Spring 1985

Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984)

M. David Shapiro

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Torts Commons

Recommended Citation

http://ir.law.fsu.edu/lr/vol13/iss1/7

This Note is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
Torts—Defamation—Private Citizens Need Only Show Negligence in Defamation Actions Against Media Defendants. Does This Stifle the Media at the Public’s Expense?—Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984)

Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press. It has accordingly been decided, by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.

—James Madison

I. Introduction

In Miami Herald Publishing Co. v. Ane, the Florida Supreme Court affirmed the judgment of the Third District Court of Appeal and held that “it is sufficient that a private plaintiff prove negligence” to establish a defamation claim against a media defendant. The court further determined that an actual injury to reputation is not a prerequisite to the recovery of compensatory damages. The supreme court’s decision in Ane comes ten years after the United States Supreme Court, in Gertz v. Robert Welch, Inc., issued a qualified invitation to the states to fashion their own standard of liability with respect to defamation actions brought by private citizens. By adopting a negligence standard, the Florida Supreme Court receded from a policy providing a qualified news

1. 4 J. Elliot Debates on the Adoption of the Federal Constitution 571 (2d ed. Philadelphia 1836). Ironically, the Third District Court of Appeal in Miami Herald Publishing Co. v. Ane, 423 So. 2d 376, 387 (Fla. 3d DCA 1982), aff’d, 458 So. 2d 239 (Fla.1984) incorrectly attributed this quotation to Thomas Jefferson, illustrating that even appellate judges, who have more time to consider their opinions than reporters have to prepare their articles, can make good faith errors of identification.
2. 458 So. 2d 239 (Fla. 1984).
3. Ane, 423 So. 2d 376 (Fla. 3d DCA 1982).
4. Ane, 458 So. 2d at 242.
5. Id. at 242-43.
6. 418 U.S. 323 (1974). The Court in Gertz announced that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” Id. at 347.
reporters’ privilege for the protection of the dissemination of news to the public. The court’s new, broader standard of liability imposed upon publishers, coupled with a more expansive treatment of damages, may lead to media self-censorship.

This Note analyzes the decisions of the Third District Court of Appeal and the Florida Supreme Court to illustrate the difficulties which the new standard of negligence creates for media defendants. The Note also examines the conflicting arguments supporting the divergent standards of actual malice and negligence. Finally, the Note proposes legislation that would attempt to reconcile the competing interests between first amendment guarantees and the rights of private citizens to protect their reputational interests.

II. A Matter Left to the States

Prior to 1964, the law of defamation was governed by the common law of the individual states. The early view was that the defamer was strictly liable unless he could prove that the words were true or privileged. If the language could be construed as defama-

---

7. Two standards of malice will be discussed; actual malice and common law express malice. Although different, both standards afford greater protection than the negligence standard adopted in An. See infra notes 149-75 and accompanying text.

8. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This was the first in a series of Supreme Court decisions which would substantially alter states’ rights to apply common law principles of strict liability in defamation actions. See infra notes 15-17 and accompanying text.

9. Defamation, including libel and slander, has been defined by Florida courts as “the unprivileged publication of false statements which naturally and proximately result in injury to another.” Wolfson v. Kirk, 273 So. 2d 774, 776 (Fla. 4th DCA 1973). See RESTATEMENT (SECOND) OF TORTS § 559 (1977), which states, “A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” The elements needed for a cause of action in defamation are:

A. A false and defamatory statement concerning another;

B. An unprivileged publication to a third party;

C. Fault amounting at least to negligence on the part of the publisher; and

D. Either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id. § 558.

Historically, defamation received no constitutional protection because of a belief that it had minimal social value. See generally Roth v. United States, 354 U.S. 476, 482 (1957) (10 of the 14 states ratifying the Constitution included guarantees of free expression in their state constitutions; 13 of these states had provisions for prosecuting libel); Chaplinski v. New Hampshire, 315 U.S. 568, 571-72 (1942) (the social benefits derived through the prevention and punishment of obscenity, libel, and fighting words outweighed any benefits that such speech provided).

10. See RESTATEMENT (SECOND) OF TORTS § 578 (1977); W. PROSSER & W. KEON, THE
tory, the defendant was liable without regard to any wrongful intent, recklessness, or negligence. This notion of strict liability was applicable both to private defendants and the media. This harsh rule emerged from a fear of the media's power to damage those whom it disfavored. Florida's common law, however, has revealed an extreme sensitivity toward free speech and an unfettered press.

The United States Supreme Court, in *New York Times Co. v. Sullivan*, decided to take defamation matters into its own hands to protect the guarantees of the first amendment. In a unanimous


11. McCollan v. L'Engle, 77 So. 270, 272 (Fla. 1917).

12. Defamation includes libel (printed word) or slander (spoken word). The expression "defamation per se" characterizes a publication that is defamatory on its face and injurious without proof. See Pipack v. Mueller, 121 So. 459 (Fla. 1929). Moreover, damages were presumed, and consequently did not have to be pled or proved. But see Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (Court abolished presumed damages regarding media defendants); Boyles v. Mid-Florida Television Corp., 431 So 2d 627 (Fla. 5th DCA 1983). The court in Boyles noted, "While Gertz has abolished one distinction between libel per se and libel per quod in an action by a private individual against the media—the presumption of damage—it has not abolished the distinction in regard to innuendo. Therefore, it has not abolished the tort of libel per se." Id. at 633. For a list of categories of defamation per se and an exhaustive list of cases dealing with the different categories, see Rahdert & Snyder, Rediscovering Florida's Common Law Defenses To Libel and Slander, 11 STETSON L. REV. 1, 4-7 (1981).

Defamation per quod is that publication where the defamatory nature of the material is not apparent on its face. The defamatory nature must be shown through extrinsic facts or innuendo and must be pled and proved. Layne v. Tribune Co., 146 So. 234, 236 (Fla. 1933). Special damages must also be pled and proved. See generally Prosser, More Libel Per Quod, 79 HARV. L. REV. 1629 (1966).

13. Layne, 146 So. at 239.

14. Jones, Varnum & Co. v. Townsend's Adm'x, 21 Fla. 431 (1885). The court asserted: [If] fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, [or] in matters where his interest is concerned . . . [or] . . . [if] fairly warranted by any reasonable occasion or exigency, and honestly made, . . . communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any named limits. *Id.* at 456 (quoting Toogood v. Spryng, 149 Eng. Rep. 1044 (Ex. D. 1834)) (emphasis omitted). See also Montgomery v. Knox, 3 So. 211 (Fla. 1887) (court restricted a privilege to show malicious intent in inhouse insurance publication); Layne, 146 So. 234 (court extended a qualified privilege to newspapers of general circulation).

15. 376 U.S. 254 (1964). The case arose from a newspaper advertisement that alleged numerous civil rights violations by the Montgomery, Alabama police force. The Alabama Supreme Court affirmed a $500,000 judgment against the *New York Times*. The United States Supreme Court reversed.

16. "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 griev-
decision, the Supreme Court announced that state law may not constitutionally permit a public official to recover damages for a defamatory falsehood relating to his official conduct, unless he proves with "convincing clarity" that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not"; or in the legal vernacular, "actual malice." 17 The objective of the New York Times rule, created to provide wide latitude for journalistic error, was to diminish the threat of libel judgments and thereby reduce the incentive for the media to self-censor its coverage of important events. 18 As the actual malice standard developed, 19 it expanded to apply to publications about public figures 20 and to matters of public concern. In 1971, the Supreme Court established the high watermark of constitutional protection in Rosenbloom v. Metromedia, Inc. 21 In Rosenbloom, the Court held that in all matters of public or general concern, public and private individuals must show with convincing clarity that the defendant publisher acted with actual malice in

anances." U.S. Const. amend. I.

17. New York Times, 376 U.S. at 279-80. The Supreme Court later expanded the definition of public officials by stating 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 government affairs." Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).


19. Actual malice was the term created to designate the standard of fault to govern constitutionally protected defamatory falsehoods. New York Times, 376 U.S. at 279-80. "Express malice" is defined as ill will, hostility or intent to injure and defame. Montgomery, 3 So. at 217. See infra notes 168-175 and accompanying text.

The term "reckless disregard," connoting actual malice, was refined in St. Amant v. Thompson, 390 U.S. 727 (1968) where the the Court explained that reckless disregard did not refer to whether a reasonable man would have published the article without further investigation. Instead, the Court focused on whether the particular defendant "entertained serious doubts as to the truth of his publication." Id. at 731.

20. See Associated Press v. Walker, 388 U.S. 130 (1967). A magazine article accused a retired Army general of leading a racial riot at the University of Mississippi. The Court determined that the plaintiff had thrust himself into a public controversy and, therefore, was a "public figure." Id. at 154-55. Because of his status, he was required to show actual malice. See also Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Butts was a companion case to Walker, which involved a magazine article accusing the plaintiff, a well known football coach, of fixing a football game. The Court concluded that the plaintiff had attained the status of a public figure by virtue of his position. Id. at 155. Thus, the classification of public figure developed into two categories. One included those individuals who thrust themselves into the center of an important controversy. The other category represented those individuals who provided a continuing interest to the public.

21. 403 U.S. 29 (1971). Rosenbloom involved a news broadcast of plaintiff's arrest for possession of obscene literature. The stories used the terms "smut literature racket" and "girlie-book peddlers."
order to recover damages. Only three years later, however, the Court retreated from this position when it announced, in *Gertz v. Robert Welch, Inc.*, that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." In the years following the *Gertz* decision, Florida courts were left in a quandary as to the standard of liability applicable to media defendants in defamation actions brought by private individuals. Absent a clear decision by the Florida Supreme Court, the circuit and district courts applied their own standards based on divergent interpretations of controlling Florida law. The case of *Miami..."
Herald Publishing Co. v. Ane27 provided an opportunity for the supreme court to clearly articulate a standard which would ameliorate the conflict between the free dissemination of news and the protection of private reputational interests.


