him. She described the verbal confrontation inside the store as "very loud" and said that the employee shouted at the individuals to leave the premises. . . . Taylor testified that the young men threatened to come back and kill the employee. According to Taylor, the employee had similar verbal confrontations with people at the store once or twice a week. She said it was common for him to "go out and yell at these people."

Taylor recounted that although the employee was upset when he returned to the store, he did not act overly concerned about the incident. A short time later, however, the employee began to complain that he did not feel well. He began rubbing his arm. Then, he said that he felt "funny and weird"; that he "had never felt like that before"; and that he could not be still. Taylor told the employee to stay where she could observe him at the front of the store, but he went outside. A few minutes later, Taylor found the employee unconscious in his car. Although Taylor promptly called an ambulance, the employee died before he reached the hospital.

Dr. Melvin Lightford, an internist and emergency room physician, testified that the employee died from "sudden cardiac death." . . . In response to a hypothetical question setting out the facts of the employee's death, Dr. Lightford testified that there was a "relationship" between the confrontation with the young men and the employee's death. Dr. Lightford opined that "the events, as hypothesized to me, did indeed precipitate what is called sudden cardiac death. . . ."

The employee's death certificate stated the cause of death as arteriosclerotic cardiovascular disease. . . .

At the close of the employee's proof, the trial court granted the employer's motion to dismiss because the emotional stress experienced by the employee the night of his death was "not extraordinary nor was it unusual in comparison to the stress he ordinarily experienced in that type of job." The Special Workers' Compensation Appeals Panel, upon reference for findings of fact and conclusions of law pursuant to Tenn. Code Ann. §50-6-225(e)(3), reversed the trial court's dismissal on the basis that there was sufficient evidence of causation to warrant a complete trial. Thereafter, the

employer filed a motion for full Court review of the Panel's decision. We granted the motion to consider whether the trial court erred in dismissing the employee's claim on the basis that his heart failure did not arise out of the employment because it was not caused by a mental or emotional stimulus of an unusual or abnormal nature, beyond what is typically encountered by one in his occupation. . . .

In order to be eligible for workers' compensation benefits, an employee must suffer an "injury by accident arising out of and in the course of employment which causes either disablement or death. . . ." Tenn. Code Ann. §50-6-102(12) (1999). The statutory requirements that the injury "arise out of" and occur "in the course of" the employment are not synonymous. An injury occurs "in the course of" employment if it takes place while the employee was performing a duty he or she was employed to perform. Put another way, "the injury must have substantially originated from the 'time and space' of work, resulting in an injury directly linked to the work environment or work-related activities." Harman v. Moore's Quality Snack Foods, 815 S.W.2d 519, 527 (Tenn. Ct. App. 1991) (citation omitted). Thus, the course of employment requirement focuses on the time, place and circumstances of the injury.

In contrast, "arising out of" employment refers to "cause or origin." Id. An injury arises out of employment "when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." The mere presence of the employee at the place of injury because of the employment is not sufficient, as the injury must result from a danger or hazard peculiar to the work or be caused by a risk inherent in the nature of the work. See Jackson v. Clark & Fay, Inc., 197 Tenn. 135, 270 S.W.2d 389, 390 (1954). As one court has put it, the "danger must be peculiar to the work. . . . [A]n injury purely coincidental, or contemporaneous, or collateral, with the employment . . . will not cause the injury . . . to be considered as arising out of the employment." Jackson v. Clark & Fay, Inc., 270 S.W.2d at 390.

In the present case, there is no dispute that the employee's death occurred in the course of his employment. Instead, the dispute focuses on whether the employee's death arose out of the employment. The employer argues that the employee's death did not arise out of the employment because the confrontation with the suspected shoplifters was not an abnormal or unusual occurrence for a person in the employee's occupation. The employee's estate responds that the employee's death arose out of his employment as that requirement has been applied in this Court's heart attack cases. The estate therefore urges us to reverse the trial court's dismissal of the case.

We agree with the parties that this case is controlled largely by our decisions addressing the compensability of heart attacks. The heart attack cases in this jurisdiction can be categorized into two groups: (1) those that are precipitated by physical exertion or strain, and (2) those resulting from mental stress, tension, or some type of emotional upheaval. If the heart attack results from physical exertion or strain, it is unnecessary that there be extraordinary exertion or unusual physical strain. Thus, it makes no difference that the employee, prior to the attack, suffered from preexisting heart disease or that the attack was caused by ordinary physical exertion or the usual physical strain of the employee's work.