On Monday, November 21, 1977, Monroe County Sheriff’s deputies discovered and seized three tons of marijuana from an Old Milwaukee beer truck in the Florida Keys.28 In preparation for a news article about the incident, Greg Kirstein, a reporter for the Miami Herald, made several attempts to obtain the identity of the truck’s owner.29 His efforts included a telephone call to the company that formerly leased the truck. He also checked with the state agency responsible for automobile registration. Additionally, Kirstein called the Dade County officials responsible for issuing auto licenses and made repeated contacts with the sheriff’s office. Notwithstanding these efforts, Kirstein was unable to positively identify the truck’s owner. His search did, however, uncover four possible owners of the truck, one of whom was Aurelio Ane, a local beer distributor.30 Officials of the sheriff’s office had informed Kirstein that the truck was registered to Lillian Fernandez.31 However, subsequent inquiry revealed a possibility that Ane had recently purchased the truck.32 Kirstein learned of Ane’s identity from Marvin Kimmel, the president of the company that formerly leased the truck.33 The law enforcement officials told Kirstein that Ane was not a suspect in the case. Ane was out of town and could not be reached to verify Kimmel’s statement regarding the ownership of the truck. Kirstein’s article, published on November 22, 1977 in the Miami Herald, read in pertinent part:

TRUCK ADVERTISED BEER: CARRIED MARIJUANA BALES An ‘Old Milwaukee’ beer truck, sold only last Thursday by a Miami firm to a Key West distributor was confiscated early Monday carrying about three tons of baled marijuana on U.S. 1 in Marathon, Monroe County Sheriff’s officials said.
THE LARGE red-and-white truck, which Monday contained bales either wrapped in burlap or packaged in cartons from Colombia, had been purchased Thursday by Aurelio Ane, Key West Distributors Inc. president, according to Marvin Kimmel, president of Miami's Universal Brands Inc.\(^{34}\)

Additionally, the *Herald* reporter listed three others as possible owners of the truck and identified the sources of the information.\(^{35}\) The following day, after the police investigation was completed, the *Herald* published the correct name of the owner and renounced any involvement on the part of the other named individuals.\(^{36}\)

Ane brought a libel action against Marvin Kimmel and the *Miami Herald*. In circuit court, the judge denied motions by the defendants for summary judgment and motions by all parties for a directed verdict.\(^{37}\) The jury was instructed that “the plaintiff could recover in his libel action if the greater weight of the evidence showed that the defendants negligently published the false and defamatory statements sued upon.”\(^{38}\) Consequently, the jury awarded $5,000 in compensatory damages against the *Herald* and $10,000 in compensatory damages against Marvin Kimmel.

On appeal, Chief Judge Hubbart, writing for the majority of the Third District Court of Appeal, affirmed the judgment of the circuit court and held that a negligence standard applies to private individuals in an action for libel. The court reasoned, “[I]n our view, a showing of *New York Times* ‘actual malice’ is never re-

\(^{34}\) *Id.* at 378-79. The court took issue with the lead paragraph of the article which attributed the naming of an unidentified beer distributor to a sheriff’s official. *Id.* Three paragraphs into the article, however, Ane’s name was first mentioned with the proper attribution. *Id.* Under Florida law, an article alleged to be defamatory must be taken as a whole and its statements read in their proper context. Valentine v. CBS, 698 F.2d 430, 432 (11th Cir. 1983).

Although the court stated that no attempt was made to contact Lillian Fernandez, a portion of the article reprinted in a footnote in the opinion reads that Fernandez could not be reached for comment. *Ane*, 423 So. 2d at 380 n.1.

\(^{35}\) 423 So. 2d at 379-80. The article also stated: “ALTHOUGH KIMMEL said Ane purchased the trucks, both sheriff’s officials and state Motor Vehicle Department officials said the truck’s plate was registered to another Key West resident, Lillian Fernandez, 2718 Harris Ave.” The article included other possible owners as well. *Id.*

\(^{36}\) *Id.* at 381. After printing the name of Lillian Fernandez as the actual owner, the article stated: “Police and a Miami beer distributor said Tuesday that Aurelio (Porky) Ane, president of Key West Distributors, Inc., was not involved in the purchase of the truck. They blamed earlier reports of his involvement on a ‘misunderstanding’.” *Id.*

\(^{37}\) *Id.*

\(^{38}\) *Id.* at 381-82.
quired where, as here, the defamation plaintiff is a private individual and not a public official or public figure." Additionally, after reviewing the full record, the court determined that the jury was correct in finding that the article was false and defamatory.

B. The Third District’s Decision

Unlike prior Florida courts faced with defamation actions brought by private citizens, the Third District Court of Appeal directly confronted the dilemma of protection of the press versus injury to reputation. While the court was apparently motivated by a sincere desire to protect the private citizen from the excesses of the media, a close examination of its opinion reveals that in reaching its desired end, the court falls short of a complete and thought-

39. Id. at 382. The Florida Supreme Court recently decided that under certain circumstances, an “express malice” standard is applicable to defendants in defamation cases against private citizens. Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984). The supreme court determined that remarks made about a teacher at a school board meeting were protected by a qualified privilege.

40. See Bose Corp. v. Consumers Union, 104 S. Ct. 1949 (1984). The Supreme Court permits a review of the record in first amendment cases to ensure that the facts support the verdict. But see Miami Herald Publishing Co. v. Frank, 442 So. 2d 982, 984 (Fla. 3d DCA 1983) (court determined that its function as an appellate court precluded it from viewing the evidence), petition for review denied, 10 Fla. L.W. 276 (Fla. May 9, 1985).

41. Id., 423 So. 2d at 390.

42. See, e.g., From v. Tallahassee Democrat, Inc., 400 So. 2d at 58. The First District asserted, “The article itself, a part of the complaint, can neither be actionable under a standard of actual malice or simple negligence; and without adopting either standard as the law in Florida, we do hold, however, that the trial judge reached the proper result, and we affirm his order.” Id. at 58. The court was able to escape this quandary by observing that the statement made in the article was based on opinion, which is protected and privileged by the Constitution. Id. at 57.

Notably, the From court elaborated on what constituted “opinion.” The court determined that “pure opinion occurs when the defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public.” Id. The court went on to say, “Mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the plaintiff or his conduct that have not been stated in the article or assumed to exist by the parties to the communication.” Id. (citing Restatement (Second) of Torts § 566 (1977)). This is yet another complicated distinction that has served as a trap to the unwary reporter. In Madsen v. Buie, 454 So. 2d 727 (Fla. 1st DCA 1984), a letter was published in the Tallahassee Democrat which attacked the teaching methods of a Florida State University professor. The court determined that it was not pure opinion and, therefore, not constitutionally protected. Id. at 729. See also Smith v. Taylor County Publishing Co., Inc., 443 So. 2d 1042, 1047 (Fla. 1st DCA 1983) where the court grappled with the fact/opinion dichotomy and concluded that statements commenting on a published letter included factual assertions that were unprotected as an opinion. But see Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984) where the supreme court protected harsh comments made by a parent about a teacher. Apparently, the court made the distinction because the statements were made at a school board meeting as opposed to publication in a newspaper.
ful analysis of Florida case law dealing with free expression.

The court initially restricted its analysis to the first amendment and to *New York Times Co. v. Sullivan* and its progeny. Misinterpreting Florida common law as establishing a strict liability standard in defamation cases, Chief Judge Hubbart, writing for the majority, asserted that “[a]ll of these higher standards are, however, not prerequisites of the Florida common law of defamation or Florida constitutional law; they are prerequisites of the First Amendment to the United States Constitution which heretofore did not exist under Florida law.” A brief examination of prior Florida law illustrates the impropriety of such a conclusion.

Contrary to the Chief Judge’s observation, the Florida judiciary and legislature have historically subscribed to the notion that the press has a special responsibility to disseminate news to its readers. In recognition of this responsibility, a qualified privilege developed under Florida common law, insulating certain communications from defamation suits. In order to overcome the qualified privilege, which was determined by the court as a matter of law, a plaintiff had to prove “express malice”; that is, “ill will, hostility, [or] evil intention to defame and injure.” The express malice standard evolved from the early case of *Jones, Varnum & Co. v. Townsend’s Administratrix*, where the Florida Supreme Court first acknowledged the qualified privilege. In *Coogler v. Rhodes*, decided in 1897, the supreme court expressly established a qualified privilege as an affirmative defense. Once the privilege was established by a showing that the information was of public concern, the burden to prove malice shifted back to the plaintiff. Subsequently, in

---

43. *Ane*, 423 So. 2d at 382-83. *See supra* notes 15-24 and accompanying text.

44. 423 So. 2d at 383.

45. 1933 Fla. Laws, ch. 16-070, §§ 1-2 (current version at Fla. Stat. §§ 770.01-02 (1983)).


47. Montgomery v. Knox, 3 So. 211, 217 (Fla. 1887).

48. 21 Fla. 431, 449-50 (1885). The *Jones* court reasoned, “The rule of evidence as to [the qualified privilege] is accordingly changed so as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring to the defendant the existence of malice as the true motive of his conduct.” *Id.* (quoting White v. Nichols, 44 U.S. (3 Howard) 266, 291 (1845)).