The rule is different, however, when the heart attack is caused by a mental or emotional stimulus rather than physical exertion or strain. In such cases, "it is obvious that in order to recover when there is no physical exertion, but there is emotional stress, worry, shock, or tension, the heart attack must be immediately precipitated by a

specific acute or sudden stressful event[ ] rather than generalized employment conditions." Thus, if the heart attack is caused by a mental or emotional stimulus rather than physical exertion or strain, there must be a "climatic event or series of incidents of an unusual or abnormal nature" if a recovery is to be permitted. Although "excessive and unexpected mental anxiety, stress, tension or worry attributable to the employment can cause injury sufficient to justify an award of benefits," Reeser v. Yellow Freight Sys., Inc., 938 S.W.2d 690, 692 (Tenn. 1997), the ordinary stress of one's occupation does not because "[e]motional stress, to some degree, accompanies the performance of any contract of employment." Allied Chem. Corp. v. Wells, 578 S.W.2d 369, 373 (Tenn. 1979). In other words, "[n]ormal ups and downs are part of any employment relationship, and as we have said on many previous occasions, do not justify finding an 'accidental injury' for purposes of worker[s'] compensation law." Bacon v. Sevier County, 808 S.W.2d at 53 (citations omitted). Accordingly, the rule is settled in this jurisdiction that physical or mental injuries caused by worry, anxiety, or emotional stress of a general nature or ordinary stress associated with the worker's occupation are not compensable. The injury must have resulted from an incident of abnormal and unusual stressful proportions, rather than the day-to-day mental stresses and tensions which workers in that field are occasionally subjected.

With these principles in mind, we review the record in the present case to determine whether the employee's death arose out of his employment. We note first that there was no physical exertion or strain involved in precipitating his heart failure. Instead, the mental stress or tension associated with confronting the suspected shoplifters caused the heart failure, at least according to some of the medical proof. Applying the law as just described, the trial court concluded the employee's death was not compensable because he was not confronted with circumstances of an unusual or abnormal nature given his work as a security guard. As the record reflects, verbal confrontations occurred at least once a week at the store, and it was common for the employee to "go out and yell at these people." However, the record also reflects that the individuals chased off by the employee threatened to return and kill him. We believe that this additional circumstance makes a difference and is sufficient to warrant the conclusion that the employee's death did not result from generalized employment conditions, but from something beyond the norm, even for a security guard. Accordingly, we find that the evidence preponderates against the trial court's finding that the employee's death did not arise out of his employment.

The reason, simply put, is that the employee has met the burden of establishing that his heart failure was caused by a mental or emotional stimulus of an unusual or abnormal nature, beyond what is typically encountered by one in the employee's position. We thus reiterate the rule again in this case that if the cause or stimulus of the heart attack is mental or emotional in nature, such as stress, fright, tension, shock, anxiety, or worry, there must be a specific, climatic event or series of incidents of an unusual or abnormal nature if the claimant is to be permitted a recovery, but no recovery is permitted for the ordinary mental stresses and tensions of one's occupation because "[e]motional stress, to some degree, accompanies the performance of any contract of employment." Allied Chem. Corp. v. Wells, 578 S.W.2d at 373. If the rule were otherwise, workers' compensation coverage would become as broad as general health and accident insurance, which it is not. . . .

In view of the foregoing discussion, we hold that the evidence preponderates against the trial court's finding that the employee's death did not arise out of his

employment. Therefore, the trial court's dismissal of the case is reversed and the case remanded for further proceedings consistent with this opinion. . . .

NOTES TO CUNNINGHAM v. SHELTON SECURITY SERVICE, INC.

1. *Scope of Coverage by Workers' Compensation Systems.* To prevent workers' compensation systems from becoming as broad as general health and accident insurance, the Tennessee statute limits benefits to injuries by accidents (a) arising out of and (b) in the course of employment. How does the court distinguish between the two phrases? How does that distinction help the court in *Cunningham* distinguish between the employee's yelling at the suspected shoplifters and their threats to kill him?

Another approach to limiting the scope of workers' compensation permits recovery for a physical injury caused by mental stress only if the claimant shows that his or her working conditions involved risks greater than those facing the general public. See Baggett v. Industrial Commission, 775 N.E.2d 908 (Ill. 2002). Would that test have given a different result in *Cunningham?*

2. *Evidentiary Rules in Administrative Proceedings.* Agencies that administer the workers' compensation system are typically excused from following common law and statutory rules of evidence. For this reason, scientific evidence that links a worker's harm to a condition in the workplace that would not be adequate in an ordinary tort case may provide a basis for an award of compensation. In Sheridan v. Catering Management, Inc., 566 N.W.2d 110 (Neb. 1997), a bartender's claim that an injury was caused by residue from chemicals used to exterminate cockroaches was held to have been adequately supported even though the scientific evidence the claimant offered would not have been admissible in a trial.