49. 21 So. 109 (Fla. 1897). In *Coogler*, the court opined that publications could contain false statements and still retain a qualified privilege. *Coogler* involved a defamatory letter from the defendant to the governor. The plaintiff had been appointed by the governor to the office of sheriff, but had not yet taken office. The defendant wrote to the governor accusing the plaintiff of running a house of ill-repute. The plaintiff, Rhodes, sued, asserting that
Layne v. Tribune Co., the supreme court extended the qualified privilege to publications reporting incidents of public interest. In Layne, the court spoke extensively about the need for new defamation doctrines to deal with the complexities of the modern media.

Overlooking the qualified privilege in its reading of Florida law, the Third District Court of Appeal interpreted the United States Supreme Court's decision in Gertz v. Robert Welch, Inc. as mandating a negligence standard in defamation actions brought by private individuals. In actuality, the Supreme Court in Gertz tolerated negligence as the minimum standard of liability in private defamation suits against media defendants. Indeed, the Supreme Court afforded "substantial latitude" to the states in the creation of their own standards of liability. Consequently, in its failure to consider Florida's long history of providing a qualified privilege to report matters of public concern, the district court subverted the foundation upon which Florida's protection of the free press had been predicated.

the letter was false and malicious. The defendant lost, but the supreme court reversed and remanded. The court rationalized, "Communications to the appointing power with reference to the character and qualifications of candidates for public office have been often given as illustrations of qualifiedly or conditionally privileged publications." Id. at 112. The court held that "no action will lie for false statements in the publication unless it be shown that they are both false and malicious, and the burden of proof in this respect rests upon the plaintiff." Id.

50. Layne, 146 So. 234 (Fla. 1933).
51. Id. at 237-39.
52. Ane, 423 So. 2d at 384.
53. Gertz, 418 U.S. at 347.
54. Id. at 345.
55. Continuing its trend of broad media protection, the Florida Supreme Court in 1947 extended the qualified privilege to newsworthy items. Cooper v. Miami Herald Publishing Co., 31 So. 2d 382 (Fla. 1947) involved a local newspaper which published an account of a shooting, supposedly at the plaintiff's restaurant. Contrary to the article, the shooting took place a short distance from the restaurant. Affirming a judgment for the newspaper, the court recognized the newspaper's responsibility of supplying vast information and broad news coverage. The court concluded that because the article "simply reflect[ed] an incident of public interest," appellant's failure to prove malice was fatal. Id. at 384. Likewise, in Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941 (5th Cir. 1948), the Fifth Circuit Court of Appeals acknowledged Florida's position and reversed an excessive verdict for the plaintiff. In Caldwell, an article charged the Governor of Florida with indifference to lynchings in the state. The court noted that the Layne decision stood for the proposition that public interests are better served by an extension, rather than a restriction, of the media's qualified privilege to publish matters affecting the interest of the general public. Id. at 943.

Subsequently, the Florida Supreme Court, in Ross v. Gore, 48 So. 2d 412 (Fla. 1950), again reiterated its commitment to a free press. Justice Roberts, writing for the majority, asserted that "[t]he public has an interest in the free dissemination of news." The court recognized the special and difficult task of gathering and reporting the news and that occasional errors are inevitable. The court reasoned that "since the preservation of our American
The Third District supported its adoption of a negligence standard by postulating that in *Firestone v. Time, Inc.*, the Florida Supreme Court had implicitly adopted a negligence standard for cases concerning private figures in libel actions. This reliance was misplaced, however, because the court in *Firestone* determined that the issue of the Firestone divorce was not one of public concern and, therefore, was not entitled to the protection of the actual malice standard. Finding the story unprotected, the supreme court incorrectly applied a strict liability standard and was reversed by the United States Supreme Court. The Supreme Court held that there must be some showing of fault when dealing with a media defendant. After determining that the matter was not one of public concern, there was no need for the Florida Supreme Court to grapple with the public-private dichotomy. Significantly, the focus of the supreme court’s analysis was on the subject matter of the news rather than the status of the parties involved.

In *Ane*, Chief Judge Hubbart cited *Gibson v. Maloney* and *Abram v. Odham* for the proposition that a qualified privilege exists to publish a “fair comment” or a “fair account” of a public matter involving a public figure. He distinguished these cases by asserting that “[t]he great majority of American courts hold that no comment can be fair if it is based on misstatements of fact.” A careful look at prior Florida case law reveals that this assertion is inaccurate. For example, in *Coogler v. Rhodes*, the Florida Supreme Court recognized that communications could contain false statements and yet be protected by a qualified privilege. The Third District in *Ane* skirted this holding by stating that the court in *Coogler* neither “adopts [n]or even discusses a Rosenbloom rule.” Although the *Coogler* court did not use the term “actual

---

56. 271 So. 2d 745 (Fla. 1972).
57. Id. at 752.
59. See Note, supra note 46, at 567 n.133.
60. 231 So. 2d 823 (Fla. 1970).
61. 89 So. 2d 334 (Fla. 1956).
62. *Ane*, 423 So. 2d at 385.
63. Id. (quoting Miami Herald Publishing Co. v. Brautigam, 127 So. 2d 718, 723 (Fla. 3d DCA 1961)).
64. 21 So. 109, 112 (Fla. 1897); accord Ross v. Gore, 48 So. 2d 412 (Fla. 1950).
65. *Ane*, 423 So. 2d at 385.
malice,\textsuperscript{66} as set forth in the Rosenbloom decision which was decided seventy-four years later, the district court did hold that with respect to candidates seeking public office, "no action will lie for false statements in the publication unless it be shown that they are both false and malicious, and the burden of proof in this respect rests upon the plaintiff."\textsuperscript{67}

The district court in Ane never directly acknowledged the standard of express malice already in existence in Florida common law. For instance, in Abram v. Odham,\textsuperscript{68} the Florida Supreme Court applied the express malice test, defining express malice as a falsehood with intent to injure.\textsuperscript{69} Stated another way, Florida's express malice standard focused on the defendant's attitude toward the plaintiff, while actual malice focused on the defendant's attitude toward the truth or falsity of the material published.\textsuperscript{70} Notwithstanding this distinction, the district court failed to recognize the precedential significance of the protective standards invoked in earlier Florida cases which insulated the press from the self-censorship engendered by a fear of libel. Significantly, the focal point of the qualified privilege has generally been the subject matter of the news, as opposed to the status of the parties involved.\textsuperscript{71}

Although the Third District Court of Appeal devoted much of its opinion to paying tribute to the notion of a free press in a democratic society,\textsuperscript{72} in its final analysis, the court reasoned that it "seems neither sensible nor fair to push the parameters of the free press and free speech to such an extent, as urged here, that we needlessly plow under other important individual rights."\textsuperscript{73} Indeed, the court made several references to the power of the press, and

\textsuperscript{66} The Florida Supreme Court has, however, used the term "actual malice" interchangeably with the term "express malice" in Jones, Varnum & Co. v. Townsend's Adm'x, 21 Fla. 431 (1885). This was not the same treatment that the United States Supreme Court gave the term in New York Times, 376 U.S. at 280. See infra notes 71-74 and accompanying text.

\textsuperscript{67} Coogler, 21 So. at 112. The court also noted with approval, "Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then, if he bona fide, and without malice, does tell them, it is privileged communication." Id. (citations omitted). Certainly a publisher has a duty in the interest of society to report the confusion over vehicles used to transport illegal drugs, as did the reporter in Ane.

\textsuperscript{68} 89 So. 2d 334 (Fla. 1956).

\textsuperscript{69} Id. at 336.


\textsuperscript{71} See generally Note, supra note 46; Rahdert & Snyder, supra note 12.

\textsuperscript{72} Ane, 423 So. 2d at 386-87.

\textsuperscript{73} Id. at 387.
stated that, "[i]n [its] judgment, the primary limitation against the excesses of the power of the mass media—a power which by any standard is considerable in this country—is the defamation action." Using defamation suits as a means to bridle the press is troubling insofar as it ignores prior Florida law which sanctioned the idea that public interests are better served by an extension, rather than a restriction, of the media's qualified privilege to publish matters of public concern. In its review of the record, the court concluded that the Miami Herald published statements that were false and defamatory. Moreover, the court determined that this was "a clear case of journalistic negligence, the evidence of which in this case was more than ample to go to the jury for final resolution." Upon the facts, the court concluded that the reporter was negligent for reporting what it characterized as "unverified, contradicted hearsay." However, the fallacy in the majority's conclusion is that as a practical matter, almost everything reported is based on "hearsay" information inasmuch as reporters and publishers rarely have first-hand knowledge of all the events which converge to create a news item. Significantly, the court did recognize, however, that the reporter made several attempts to verify the information which ultimately led to the discovery of the identities of other possible owners of the truck whom he named in his article. Moreover, the contradictory information was included in the article. In news reporting, the kind of personal verification advocated by Chief Judge Hubbart is impractical, if not impossible.

Judge Pearson, in a special concurrence, supported Chief Judge Hubbart's conclusion that the Florida Supreme Court had adopted

74. Id. at 388. Chief Judge Hubbart asserted, "Indeed, it is a basic tenet of democracy that all power—public as well as private—must be subject to effective limitation lest the power be abused." Id. at 388 (footnote omitted).
75. See Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941, 943 (5th Cir. 1948).
76. Ane, 423 So. 2d at 390.
77. Id.
78. The article provided, "ALTHOUGH KIMMEL said Ane purchased the trucks, both sheriff's officials and state Motor Vehicle Department officials said the truck's plate was registered to another Key West resident, Lillian Fernandez, 2718 Harris Ave." Id. at 380 n.1. The article further stated:

Adding more confusion to the case was a registration sticker pasted on the beer truck's license plate that did not coincide with Dade County Auto Tag Division records for that plate. A division spokeswomam said the sticker found on the beer truck rightfully belonged on a 1964 Chevrolet pick-up truck owned by a Miami man.

Id.
a negligence standard in Firestone II. Although he never expressly took issue with any part of the majority opinion, Judge Pearson apparently believed that the plaintiff’s burden of proof, as established in Firestone II, was one of clear and convincing evidence, rather than a preponderance of the evidence. Indeed, this would explain his desire to write an opinion which, in all other respects, merely supported Chief Judge Hubbard’s analysis.

Judge Hendry, in a well-reasoned dissenting opinion, questioned the majority’s interpretation of the Firestone decisions. He saw the Ane case as an opportunity to clarify the Firestone cases and to adopt a standard “requiring private individuals who bring libel actions, arising from news reports of general or public interest, to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of the truth.”

Reflective of the uncertainty which surrounds the area of libel law, Judge Hendry took a strikingly different view of the Firestone I decision and Florida’s common law. Judge Hendry maintained that before Gertz was decided, the Florida Supreme Court in Firestone I had determined that private individuals had to prove that a reporter had acted with actual malice before recovering for defamation involving matters of public or general concern. He noted the significance of the sequential order of the Firestone and Gertz cases, and argued that since Firestone I was decided prior to Gertz, the actual malice standard established in Rosenbloom remained intact. Likewise, the Florida Supreme Court in Firestone II did not reject the Rosenbloom rule, nor did it specifically address the issue of liability involving private citizens.

---

79. Id. at 390-91.
80. Id. at 391.
82. 423 So. 2d at 392 (Hendry, J., dissenting). He realized that Gertz did not compel any standard other than a showing of fault and, therefore, Firestone I was still valid law in Florida. Id. at 393-94.
84. Although there was a reference to the word “negligence” in Firestone II, 305 So. 2d at 178, the focus of the Florida Supreme Court was still on the content of the news. Judge Hendry, in his dissenting opinion in Ane, noted this but opined that after considering the
Judge Hendry also recognized that *Gertz* merely allowed states to formulate their own standards of liability regarding private individuals. He concluded that *Firestone I* was the last statement by the Florida Supreme Court and, therefore, binding upon the courts. Accordingly, Judge Hendry opined that the actual malice standard was the law in Florida.

Focusing on Florida common law, Judge Hendry observed the Florida Supreme Court’s long tradition of insulating the press from libel actions which would lead to self-censorship. He viewed the majority’s holding as a serious threat to the free flow of news—a threat which is not justified by an occasional harm. He asserted that “[t]he actual malice standard permits freedom of speech and press to dominate, but not eradicate, the individual interest of reputation and privacy.” Finally, he perceived the actual malice standard as providing certainty to the reporter, while protecting private and public individuals from recklessness.

**B. The Florida Supreme Court Adopts a Negligence Standard**

Acknowledging the magnitude of its decision, the Third District certified the following question to the Florida Supreme Court as a matter of “great public importance”:

> [W]hether a plaintiff [who is neither a public official nor public figure] in a libel action is required under Florida law to establish as an element of his cause of action that the defendant published the alleged false and defamatory statements sued upon with ‘actual malice’ . . . [i.e., either with knowledge of [their] falsity or with reckless disregard of [their] truth or falsity] when the al-
leged false and defamatory statements relate to an event of public or general concern.92

In a brief opinion, the supreme court affirmed the holding of the Third District Court by a vote of five-to-two in favor of a negligence standard.93

Ironically, the Florida Supreme Court largely agreed with the arguments of the Miami Herald and Judge Hendry. Following Judge Hendry’s reasoning, and contrary to Chief Judge Hubbart’s position, the supreme court recognized that a qualified privilege existed for media defendants under Florida common law, which required a showing of express malice.94 It noted that to overcome this privilege, the plaintiff must have shown ill will, hostility, or an evil intention to defame and injure.95 Despite its acknowledgment of a qualified privilege, the supreme court rejected express malice as the appropriate standard, apparently troubled by what it perceived to be an attempt by the Miami Herald to expand the privilege beyond its traditional scope.96 The supreme court also recognized that the Gertz decision did not mandate a negligence standard, but merely required some showing of fault.97

The supreme court, departing from Judge Hendry’s analysis, embraced the views of the majority of the district court and held that a qualified privilege to report on matters of public concern is applicable only to plaintiffs who are governmental officials, candidates, or other public figures.98 The supreme court also echoed the Third District’s belief that the negligence standard will encourage responsible reporting and that it provides “breathing room for mistakes to occur.”99 Like the Third District, the supreme court in Ane independently examined the record and agreed that there was

92. Id. at 378.
94. Id. at 240. The supreme court cited Coogler v. Rhodes, 21 So. 109 (Fla. 1897), as establishing a standard of “express malice.” See also Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984).
95. Ane, 458 So. 2d at 240 (citing Montgomery v. Knox, 3 So. 211, 217 (Fla. 1887)).
96. Id at 242.
97. Id. at 241. Although the supreme court was cognizant that Gertz did not mandate a negligence standard, it opted for the minimum showing of fault. The court reasoned, “The effect of Gertz is to treat all matters of general or public interest and to reject the proposition that these matters are qualifiedly privileged.” Id.
98. Id. at 242.
99. Id.
sufficient evidence to support the jury's verdict. The court concluded that an injury to reputation was not necessary to prove an actual injury. Proof of mental anguish and personal humiliation were considered sufficient to warrant recovery.

In Tribune Co. v. Levin, decided the same day as Ane, the supreme court affirmed the decision of the Second District Court of Appeal which had characterized a manufacturer of solar heating devices as a private citizen. Without discussion and based solely upon its decision in Ane, the supreme court affirmed the defendant publisher's liability for articles concerning the manufacturer's business and personal activities, and found that evidence submitted on a negligence standard was sufficient to sustain a jury verdict.

Justice McDonald, joined by Justice Erhlich, dissented in both Ane and Levin. In Ane, the dissenters stated that an actual malice standard was the more appropriate standard for media defendants reporting events of public concern. Justice McDonald reasoned that "[i]f the news media is to perform its role fearlessly and responsibly in our free society, it should not have to defend its inadvertent and unintentional errors."

In his dissenting opinion in Levin, Justice McDonald asserted that "a commercial enterprise engaged in marketing and selling goods or services to the public, for libel purposes, is on the same footing as a public figure or public official." He reasoned that a commercial enterprise profiting from the public does not merit the rights afforded private individuals. He found constitutional support for his conclusions in the United States Supreme Court's decision in Bose Corp. v. Consumers Union. The Court in Bose determined that an enterprise publicly engaged in business is analogous to a public figure and, therefore, must show actual malice.

100. Id.
101. Id. at 242-43.
102. 458 So. 2d 243 (Fla. 1984).
103. Tribune Co. v. Levin, 426 So. 2d 45 (Fla. 2d DCA 1982).
104. Levin, 458 So. 2d at 244 (Fla. 1984).
105. Id. at 243.
106. Id.
107. Id. at 245.
108. Id. Justice McDonald asserted, "The media can and should address and report the conduct of those concerns dealing commercially with the public." Id.
110. Levin, 458 So. 2d at 245. Justice McDonald saw no difference between the commercial trade of stereo speakers and solar energy.
C. Analysis of Ane

The decisions in Ane and Levin strongly suggest that the supreme court was predisposed to bridle what it perceived to be the excessive power of the press. In contrast to its solicitude for the plaintiffs in Ane and Levin, the court had no difficulty applying the express malice standard in a subsequent defamation suit brought by a private citizen against a nonmedia defendant. In Nodar v. Galbreath,\textsuperscript{111} decided three months after the Ane and Levin decisions, the supreme court held that a parent has a qualified privilege as a matter of law to utter defamatory communications about a teacher’s performance at a school board meeting.\textsuperscript{112} The court then concluded that there was not a sufficient showing of express malice to overcome this privilege.\textsuperscript{113}

The strong protection the supreme court was willing to afford communications made by a nonmedia defendant at the expense of a private citizen’s\textsuperscript{114} reputation may reveal that its decisions in Ane, Levin, and Nodar reflect an ideological double standard, treating communications made by the media differently from those made by private citizens. The extent of this different treatment will have to be reconciled in future decisions.\textsuperscript{115} In the meantime, the threat of liability persists. Curiously, the extent of protections of the first amendment and the common law qualified privilege are now governed by such distinctions as the status of the speaker\textsuperscript{116}

\begin{enumerate}
\item \textsuperscript{111} 462 So. 2d 803 (Fla. 1984).
\item \textsuperscript{112} Id. at 809-10.
\item \textsuperscript{113} Id. at 812.
\item \textsuperscript{114} A good argument exists as to whether the supreme court came to the proper conclusion when it characterized a school teacher as a private citizen for purposes of a defamation action. The Supreme Court observed in another context:
\begin{quote}
[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities.
\end{quote}
\item \textsuperscript{115} The Florida Supreme Court in Nodar acknowledged that “past cases had recognized the privilege of comment where there were ‘additional factors’.” 462 So. 2d at 810 n.5. This may indicate that the supreme court will be more receptive in other cases dealing with matters of public or general concern if the factual situation justifies protection.
\item \textsuperscript{116} See, e.g., Smith v. Taylor County Publishing Co., Inc., 443 So. 2d 1042 (Fla. 1st DCA 1983). The court discussed the distinction between public and private persons but never actually decided the classification of a publisher of a newspaper. Id. at 1048-49. The dissenter took issue with the court’s holding and stated that a publisher should be a public figure as a matter of law. He also opined that the allegedly libelous statements were pure opinion and, therefore, were protected. Id. at 1049-50. (Thompson, J., dissenting).\end{enumerate}
and where the communication is published,\textsuperscript{117} rather than the actual newsworthiness of the statements.\textsuperscript{118}