3. *Problem: Injury Arising out of Employment.* The plaintiff's decedent worked as an editorial writer at a newspaper. He suffered a fatal heart attack during a meeting at which editorial board members and other staff members were arguing about what position the paper should take on an important international affairs crisis. The meeting had begun at six o'clock p.m. in a hot and crowded room. Shortly before nine o'clock, the decedent began to speak, became excited, and collapsed. Should this employee receive compensation under the workers' compensation system under either of the rules discussed above? See Strauss v. Freiheit, 331 N.Y.S.2d 520 (3d Dept. 1972).

Statute: SCHEDULE IN CASE OF DISABILITY

N.Y. Workers' Comp. Law §15 (Consol. 2002)

The following schedule of compensation is hereby established:

1. Permanent total disability. In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. . . .

2. Temporary total disability. In case of temporary total disability, sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance thereof, except as otherwise provided in this chapter.

3. Permanent partial disability. In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named in this subdivision, as follows:

Member Lost	*Number of Weeks' Compensation*
a. Arm	312
b. Leg	288
c. Hand	244
d. Foot	205
e. Eye	160
f. Thumb	75
g. First finger	46
h. Great toe	38
i. Second finger	30
j. Third finger	25
k. Toe other than great toe	16
l. Fourth finger	15

NOTES TO STATUTE

1. ***Amounts of Awards.*** These awards are set by the New York legislature, keyed to the injured workers' average weekly wages. Using the example of a worker whose annual wages were $30,000, the compensation payment for loss of a leg would be 288 multiplied by two-thirds of that worker's average weekly wages. The payment would be about $111,000. Does that seem like the right amount of compensation for the loss of a leg? Does it seem to be an amount that might be awarded by a jury in a case that was treated in the ordinary litigation system rather than in the administrative workers' compensation system?

2. ***Standardization of Awards.*** Injuries have different effects on different people, but the workers' compensation system ignores those variations. For example, loss of a leg might change the life of an individual who enjoyed playing sports and participating in outdoor recreation more than it would change the life of a typically sedentary person.

The award structure ignores the age of the victim, so that benefits do not vary even though a young claimant might experience 50 years of hardship due to loss of a limb while an older claimant might suffer that disability only for five or ten years.

Relating the size of award to the worker's wages simplifies the administration of the system. Does it seem sensible to treat injuries as worth more or less because of the earning power of the injured individual?

Perspective: Reforming Workers' Compensation

In its original conception, workers' compensation gave workers access to reliable compensation and denied them the opportunity to seek redress in the tort system. A recent critique of the system suggests that the "exclusive remedy doctrine is riddled with judicially-created exceptions that give injured workers the ability to circumvent the workers' compensation system," that the Americans with Disabilities Act and the Family Medical Leave Act "provide new federal protection to injured workers and leave employers tripping over conflicting obligations," and that "most workers have a multitude of insurance options available, including group health and both short and long-term disability." The authors suggest evaluating four responses: "(1) restoring the exclusive remedy doctrine; (2) creating a federal workers' compensation system; (3) establishing a choice/no fault system; and (4) eliminating the exclusive remedy doctrine." Discussing total elimination of the workers' compensation system, they suggest:

> Employees would protect themselves against an on-the-job injury just as they protect themselves against a non-workplace accident. If a third party, including his or her employer, is at fault, the employee could sue in tort. If the employee is responsible for his or her own injury, he or she could rely on individual or group health insurance to cover medical expenses and short-term or long-term disability insurance to minimize income loss. The system would no longer be a no-fault system, but instead a pure tort system where the tortfeasor bears the costs of injury. A tort system for injured workers has the same advantages as the tort system for any party seeking redress. . . .
>
> The traditional workers' compensation approach, by contrast, provided an artificially low level of compensation so as to provide an incentive to return to work. Eliminating the exclusive remedy doctrine would also eliminate this issue of insufficient compensation. . . . While the level of recovery an injured plaintiff receives in a tort suit is also highly criticized, the formula for awarding that recovery is at least intended to fully compensate the injury. Along with increased recovery would presumably come increased deterrence against employer wrongdoing, another central tenet of tort theory.