With respect to the \textit{Ane} court's finding that the statements were both false and defamatory, noticeably absent from the analyses of the district court and supreme court was the case of \textit{Cooper v. Miami Herald Publishing Co.}\textsuperscript{110} In \textit{Cooper}, the supreme court affirmed the district court's judgment in favor of the defendant in a case involving a news article about criminal behavior in south Florida. The article dealt with a shooting that was reported to have occurred at a Miami restaurant.\textsuperscript{120} Although the shooting actually occurred a short distance from the restaurant, the court considered the article in its entirety and decided that the article was neither defamatory nor malicious, "but simply reflect[ed] an incident of public interest in the environs of the City of Miami."\textsuperscript{121} Inasmuch as both the \textit{Ane} and \textit{Cooper} articles involved criminal activity in south Florida, the \textit{Miami Herald}'s primary circulation area, it would seem that the analysis used by the supreme court in \textit{Cooper} is applicable to the \textit{Ane} case. The court's failure to distinguish these cases provides publishers with no clear guidelines to use in their publication decisions.

\section*{III. \textbf{Ramifications of Ane}}

The issue of free press versus private reputation has inspired debate among legal scholars, legislators, and judges since the eighteenth century.\textsuperscript{122} The measure of protection afforded the media under the broad language of the first amendment has undergone

\begin{footnotesize}
\item[117] See, e.g., \textit{Madsen v. Buie}, 454 So. 2d 727 (Fla. 1st DCA 1984), where the court held that defamatory statements about a professor in a newspaper were not privileged. Compare \textit{Nodar}, 462 So. 2d 803. (Fla. 1984) where the court held that defamatory comments made about a teacher at a school board meeting had a qualified privilege.

\item[118] See \textit{Susman v. Damian}, 355 So. 2d 809 (Fla. 3d DCA 1977). Judge Hubbart, speaking for a unanimous panel, upheld a summary judgment in favor of an angry lawyer who had accused another lawyer of professional misconduct. It seems hard to reconcile that an attorney in a nonjudicial proceeding could be afforded a qualified privilege for angry words spoken, but that a reporter performing his job in good faith can be precluded from having the same privilege and, thus, be held accountable for his mistake. It is instructive that judges, who are members of the legal profession, have no trouble recognizing the need for a qualified privilege with respect to the practice of law.

\item[119] 31 So. 2d 382 (Fla. 1947).

\item[120] \textit{Id.} at 383.

\item[121] \textit{Id.} at 384.

\item[122] The Third District in \textit{Ane} noted that a great deal of debate existed among the Founding Fathers regarding the public interest in the free dissemination of news versus the importance of the defamation action as an individual's sole remedy against the occasional excesses of the media. \textit{Ane}, 423 So. 2d at 386-87.
\end{footnotesize}
significant changes over the years. The emergent body of defamation law abounds with subtle distinctions that confuse even the trained legal mind, not to mention the reporter or publisher whose behavior it attempts to govern.

As in most constitutional issues, persuasive arguments exist on both sides. Some have argued that with the increased power of the press comes a heightened responsibility to its audience and to the subjects of its stories. Even the strongest advocates of the first amendment would agree that the special role played by the press in our society should inspire it to act responsibly. Notwithstanding this desire, they acknowledge that reputational interests must always collide with interests in free expression. Some commentators and judges believe that strong libel laws are a means to accomplish the objectives of promoting responsible journalism and providing a remedy for injured claimants. Justice Harlan believed that the Court's devotion to preventing self-censorship at the expense of libel laws was unwarranted. He perceived that some self-censorship was desirable. He opined that "[i]t does no violence . . . to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise these freedoms." Other commentators and judges believe that a negligence standard of liability will lead to troublesome and uncertain results.


125. Professor Anderson states:

"I share Professor Robertson's distaste for some of the journalistic practices evident in these cases. As an editor, I would have serious doubts about publishing in a national news magazine the divorces of private citizens. . . . But it is one thing to state one's views as an editor or reader, and quite another to advance them as the basis for a system of libel law."

Anderson, supra note 123, at 281.


128. Id. at 70. See Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Calif. L. Rev. 935, 950 (1968).

129. Professor Anderson asserts, "I do not think libel law is an appropriate solution to the problem of press accountability. It is too clumsy, too discriminatory, too uncertain."
The Florida Supreme Court and proponents of a negligence standard for media defendants seem to envision a regime, however unrealistic, where a reporter's use of reasonable care will effectively protect him from liability in libel actions brought by private individuals. However, one need look no farther than the *Ane* case to conclude that a negligence standard provides no greater protection than strict liability.\(^{130}\) The facts of *Ane* reveal that the reporter received information about the ownership of the truck from the president of the company that formerly leased the truck.\(^{131}\) The reporter made several calls in attempting to verify the truck's ownership. Refusing to speculate as to the truck's true owner, he listed four possible owners and commented on the confusion surrounding the ownership in his article.\(^{132}\)

Despite what some reporters would consider diligent efforts, the jury's finding of negligence comes as little surprise. The juror has little or no experience in the practical realities of newspaper deadlines.\(^{133}\) Unlike other professions, such as medicine and law, expert testimony on responsible publishing will not be instructive because of the divergence of opinion surrounding the practice of journalism held by reporters and publishers.\(^{134}\) Indeed, this will penalize the more radical publications and promote conservative reporting. More importantly, publishers have little incentive to conform to a certain mode of behavior. They may find it more expedient to censor important but potentially defamatory information rather than risk liability.\(^{135}\) Equally perplexing, appellate review of the jury's determination will be difficult, since judges generally regard the elements of negligence as exclusively within the province of the

---


130. Brief of Amicus Curiae Apalachee Publishing Co. at 6, Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984).

131. *Ane*, 423 So. 2d at 379 (Fla. 3d DCA 1982).

132. The reporter wrote in the article: "'It may be that the truck's [sic] changed hands two or three times recently. We're just starting (the investigation),' Detective Joe Valdes said of the confusion over the truck's ownership. 'We find a lot of this in these cases.'" *Ane*, 423 So. 2d at 380 n.1.

133. Brief of Petitioner at 39, Miami Herald v. Ane, 458 So. 2d 239. Even more troubling is the difficulty in determining what constitutes a reasonable publisher. Since the press is considered the professional disseminator of news, presumably the defendant's conduct is to be measured against a professional standard. Clearly, a "responsible publisher" standard would be inappropriate since the members of the journalism profession cannot agree among themselves as to what constitutes "responsible" conduct. See Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 466 (1976).

134. See Anderson, *supra* note 133, at 455.

135. *Id.* at 432 n.56.
jury. The situation is further aggravated by the supreme court's implicit decision to change the plaintiff's standard of proof from "clear and convincing" to "the greater weight of the evidence." Consequently, judges and juries have been given liberty to invoke their own uninformed notions about the practice of journalism. Hence, the editor must base his decision on a lay person's assessment of what is reasonable for the profession. Although this situation characterizes many civil liability rules, the deterrence function of the rule is counterbalanced by the unique and intolerable threat of self-censorship.

As a practical matter, the negligence standard adopted in Ane may be expected to change potential plaintiffs' perceptions of their chances for success. The plaintiffs' bar, not surprisingly, will sense the trend of media disfavor by both the judiciary and juries. De-


137. The supreme court never expressly adopted this new burden of proof, but implicitly did so by affirming the decision of the trial court that used this standard in its jury instructions. Ane, 423 So. 2d at 381-82. Judge Pearson's concurrence, however, leaves doubt as to whether this matter will have to be expressly addressed in the future. Id. at 390-91.

138. See Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d 580 (Ind. Ct. App. 1974). In Aafco, an Indiana appellate court recognized this dilemma when it commented, "We refuse to adopt a rule that would allow private citizens to obtain judgments on the basis of a jury determination that a publisher probably failed to use reasonable care. Such a rule would promote self-censorship 'to steer far wider of the unlawful zone.'" Id. at 588 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

139. There are those who question whether a negligence standard for private citizens will lead to self-censorship. For instance, Justice White asserted, "To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth." Gertz, 418 U.S. at 390. See also Robertson, supra note 123, at 210. Professor Robertson, like the Third District in Ane, used the Watergate exposé as an example of journalistic aggressiveness. Insofar as the Watergate series of articles involved public officials, the actual malice standard applied. The question is whether in the face of a lesser standard, this intrepid style of reporting might not be extended to coverage of unions, universities, corporations, and other powerful private institutions. Professor Anderson notes that even the most casual reader should recognize that these areas do not get equal treatment. Anderson, supra note 123, at 283 n.46; see also The Associated Press, The Dangers of Libel. (1964) which instructs:

There are three steps to be taken in the evaluation of a story. The first question is whether it is libelous, that is, whether it is actionable on its face. If it is, then the test is whether the facts stated are provably true. If the answer to the first question is in the affirmative, and you are not certain as to the second, then you must decide whether the story is qualifiedly privileged. If the story is libelous or potentially libelous and it fails to survive the two tests mentioned, then there is only one course of action to be followed: KILL IT AT ONCE.