Joan T.A. Gabel, Nancy R. Mansfield & Robert W. Klein, The *New Relationship Between Injured Worker and Employer: An Opportunity for Restructuring the System*, 35 Am. Bus. L.J. 403 (1998).

C. No-Fault Automobile Insurance

Under standard tort doctrines, a person who was injured in an automobile accident would bear the costs of those injuries personally, unless he or she could prove that the accident had been the result of another person's tortious conduct. Early forms of automobile insurance reflected this concept and protected policy holders from liability. Since insurance companies would pay damages only if their policy holders had

been at fault, many cases required determinations about who caused an accident and the quality of that person's conduct.

Most states now require automobile owners to purchase insurance that provides first-party coverage in addition to liability coverage. First-party coverage means that the policy holder's own insurance company will pay for injuries suffered by the policy holder and members of the policy holder's family without regard to fault. When an injury is covered by this type of compensation, the victim is prohibited from seeking additional recovery against anyone whose conduct might have caused the injury.

The New Jersey Supreme Court described the history of its state's automobile no-fault legislation:

> The No-Fault Law's goal was "compensating a larger class of citizens than the traditional tort-based system and doing so with greater efficiency and at a lower cost." Oswin v. Shaw, 129 N.J. 290, 295, 609 A.2d 415, 417 (1992) (quoting Emmer v. Merin, 233 N.J. Super. 568, 572, 559 A.2d 845, 846 (App. Div.), *cert. denied,* 118 N.J. 181, 570 A.2d 950 (1989)). That "new approach" to automobile insurance was to result
>
> > in the motoring public's securing protection at lesser cost, expediting the relief of the accident victim and his family from a frequently staggering and intolerable economic burden, and yet preserving that victim's right to full and adequate compensation in cases which *involve more serious and disabling injury.*
> >
> > In addition to bringing about an intended reduction in insurance premiums, *another major benefit of the proposed system would be a reduction of the present court backlog.* A substantial percentage of civil court actions are automobile accident cases. Under the proposed plan, it is expected that *many of these cases would be settled outside the court, thereby permitting other more serious and meritorious causes to be heard with more dispatch.*
>
> [Governor's Second Annual Message (January 11, 1972) (emphasis added).]
>
> Although the movement to adopt no-fault legislation was the "result of ever-increasing automobile-insurance premiums," *Oswin,* supra, 129 N.J. at 295, 609 A.2d at 417, it also arose from the recognition that the necessity of determining fault in a lawsuit before recovery of medical expenses resulted in great hardship for many injured parties. See Governor's First Annual Message (January 12, 1971) (stating, "Too many injured persons must wait too long for an uncertain remedy while enduring physical and financial injury.") Thus, the proponents of the legislation anticipated that the elimination of minor personal-injury claims from the court system not only would reduce insurance premiums but also would provide prompt payment of medical expenses to injured parties.
>
> To achieve those purposes the Legislature created the no-fault statutory scheme. Under that scheme every automobile liability-insurance policy issued in New Jersey had to provide PIP [personal injury protection] coverage, including medical-expense benefits, "without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustained bodily injury as a result of an automobile accident." N.J.S.A. 39:6A-4. A person's no-fault insurance was to be an injured person's exclusive remedy for medical-expense claims arising out of an automobile accident.
>
> As a trade-off for the payment of medical expenses, regardless of fault, no-fault systems provided for "either a limitation on or the elimination of conventional tort-based personal-injury lawsuits." *Oswin,* supra, 129 N.J. at 295, 609 A.2d at 417. N.J.S.A. 39:6A-8 (section 8) provided such a limitation by holding that an injured person could file a lawsuit *only* if medical expenses exceeded a $200 threshold.

Roig v. Kelsey, 641 A.2d 248 (N.J. 1994).

The relationship between standard tort law and no-fault doctrines is examined in State Farm Mutual Automobile Insurance Co. v. Peiffer, which involved a dispute between an insurance company and its policy holder. Other recurring no-fault issues involve individuals who seek to avoid the prohibition on access to the tort system or who seek to obtain the benefits of no-fault coverage in circumstances where that coverage is likely the only source from which compensation could be obtained. In Oberly v. Bangs Ambulance, Inc., New York's highest court interprets a provision of that state's no-fault statute to determine whether the plaintiff would be limited to no-fault recovery or would be permitted to bring a tort suit for damages related to his injury. In Weber v. State Farm Mutual Automobile Insurance Co., the court considers whether the no-fault benefits required by statute to be provided in automobile insurance should cover an injury caused by a hunter's discharge of a rifle as he was leaving a vehicle.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. PEIFFER

955 P.2d 1008 (Colo. 1998)

BENDER, J.