Id. at 4. (emphasis in original).
spite the "breathing room" the supreme court thought it preserved for the press, publishers will undoubtedly be painfully cognizant of this changed perception of potential plaintiffs. The press will feel intimidated by the imposition of liability even in light of the militating factual scenario of Ane, and in an inevitable increase in the cost of libel insurance.

As an alternative to censorship or nonpublication, and in support of a negligence standard, Professor Robertson suggests that the "publisher identify the source of the story so that the credibility of the newspaper no longer supports the truth of the statement." In support of this alternative, he cites the Florida case of Layne v. Tribune Co. in which the supreme court absolved a newspaper for republication of a defamatory remark. The court in Layne described its decision as "in harmony with the theory that under the ancient rules of the common law, one who heard a slander was not liable for repeating it, if he does so in the same words, and at the same time gave in publishing it, his authority for the statement made." Despite the court's analysis in Layne, the facts of the Ane case reveal that this is not a safe alternative to self-censorship. Closely akin to the privilege to republish the news is the doctrine of "neutral reporting." This is founded upon the notion that newspapers should not be liable for errors published which are not their own. The facts of Ane reveal a classic case of

140. Ane, 458 So. 2d at 242. See Anderson, supra note 133, at 452.
141. See Robertson, supra note 123, at 264.
142. 146 So. 234 (Fla. 1933).
143. Id. at 238.
144. See Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977). In Edwards, the court held that the first amendment protects disinterested reporting of statements by others involving events that are of public interest. Accord El Amin v. Miami Herald Publishing Co., 9 Media L. Rep. (BNA) 1079 (Fla. 11th Cir. Ct. 1983). The court acknowledged the Third District's opinion in Ane, but found neither negligence nor actual malice in this case due to the privilege to neutrally report the news. Id. at 1081-82. The court went on to say that the "First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity." Id. at 1081.
145. The court in Edwards opined, "The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them." 556 F.2d at 120.
neutral reporting where the reporter attributed the reported information to its source. Despite his adherence to this accepted journalistic practice, the jury found the reporter negligent. Somewhat inconsistently, the jury held the publisher of the information liable, even though it believed that the statements were in fact made to the Herald. In order for a jury to recognize and apply these doctrines, comprehensive jury instructions must be given. Even more troubling, by upholding the finding of negligence, the Third District and the supreme court failed to adopt the Layne rationale or the more modern doctrine of neutral reporting.

A. A Showing of Malice

The argument has been advanced that the only effective way to deter press censorship is to grant to the media an absolute immunity from libel suits. Justices Black and Douglas long argued that the framers of the Constitution intended that the press should be completely unfettered and thus, not accountable for its occasional errors. This argument stems from a belief that juries cannot grasp the actual malice standard, and that the judiciary has failed

See also Bair v. Palm Beach Newspapers, 8 Media L. Rep. (BNA) 2028 (Fla. 15th Cir. Ct. 1982). The facts of this case are similar to the facts in Ane. In Bair, the executive director of a drug abuse center made statements to a reporter about the dismissal of the plaintiff. The plaintiff conceded the statements were made and that they were accurately reported and attributed to their source. The court determined that there was a common law qualified privilege to report on matters of public concern. Id. at 2031. It also noted that the Rosenbloom standard of actual malice survived Firestone II and was therefore, still controlling. Lastly, the court concluded that the doctrine of neutral reporting applied in this case “where a news article has merely related statements made by a responsible official concerning a matter of public concern.” Id. at 2032. See also Wade v. Stocks, 7 Media L. Rep. (BNA) 2200 (Fla. 2d Cir. Ct. 1981).

146. Ane, 423 So. 2d at 382.
147. Id.
148. See also Karp v. Miami Herald Publishing Co., 359 So. 2d 580 (Fla. 3d DCA 1978). The court made an independent judicial determination that the reporter was not negligent and granted the defendant publisher’s motion for summary judgment.
to properly apply the standard on de novo review.\textsuperscript{150} Although the absolutist view has never gained the support of the majority, case law nevertheless reveals this argument to be meritorious.\textsuperscript{151} Courts have sometimes distorted the test of actual malice to punish those whom they believe to be irresponsible publishers.\textsuperscript{182} The end result is that any standard of liability is only as good as the court's application of the standard. Judicial reluctance to apply any standard consistently and thoughtfully will render it ineffective.

The actual malice standard has also been criticized because it generally is not utilized until the trial stage\textsuperscript{153} or beyond.\textsuperscript{154} Consequently, it does little to reduce litigation costs. In a recent decision

\textsuperscript{150} See Anderson, supra note 133, at 456.

\textsuperscript{151} For instance, in Sprouse v. Clay Communications, Inc., 211 S.E.2d 674 (W. Va.), cert. denied, 423 U.S. 882 (1975), the 1968 Democratic nominee for Governor of West Virginia brought a libel action. After being tipped off by members of his opponent's campaign staff, reporters investigated and published a series of news items implicating Sprouse's involvement in illegal land transactions. Although the court acknowledged that most of the statements were true, it believed that the stories gave rise to inferences that he participated in shady deals. Despite his position as a political candidate and thus, a requirement of an actual malice standard, the jury awarded Sprouse $750,000. The court reduced the judgment to $250,000. After reviewing the record, the West Virginia Supreme Court justified the judgment by asserting that the evidence indicated that the "[defendant] newspaper foreswore its role as an impartial reporter of facts and joined with political partisans in an overall plan or scheme to discredit the character of a political candidate." \textit{Id.} at 680. Notwithstanding the truth of the stories, the court imposed liability because it found that the articles deliberately misled the reader with words and oversized headlines. Indeed, intent to injure Sprouse was inferred from the story merely because the information was obtained from his political opponents. It is apparent that the court based its decision on whether to extend first amendment protection on matters of journalistic style rather than content.


\textsuperscript{153} In \textit{Liberty Lobby, Inc. v. Anderson}, 746 F.2d 1563 (D.C. Cir. 1984), the court of appeals rejected the use of summary judgment for media defendants. The court determined that "convincing clarity" and independent judicial determination requirements do not apply at the summary judgment stage. The court asserted:

Imposing the increased proof requirement at [the summary judgment] stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well.

\textit{Id.} at 1570.

\textsuperscript{154} \textit{See Bose Corp. v. Consumers Union}, 104 S. Ct. 1949 (1984) (allowing a de novo review of the facts to determine whether they supported the verdict); \textit{see also} Abrams, \textit{The Supreme Court Turns New Page in Libel}, 70 A.B.A. J. 89 (1984). The article noted that 89% of the cases that reach the jury are decided against the defendant. On appeal, nearly 75% of these verdicts are reversed or reduced in amount.
by the United States Court of Appeals for the District of Columbia, the court restricted the use of summary judgments in libel actions.\(^\text{155}\) Hence, the issue becomes whether the story is worth the cost of a potential defense of a jury trial.\(^\text{166}\)

1. **Actual Malice**

Despite these valid criticisms, application of the actual malice standard when judging the conduct of one who reports matters of public concern would better serve Florida's commitment to "robust and open debate" than would a simple negligence standard.\(^\text{157}\) The actual malice standard serves two important objectives. First, it holds the media accountable for intentional abuses. Second, it provides the adequate breathing space\(^\text{158}\) necessary to prevent the "chilling effect" of self-censorship. Notwithstanding arguments to the contrary, this alternative does not preclude the private individual from pursuing an action in defamation where the press acts in a reckless manner.\(^\text{159}\) Furthermore, this approach is consistent with the development of Florida's media law, which has focused on the

\(^{155}\) *Anderson*, 746 F.2d at 1570. The court apparently perceived this as a benefit to the plaintiffs but, conceivably, it might cost them a great deal more. The smaller newspapers will also feel the financial burden.

\(^{156}\) See *Anderson*, *supra* note 133, at 436-38 (author noted that some newspapers cannot afford the costs of litigating a libel suit); see also *Robertson*, *supra* note 123, at 260.

\(^{157}\) *Ane*, 458 So. 2d at 242.

\(^{158}\) It has been argued that since no one can prove the necessity of "breathing space" for the first amendment or the necessity of redressing reputational injuries, neither deserves greater reverence. See *Robertson*, *supra* note 123, at 210-11. In support of this proposition, Professor Robertson cites Judge Learned Hand who aptly stated, "[The first amendment] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), afl'd, 326 U.S. 1 (1945).

\(^{159}\) Florida courts have not been reluctant to hold media defendants accountable for what is perceived as recklessness. For example, in Holter v. WLCY T.V., Inc, 366 So. 2d 445 (Fla. 2d DCA 1978), the Second District set aside the trial court's directed verdict in favor of the media. The court held that there was sufficient evidence for a jury to determine that a television station acted with actual malice when it aired statements that a Reddington Beach mayor resigned because he had been implicated in embezzlement and extortion. *Id.* at 455-56.