This case involves an action for breach of an automobile insurance contract brought against the petitioner, State Farm, by its insured, respondent Donna Peiffer ("Peiffer"), concerning State Farm's refusal to pay personal injury protection ("PIP") benefits under Peiffer's automobile insurance policy in accordance with the Colorado Auto Accident Reparations Act, section 10-4-701 to 10-4-723, 3 C.R.S (1997) ("No-Fault Act"). We hold that in appropriate circumstances, a trial court may provide a "thin skull" jury instruction in an action for breach of contract for PIP benefits, and we affirm the decision of the court of appeals. We return this case to the court of appeals to remand to the district court for further proceedings.

On December 24, 1990, Peiffer was injured in an automobile accident when her car was struck by another vehicle. Peiffer was insured under an automobile insurance policy issued by State Farm that included coverage for PIP benefits in accordance with the No-Fault Act. Under the policy, State Farm was responsible for payment of up to $50,000 for medical and rehabilitation treatments that were reasonable, necessary, and causally related to the automobile accident.[1]

---

[1] Section 10-4-706(1), 3 C.R.S. (1997), provides in pertinent part:

> Subject to the limitations and exclusions authorized by this part 7, the minimum coverages required for compliance with this part 7 are as follows:
>
> . . . (b)(I) Compensation without regard to fault, up to a limit of fifty thousand dollars per person for any one accident, for payment of all reasonable and necessary expenses for medical, chiropractic, optometric, podiatric, hospital, nursing, x-ray, dental, surgical, ambulance, and prosthetic services, and nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing, performed within five years after the accident for bodily injury arising out of the use or operation of a motor vehicle. . . .
>
> . . . (c)(I) Compensation without regard to fault up to a limit of fifty thousand dollars per person for any one accident within ten years after such accident for payment of the cost of rehabilitation procedures or treatment and rehabilitative occupational training necessary because of bodily injury arising out of the use or operation of a motor vehicle. . . .

After the accident, Peiffer began receiving extensive treatment from multiple health care providers. Although these providers believed that the treatment was necessary, State Farm instructed Peiffer to submit to several independent medical examinations ("IMEs"). In 1991, Peiffer underwent an IME by a chiropractor who indicated that Peiffer should be weaned from chiropractic treatment and massage therapy because they were unnecessary. In 1992, Peiffer underwent an IME by a psychiatrist/neurologist who stated that Peiffer's psychiatric therapy was no longer reasonably related to the accident. Also in 1992, Peiffer submitted to an IME by an orthopedic spine surgeon who found that Peiffer had reached maximum medical improvement. Based on these determinations, State Farm refused to pay for further treatment other than pool therapy.

On June 24, 1993, Peiffer sued State Farm for breach of contract for failure to pay PIP benefits, and for the tort of bad faith breach of an insurance contract. At trial, State Farm called Peiffer as a hostile witness and elicited testimony that during the IMEs, Peiffer failed to inform the examining physicians that she received substantial chiropractic treatment before the accident. . . . During closing argument, State Farm argued that Peiffer's continued treatment was not necessary because Peiffer's assertions regarding her symptoms were not credible.

Upon Peiffer's request, and over State Farm's objection, the district court gave the jury the following "thin skull" instruction:

> In determining the amount of benefits for which the Defendant, State Farm Mutual Automobile Insurance Company, is responsible to pay, you cannot reduce the amount of or refuse to award any such payments because of any physical frailties or mental condition of the Plaintiff that may have made her more susceptible to injury, disability, or impairment.

The instruction was not limited to Peiffer's tort claim. The jury awarded Peiffer $10,068 for breach of contract and $10,000 for bad faith breach of an insurance contract.

State Farm appealed, arguing that the district court erred by giving the "thin skull" instruction because the "thin skull" doctrine is a tort concept that has no application to claims of breach of contract. The court of appeals rejected State Farm's argument and affirmed the holding of the district court. State Farm then petitioned this court for certiorari review.

The "thin skull" doctrine provides that a negligent defendant is liable for harm resulting from negligent conduct even though the harm was increased by the particular plaintiff's condition at the time of the negligent conduct. In Colorado, it is fundamental that a tortfeasor must accept the victim as the victim is found. . . .

We have held that a "thin skull" instruction is appropriate in tort cases when the defendant seeks to avoid or reduce liability by employing a technique known as "spotlighting," in which the defendant calls attention to the plaintiff's preexisting conditions or predisposition to injury and asserts that the plaintiff's injuries would have been less severe had the plaintiff been an average person. However, the applicability of the "thin skull" instruction in a contract case for breach of an automobile insurance agreement for no-fault PIP benefits is an issue of first impression for this court. This issue requires us to consider the policies underlying the No-Fault Act.

The No-Fault Act governs compensation, including medical and rehabilitation benefits, for personal injuries resulting from automobile accidents regardless of fault.

This scheme requires automobile owners to acquire an automobile insurance policy that complies with the minimum amount of coverage mandated by the No-Fault Act. Insurers, in turn, must pay all of the reasonable and necessary medical expenses incurred by the insured in an accident arising out of the use of an automobile, up to the limits of the policy, even if the insured was to blame for the accident. The legislature articulated the public policy of the No-Fault Act in section 10-4-702, 3 C.R.S. (1997), as follows:

> The general assembly declares that its purpose in enacting this part 7 is to avoid inadequate compensation to victims of automobile accidents; to require registrants of motor vehicles in this state to procure insurance covering legal liability arising out of ownership or use of such vehicles and also providing benefits to persons occupying such vehicles and to persons injured in accidents involving such vehicles.

In addition, this court has recognized that one of the primary purposes of the No-Fault Act was to decrease the volume of tort litigation arising out of automobile accidents.

The No-Fault Act precludes a person injured in a motor vehicle accident from bringing a traditional tort action against another person involved in the accident except under limited statutorily enumerated circumstances. However, the No-Fault Act is not a precise substitute for a traditional tort action. For example, the Act provides benefits for injured tortfeasors, who would not be eligible to recover damages as a plaintiff in a traditional tort action. In addition, the Act allows a victim who sustains economic losses in excess of a no-fault insurance policy to recover against the tortfeasor by filing a civil lawsuit. The Act serves to maximize, not minimize, insurance coverage. The No-Fault Act "is to be liberally construed to further its remedial and beneficent purposes." Regional Transp. Dist. v. Voss, 890 P.2d 663, 669 (Colo. 1995) (quoting Travelers Indem. Co. v. Barnes, 191 Colo. 278, 283, 552 P.2d 300, 304 (1976)).

Applying these principles to the facts of this case, we agree with State Farm that the "thin skull" doctrine is a tort concept that generally does not apply to an action for breach of contract. . . .

However, damages for a breach of contract for PIP benefits are analogous to damages arising from the commission of a tort because an insurance contract for PIP benefits always involves an unforeseeable amount of money. Although the limits of the policy are within the contemplation of the parties, neither the insured nor the insurer can anticipate the precise amount of benefits to which the insured might be entitled were an automobile accident to occur. In addition, unlike a policy for life insurance or health insurance, a policy for PIP benefits due to injury arising out of an automobile accident does not contain exclusions for pre-existing conditions.

When an insurer attempts to avoid or reduce liability by "spotlighting" the insured's pre-existing conditions, a thin-skull instruction furthers the No-Fault Act's policy of fully compensating the victim. Thus, in breach of contract cases for PIP benefits, when the trial court finds that the insurer "spotlighted" the victim's pre-existing mental or physical conditions, a "thin skull" instruction may be given. . . . We affirm the decision of the court of appeals, and we return this case to the court of appeals to remand to the district court for further proceedings.

OBERLY v. BANGS AMBULANCE, INC.

751 N.E.2d 457 (N.Y. 2001)

SMITH, J.

The No-Fault Law provides a plan for compensating victims of automobile accidents for their economic losses without regard to fault or negligence. An injured party may bring a plenary action in tort, however, to recover for non-economic loss, pain and suffering, but must show that he or she has suffered a serious injury within the meaning of the No-Fault Law. The issue before this Court is whether a party bringing a claim under the no-fault serious injury category of "permanent loss of use of a body organ, member, function or system" is required to prove that the loss of use is significant or consequential.

We conclude that only a total loss of use is compensable under the "permanent loss of use" exception to the no-fault remedy. Insofar as plaintiffs have not established total "loss of use" and have abandoned any claim concerning a "permanent consequential limitation" or "significant limitation of use of a body function or system," they have failed to establish a "serious injury" within the meaning of the No-Fault Law.

Plaintiff Richard Oberly, a dentist, was injured while being transported in an ambulance owned by defendant Bangs Ambulance. Plaintiff was positioned face-up on a stretcher with an IV needle in his arm, and a five-pound IV pump was set on a shelf above him. While in transit, the ambulance struck a curb, and the IV pump toppled from the shelf and fell on his right forearm. Plaintiff suffered bruising and continues to complain of pain and cramping in that arm, which pain allegedly limits his ability to practice as a dentist.