See also *Cape Publications, Inc. v. Adams*, 336 So. 2d 1197 (Fla. 4th DCA 1976), cert. denied, 434 U.S. 943 (1977). In *Cape Publications*, the Fourth District held that the evidence sustained a jury finding that the defendant newspaper acted in reckless disregard of the truth. *Id.* at 1200. The article dealt with alleged bribes by the building official of Vero Beach. Notably, the record showed that the reporter had made the statement that he was "going to get the appellee and put him in jail." *Id.* The court implied that there was sufficient evidence to overcome the burden of proving common law express malice as well.
content of the speech as opposed to the status of the parties.\textsuperscript{160}

The advantages of the actual malice standard have been recognized outside the confines of the judiciary. During the Florida constitutional revision of 1978, the Ethics, Privacy and Elections Committee accepted the invitation extended in \textit{Gertz} and recommended that as a matter of state law, "[i]n all defamation actions, truth shall be a defense and, in all matters of public or general concern, the publication shall be privileged in the absence of actual malice".\textsuperscript{161} After vigorous debate, the committee's proposal was defeated.\textsuperscript{162} One commentator noted that "conflicts between the rights of free speech and press and the individual's interest in good reputation will be resolved by the judiciary, unaided by political policymakers—the commission and the people".\textsuperscript{163}

Notwithstanding criticism that the subject matter approach reposes too much editorial discretion in the judiciary, emphasis upon the content of the information is still superior to emphasis upon the plaintiff's status.\textsuperscript{164} Additionally, distinguishing between public and private matters will provide stronger protection for all citizens when news stories invade their private concerns.\textsuperscript{165} Moreover, the ad hoc determination of who is a public figure or official has been applied with difficulty and inconsistency.\textsuperscript{166}

\begin{itemize}
  \item Content of speech as opposed to the status of the parties has also been the focal point in privacy actions. The Florida Supreme Court has announced that one emerges from seclusion by being present at the occurrence of an event of public interest. \textit{Jacova v. Southern Radio & Television Co.}, 83 So. 2d 34, 36 (Fla. 1955). Subsequent to the Florida Supreme Court's decision in \textit{Jacova}, the United States Supreme Court decided \textit{Time, Inc. v. Hill}, 385 U.S. 374 (1967) in a similar fashion. In \textit{Hill}, a magazine reported that a current play recounted the experiences of the plaintiff's family when they were held hostage in their home by escaped convicts. After the family brought an action under a state privacy statute, the Court determined that because the article dealt with a matter of public concern, the privacy interest of the individual must yield to the primary value that society places on freedom of the press. \textit{Id.} at 388. The Court concluded that a showing of actual malice would be necessary for recovery. \textit{Id.} at 390. \textit{See generally Wright, Defamation, Privacy, And The Public's Right To Know: A National Problem And A New Approach}, 46 Tex. L. Rev. 630 (1968).
  \item \textit{Id.} at 632.
  \item \textit{Id.} at 632.
  \item \textit{See Dore, supra note 161, at 632. Justice Overton, who was acting as commissioner, believed that the standard of liability was a policy question. Professor Dore noted Justice Overton's belief that this issue was "more appropriately decided in a political, rather than a judicial, forum." \textit{Id.} at 631 (citing the transcript of Fla. C.R.C. proceedings 69-71 (Jan. 10, 1978)).
  \item \textit{See Anderson, supra note 123, at 281-82. The author notes, "The danger inherent in so limited a view of the first amendment is that it makes freedom of expression dependent on a judge's assessment of a statement's utility."
  \item Certainly, the ad hoc determination of public matters is not more difficult than the determination of who is a public figure. In \textit{Gertz}, the court of appeals questioned the finding
Professor Keeton has suggested the following formula when dealing with intentional defamation:

(1) Evaluative opinions, unlike other defamatory statements are not actionable.
(2) The plaintiff can establish a prima facie case of intentional defamation by proving the following:
   (a) that the defamatory statement about the plaintiff was false;
   (b) that the defendant published the matter with knowledge of its falsity, or without an honest belief in its truth, or without a reasonable basis for believing its truth; and
   (c) that actual harm to the plaintiff's reputation occurred because of the publication.\(^{167}\)

This formula of recovery differs from the standard adopted in \textit{Ane} in several respects. First, rather than determining whether the reporter acted reasonably, the inquiry is whether the reporter had a reasonable basis for believing his source.\(^{168}\) This query focuses on the reporter's state of mind, thereby eliminating the inadequacy of second-guessing the reasonableness of his editorial decisions. This approach is consistent with the actual malice standard as well as the express malice standard. Second, the formula requires proof of actual harm to the plaintiff's reputation rather than a mere inference of humiliation or mental anguish. Professor Keeton's formula thus provides adequate protection against jury (in)discretion and at the same time allows recovery for actual reputational damage.

2. \textit{Express Malice}

A showing of express malice would make it more difficult for a

\begin{itemize}
\item that Elmer Gertz was not a public figure. The court stated, "Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a 'public figure' as the term has been used by the progeny of \textit{New York Times}.” 471 F.2d at 805. Cf. Steere v. Cupp, 602 F.2d 1267 (Kan. 1979) (Kansas Supreme Court held that a lawyer who represented a murder suspect was a public figure); Buchanan v. Associated Press, 398 F. Supp. 1196 (D.D.C. 1975) (an accountant for the committee to reelect the president was a public figure); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (person failing to appear before a grand jury investigating espionage not a public figure). Certainly, reporters and judges will have a difficult time making this determination. See Brief of Amicus Curiae, Apalachee Publishing Co., at 11, \textit{Ane}, 458 So. 2d 239 (Fla. 1984).
\item Perhaps an even better modification would be to substitute the word “rational” in place of “reasonable.” This would likely dissuade jurors from imposing their personal views of what constitutes reasonable conduct in reporting.
\end{itemize}
private citizen to recover in defamation actions. However, Florida's common law has recognized that a heightened standard of liability better serves the public's interest in the free flow of information. Although the supreme court considered the common law privilege a lesser burden on the plaintiff than the actual malice standard, history reveals that the common law privilege afforded the media stronger protection than the negligence standard adopted in Ane. Recently, in Nodar v. Galbreath, the Florida Supreme Court adhered to the common law standard of "express malice" in a defamation action brought by a private citizen against a nonmedia defendant. Indeed, the supreme court mandated rigid application of the express malice standard by announcing that "[s]trong, angry, or intemperate words do not alone show express malice; rather, there must be a showing that the speaker used his privileged position to gratify his malevolence."

Further support for the adoption of the common law express malice standard can be drawn from the United States Supreme Court's refusal to mandate a negligence standard in Gertz. This suggests that the Court believes defamation law, as developed by the individual states, may better reconcile the competing interests in ensuring a free press and protecting individual reputation. The Florida judiciary has demonstrated a strong commitment to the principle of a free press, which has often predated parallel de-

169. See supra notes 67-71 and accompanying text.

170. Ane, 458 So. 2d at 242. The supreme court reasoned that "under Florida common law, the privilege was always defeated by express malice, a lesser standard than the actual malice urged by petitioners." But see Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984) (very difficult to overcome the burden to show express malice).

171. See generally Rahdert & Snyder, supra note 12 (authors present a comprehensive analysis of Florida common law regarding defamation).

172. 462 So. 2d 803.

173. Id. at 811. The supreme court elaborated on what kind of language would constitute a finding of express malice:

Examples of cases where the false and defamatory words themselves were so extreme as to intrinsically show express malice are Loeb v. Geronemus, 65 So. 2d 241 (Fla. 1953) (defendant said plaintiff was guilty of evil conduct, was of low moral character, was a disgrace, a troublemaker, was not respectable, had been compelled to leave Chicago) and Brown v. Fawcett Publications, Inc., 196 So. 2d 465 (Fla. 2d DCA 1967) (defendant said plaintiff was a murderer, rapist, and sodomite).

Id. at 812.

This standard would seem to provide greater protection than that afforded under the actual malice standard. Cf. Holter, 365 So. 2d 445 (Fla. 2d DCA 1979); Cape Publications, 336 So. 2d 1197 (Fla. 4th DCA 1976).

velopments in the United States Supreme Court.\textsuperscript{175} Thus, express malice, as defined in Florida's common law and applied recently in \textit{Nodar}, establishes an acceptable middle ground which accommodates the reputational interest of the private individual, and at the same time assures that the press is free to publish matters of public concern.\textsuperscript{176} The Florida Supreme Court should not have felt restricted to a negligence standard by the \textit{Gertz} decision.

\section*{B. Actual Injury}

It is difficult to prove injury to reputation, since the plaintiff's only injury may be to his self-perception, and not to the manner in which others perceive him. Acknowledging this possibility, the Court in \textit{Gertz} did not mandate a showing of injury to reputation, but allowed mental anguish and personal humiliation to constitute recoverable injury.\textsuperscript{177} Justice Powell, writing for the majority, attacked the notion of presumed damages, stating that it "invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."\textsuperscript{178} Accordingly, the holding in \textit{Gertz} requires competent evidence of "actual injury."\textsuperscript{179} As a practical matter, it is difficult to imagine that injuries such as mental anguish and personal humiliation will not be presumed or inferred by the jury.\textsuperscript{180} Professor Anderson has observed that "[i]n the absence of a demonstration of \textit{Times} recklessness, \textit{Gertz} should preclude recovery for emotional injuries unaccompanied by injury to relational interests."\textsuperscript{181} This reasoning follows from the Court's insistence that the states must not transcend their legitimate interests in compensating for actual injury to reputation.\textsuperscript{182} Professor Anderson further asserts that once reputational injury is proved, the plaintiff may be compensated for ancillary emotional injuries. He states that "[t]o permit recovery for emotional injuries when no actual injury to reputation exists would subvert the 'actual loss' requirement."\textsuperscript{183}

\begin{itemize}
\item \textsuperscript{175} See generally Note, supra note 46. The Note tracks the development of the qualified media privilege in decisions of the Florida Supreme Court and the United States Supreme Court.
\item \textsuperscript{176} See Rahdert & Snyder, supra note 12, at 50.
\item \textsuperscript{177} \textit{Gertz}, 418 U.S. at 349.
\item \textsuperscript{178} Id.
\item \textsuperscript{179} Id.
\item \textsuperscript{180} See Anderson, supra note 133, at 472.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id.
\end{itemize}
In accordance with this apprehension, Justice Brennan believes that a prohibition against presumed damages alone would not defeat the self-censorship threat. He reasons that “the Court's broad-ranging examples of 'actual injury' . . . inevitably allow a jury bent on punishing expression of unpopular views a formidable weapon for doing so.”\(^{184}\) Although \textit{Gertz} requires that all awards be supported by competent evidence, its expansive definition of actual injury will not prevent substantial and random awards.

Despite the criticism of actual injury under \textit{Gertz}, the Florida Supreme Court adhered to the notion that actual injury to reputation is unnecessary to support an award of damages. The supreme court determined that personal humiliation and mental anguish standing alone were enough to justify an award.\(^{185}\) Ironically, Florida courts have traditionally required plaintiffs to meet strict standards before they have been permitted to recover damages for intentional or negligent infliction of emotional distress.\(^{186}\) For example, in \textit{Gmuer v. Garner},\(^{187}\) the court insisted that for an action to lie for emotional distress absent physical injury, the conduct of the defendant must be outrageous. The supreme court in \textit{Ane} may have inadvertently created a new standard of liability which may find broader application in the body of tort law as a whole.\(^{188}\) Ultimately, the ability to recover for emotional distress resulting from such an expansive definition will neither materially reduce the risk of capricious jury verdicts nor deter a jury from punishing a publisher of unpopular ideas.\(^{189}\)

C. A Better Approach: Proposed Legislation

Justice Brennan has suggested that more suitable remedies might be found for reviving the reputation of the defamed individ-

\(^{184}\) \textit{Gertz}, 418 U.S. at 367 (Brennan, J., dissenting). Justice Brennan also noted that tinkering with defamation damages does not reduce self-censorship damages.

\(^{185}\) \textit{Ane}, 458 So. 2d at 242-43 & n.3 (citing Time, Inc. v. Firestone, 424 U.S. at 460).

\(^{186}\) \textit{Kirksey v. Jernigan}, 45 So. 2d 188 (Fla. 1950). The court stated, “This Court is committed to the rule, and we re-affirm it herein, that there can be no recovery for mental pain and anguish unconnected with physical injury in an action arising out of the negligent breach of a contract whereby simple negligence is involved.” Id. at 189. Accord \textit{Slocum v. Food Fair Stores of Fla.}, 100 So. 2d 396 (Fla. 1958).

\(^{187}\) \textit{426 So. 2d 972 (Fla. 2d DCA 1982)}.

\(^{188}\) \textit{The Miami Herald} made an interesting characterization of the decision in the \textit{Ane} case. The \textit{Herald} believed that the supreme court created a new tort of “negligent infliction of emotional distress as a result of a newspaper article.” Petitioner's Motion for Rehearing and Clarification at 2, Miami Herald Publishing Co. v. Ane, 458 So. 2d 239 (Fla. 1984).

\(^{189}\) \textit{See Taskett v. King Broadcasting Co.}, 546 P.2d 81, 103 (Colo. 1976).
ual outside the realm of monetary damages. Hinting that legislation may be more appropriate, he asserted in *Rosenbloom* that, "[i]f the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."190

Unfortunately, the Florida legislature’s failure to define actual injury has not eliminated the danger of large libel awards. Florida’s defamation statute states, in relevant part, that if an “article or broadcast was published in good faith; that its falsity was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements in said article or broadcast were true; . . . then the plaintiff in such case shall recover only actual damages.”191

As a practical matter, this statute does nothing to lessen the liability of publishers or to discourage libel actions. Although the statute represented a significant step in media protection when it was first adopted in 1933,192 it has become superfluous in light of the Supreme Court’s mandate that the actual malice standard must be satisfied as a condition to recovery of punitive damages.193 Indeed, by its terms, the statute appears to mandate application of something less than a negligence standard to recover actual damages. Moreover, by deferring to the supreme court’s broad definition of actual injury, the Florida legislature has in no way protected the media from punishment for controversial publications.

The legislature should revise the statute to include a brief description of what constitutes actual damages. The statute should require a showing of injury to reputation. Since the purpose of such a statute is to minimize possible reputational injury to the allegedly defamed individual, a required showing of reputational injury is consistent with its objective. Additionally, by mandating a showing of injury to reputation, two other desirable objectives are furthered: (1) First amendment interests are better served because the number of claims will be reduced; and (2) this approach is consistent with Florida case law which has restricted the circumstances that allow an individual to recover exclusively for an emotional injury.

The legislature could better resolve the inefficacy of the current

---

190. *Rosenbloom*, 403 U.S. at 47.
191. FLA. STAT. § 770.02 (1983).
192. Ch. 16-070, 1933 Fla. Laws 427.
statute by adopting a statute similar to England’s Defamation Act
of 1952.\textsuperscript{194} The Act allows the publisher to avoid liability by es-
ablishing reasonable care and publishing an apology or correction.\textsuperscript{195} Constitutional restrictions currently preclude a mandatory right of reply statute,\textsuperscript{196} but a consensual reply statute has not been fore-
closed. This approach is entirely consistent with tort law principles
that protect some individual interests, particularly relational inter-
ests, only from intentional invasion. Consequently, accidental inva-
sions of privacy do not give rise to a cause of action.\textsuperscript{197}

There are three advantages to this approach. In order to avoid
litigation costs and a possible adverse judgment, the print and
electronic media will be more receptive to requests for replies from
those who believe they have been defamed. This comports with the
notion that the media should be a market place of ideas. Second,
since credibility is one of the most important attributes of a news-
paper or news broadcast, the publisher will be encouraged to per-
form responsibly to ensure that corrections and apologies will not
take precious time and space, thereby avoiding unnecessary doubt
as to newspaper veracity. Third, the individual who feels he has
been defamed will have a mechanism by which he can attempt to
preserve his reputation, and recover for any injuries, provided he
can prove them.

IV. Conclusion

Although it is too early to determine its full effect, the Florida
Supreme Court’s decision in \textit{Miami Herald Publishing Co. v. Ane}
represents a retreat from the enthusiastic extension of media pro-

\begin{footnotes}
\item 194. Defamation Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66.
provided that if a newspaper attacked the character or official record of a candidate for
office, the newspaper \textit{must}, upon request and without cost, permit the candidate to reply.
The \textit{Miami Herald} refused a request from Pat Tornillo who was running for office. The trial
court held the law violative of the first amendment and refused to enforce it. The Florida
Supreme Court reversed the lower court’s ruling. The United States Supreme Court unani-
mously reversed the Florida Supreme Court’s decision. Chief Justice Burger opined,
“\textit{A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated
by the Constitution and like many other virtues it cannot be legislated.” Id. at 256. But see
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Supreme Court held that
malingred individuals deserve the right to reply and that the public has the right to hear
opposing views.
\item 197. \textit{See}, e.g., 1 F. \textit{Harper} & F. \textit{James}, \textit{The Law of Torts} § 6.10 (1956); Green, \textit{Protec-
\end{footnotes}
tection that previously characterized Florida’s common law. The court’s adoption of the simple negligence standard will likely increase the number of defamation actions and thus encourage media self-censorship.

The United States Supreme Court has all but conceded that the competing interests of reputation and free expression cannot be reconciled. Revealing its uncertainty, the Court in *Gertz* surrendered part of the task to the individual states. Due to the broad language of the first amendment, confusion over common law principles of defamation, and compromises resulting from an ad hoc approach, a network of subtle and confusing distinctions has developed which courts have applied inconsistently. In an area where certainty and consistency are crucial, the decisions in *Ane*, *Levin*, and *Nodar* send conflicting signals regarding the Florida Supreme Court’s position regarding freedom of speech and the press. Significant case law that is inconsistent with the decision in *Ane* and *Levin* remains undisturbed. In its zeal to bridle the excesses of the press, the supreme court failed to realize that such a restrictive standard would not alter the behavior of reporters, but only serve to force publishers to predict a jury’s assessment of reasonableness. The only safe alternative for the media is censorship of information that would have otherwise been reported to the public. This totally contradicts the goal of opening all channels of communication and allowing the credibility of the information to stand or fall on its own merits.

By rejecting the constitutional actual malice standard and the common law express malice standard, the court has created illogical distinctions that inhibit free speech. Indeed, the court’s own treatment of express malice in *Nodar* would have been more consistent with the historical treatment of freedom of the press.

Further uncertainty is introduced by the court’s broad definition of actual injury, which can only encourage libel suits and force publishers to steer far wider of the unlawful zone. This is exactly the danger that both the United States Supreme Court and the Florida Supreme Court have traditionally tried to avoid.

The legislature should return Florida’s long-standing principle of a free press, which can be accomplished only by the ability to disseminate the news in a quick and fearless manner. The objective of

---

198. See *New York Times*, 376 U.S. at 281 ("Whatever is added to the field of libel is taken from the field of free debate.") (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir.), cert. denied, 317 U.S. 678 (1942)).
defamation actions is to compensate individuals whose reputations have been injured. It logically follows that any statutory recovery should be based on actual injury to reputation.

Through a consensual reply statute, the legislature can create a condition precedent to instituting a libel action that, if honored, will preclude any recovery other than actual injury to reputation. If litigated, the express or actual malice standard should be applicable. The statute would also serve as a vehicle through which the defamed individual, private or public, could respond and thereby more efficiently protect against reputational injury. A legislative directive of this kind will adequately readjust the delicate balance between the law of defamation and the freedom of speech and press.

M. David Shapiro