Plaintiff and his wife commenced this personal injury action for negligence, alleging a serious injury under the No-Fault Law, Insurance Law §5102(d),[2] in Supreme Court against defendant, asserting that plaintiff had suffered a serious injury. In response to defendant's demand that they particularize the serious injury, plaintiffs identified four of the plausible injury standards under Insurance Law §5102(d): "significant disfigurement," "permanent loss of use of a body organ, member, function or system," "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." Following joinder of issue, defendant moved for summary judgment. In opposing summary judgment, plaintiffs abandoned all of the cited serious injury standards except for the "permanent loss of use of a body organ, member, function or system" standard.

Supreme Court dismissed plaintiffs' action for lack of evidence that he had suffered a serious injury. The Appellate Division affirmed, ruling that the statute requires a party claiming a partial loss of use of a body "organ or member" to show that the limitation is "consequential or significant," and that plaintiff had not met that threshold. The two dissenting Justices concluded that the nerve damage to plaintiff's arm could constitute a partial loss of use of a body "function or system," for which no proof of significance was required.

[2] Chapter 13 of the Laws of 1973 is formally known as The Comprehensive Motor Vehicle Insurance Reparations Act . . . .

On this appeal, plaintiffs argue that the statute does not require proof that a "permanent loss of use" of a body member is significant even if the loss is only partial. They also contend that the limitation of the use of plaintiff's arm itself qualifies as "permanent loss of use of body member, body function and body system." We disagree.

The No-Fault Law was adopted by the Legislature in 1973 to assure prompt and full compensation for economic loss and to provide for non-economic loss in the case of serious injury. As originally enacted, it contained two categories of "serious injury": first, claims for death, dismemberment, significant disfigurement, certain types of fractures and permanent loss of use of a body organ, member, function or system and second, claims for medical charges as a result of an injury that exceeded $500. In 1977 this section was replaced with the present section, which defines a serious injury as

> a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (Insurance Law §5102[d]).

The serious injury category at issue, "permanent loss of use," has been in place since 1973 without legislative change. Until today, however, the question of how this statutory section should be construed has never been squarely before this Court. We hold that to qualify as a serious injury within the meaning of the statute, "permanent loss of use" must be total.

Our holding today proceeds from both the statutory text and from the conclusion that the Legislature, in amending the definition of "serious injury" in 1977, meant to create a consistent framework. First, the statute speaks in terms of the loss of a body member, without qualification. Thus, the legislative intent is shown in the actual wording of the statute. Second, requiring a total loss is consistent with the statutory addition, in 1977, of the categories "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system." Had the Legislature considered partial losses already covered under "permanent loss of use," there would have been no need to enact the two new provisions.

While the Appellate Division properly affirmed the dismissal of plaintiffs' claim, it improperly engrafted the term "partial" to the "loss of use" standard. Because both the "permanent consequential limitation of use" standard and the "loss of use" standard require a permanent injury, and because there is no qualitative difference between a partial "loss of use" and a "limitation of use," engrafting the term "partial" creates a redundancy.

Accordingly, the order of the Appellate Division should be affirmed, with costs....

WEBER v. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.

284 N.W.2d 299 (N.D. 1979)

PAULSON, J.

The appellant, State Farm Mutual Automobile Insurance Company [State Farm], brought this appeal from a judgment of the district court of Ward County. The issue presented is whether or not the North Dakota Auto Accident Reparations Act [commonly known as the No-Fault Insurance Act], applies to the facts of this case. We hold that it does and affirm the judgment of the district court.

The facts are simple and undisputed. Robert Weber was the owner of a 1963 Chevrolet 4-door, ½ ton pickup truck insured by State Farm pursuant to the provisions of Chapter 26-41, N.D.C.C. Robert, his wife, Virginia A. Weber, Brian Bradberry, and John Gabby were hunting deer on November 12, 1977. Robert was seated in the driver's seat and Virginia was seated beside him on the right side of the front seat. Bradberry was seated in the rear seat directly behind Robert and Gabby was seated behind Virginia.

Upon spotting some deer crossing the road, Weber drove his vehicle into the ditch on the north side of North Dakota Highway 5, west of Mohall. As the pickup slowed to a halt, Gabby jumped out the right rear door. As Gabby was moving out of the door, he was feeding shells into his 270-calibre bolt action rifle. Gabby testified that he was loading the rifle and exiting from the vehicle at the same time. As he closed the bolt of the gun it discharged. The bullet from the rifle went through the open right rear door, through the back of the front seat, and struck Robert in the back while Robert was still seated behind the steering wheel. Robert was pronounced dead on arrival at Mohall Hospital.

Virginia A. Weber, as surviving spouse of Robert, made a demand on State Farm for death benefits under State Farm Policy Number 533-285-D17-34B, which policy was issued pursuant to the provisions of the North Dakota Auto Accident Reparations Act, Chapter 26-41, N.D.C.C. State Farm denied coverage and the district court action ensued.

The district court, in a bench trial, found that Robert Weber was occupying the vehicle within the meaning of §26-41-07, N.D.C.C., and that Virginia was entitled to no-fault benefits as his survivor. Judgment was entered in Virginia's favor for the policy amount of $15,000; $1,000 for funeral expenses; and $14,000 as survivor's income loss.

State Farm contends that the trial court erred because the North Dakota Auto Accident Reparations Act does not provide for coverage for this type of an accident. Counsel for State Farm argues that there was no "causal connection" between the operation of the motor vehicle and the accident which resulted. This causal connection test is one which was commonly used in interpreting the scope of coverage of insurance *policies* prior to the adoption of no-fault statutes such as Chapter 26-41, N.D.C.C.

In Norgaard v. Nodak Mutual Insurance Company, 201 N.W.2d 871 (N.D. 1972), this court adopted the causal connection test. The facts in *Norgaard* are distinguishable from those in the instant case but somewhat similar in certain respects. On August 20, 1967, Richard Norgaard and Stanley Baldock, along with two other companions, went hunting in Norgaard's 1959 Chevrolet sedan. Norgaard spotted some birds and stopped the automobile. Using the roof of the automobile as a gun rest, Norgaard

discharged his rifle in the direction of the birds. At that instant, Baldock was alighting from the automobile and was struck in the back of the head by a bullet from the rifle. He died some thirteen days later.

The issue in *Norgaard* was whether the injury and subsequent death of Baldock resulted from the operation, maintenance, or use of the automobile. This court discussed the causal connection between the accident and the scope of coverage under the policy. We held that "the use of the rifle, notwithstanding it rested upon the automobile at the time of its discharge, constituted an independent and intervening cause of the injury and death of Stanley Baldock." *Norgaard*, supra, 201 N.W.2d at 876.

Norgaard is distinguishable from the instant case in several ways. *Norgaard* was decided prior to January 1, 1976, the date of adoption of the North Dakota no-fault insurance law. Therefore, it was decided at a time when fault determinations were essential to the establishment of liability. The "causal connection" test was rooted in traditional negligence principles. One of the purposes of the no-fault insurance law is to avoid protracted litigation over issues of fault or causation. *Norgaard* is also distinguishable on its facts. In the instant case, Weber was seated in his car at the steering wheel. In *Norgaard*, the victim of the accident was outside of the car. . . . The major difference between the two cases, however, is that *Norgaard* was a case involving interpretation of the scope of coverage under the insurance policy, whereas in this case we are interpreting a statute . . . .

We now turn to an interpretation of the North Dakota no-fault statute, Chapter 26-41, N.D.C.C. The trial court found that coverage existed as a result of the fact that Weber was a person occupying the vehicle, pursuant to §26-41-07, N.D.C.C. Section 26-41-07(1), N.D.C.C., provides, in pertinent part:

> *Persons entitled to basic no-fault benefits.* — Each basic no-fault insurer of a secured motor vehicle shall pay basic no-fault benefits without regard to fault for economic loss resulting from:
>
> 1. Accidental bodily injury sustained within the United States of America, its territories or possessions, or Canada by the owner of the motor vehicle or any relative of the owner:
>
> a. *While occupying any motor vehicle,*
>
> or
>
> b. . . . [Emphasis added.]

In interpreting a statute words are to be given their plain, ordinary, and commonly understood meaning. Consideration should be given to the ordinary sense of statutory words, the context in which they are used, and the purpose which prompted their enactment. The purpose for the Act is embodied in §26-41-02, N.D.C.C., which states:

> *Legislative declaration.* — The legislative assembly declares that its purpose in enacting this chapter is to avoid inadequate compensation to victims of motor vehicle accidents, to require registrants of motor vehicles in this state to procure insurance covering legal liability arising out of ownership or operation of such motor vehicles and also *providing benefits to persons occupying such motor vehicles* and to persons injured in accidents involving such motor vehicles; to limit the right to claim damages for noneconomic loss in certain cases; and to organize and maintain an assigned claims plan. [Emphasis added.]