Awards of Damages for Mental Anguish Without Proof of Harm to Reputation: Is There Parasitic or Independent Life After Gertz?

by Erik L. Collins* and Gretchen M. Smith**

I. INTRODUCTION

Today, despite more than twenty years of first amendment-related tests, decisions, and suggested standards (beginning with the Supreme Court's historic opinion in New York Times v. Sullivan¹), defamation law remains riddled with complexities and confusion. While often applauding its protection of political and public speech, many first amendment scholars and other legal observers agree that interpretations of New York Times and its progeny have created a whole new range of problems. These include Westmoreland-like political libel suits, endless discovery, soaring legal costs, confusion over definitions of public versus private figures, and lack of uniformity in the application of standards from state to state and court to court, to name only a few.

Those who believe that these problems threaten speech interests advance solutions that run the gamut from absolute first amendment protection for certain kinds of speech to reallocation of court costs. Those who believe that New York Times and its progeny have given short shrift

* Associate Professor, College of Journalism and Mass Communications, University of South Carolina. Florida State University (B.A., 1965); Florida State University (M.A., 1966); Syracuse University (Ph.D., 1972); Ohio State University (J.D., 1978).

** Graduate Student, College of Journalism and Mass Communications, University of South Carolina. University of Alabama (B.A., 1971).

to plaintiffs' rights counter that courts have been too solicitous of the fears of defamation's chilling effect. Their remedies include limiting public-figure status, applying negligence standards only to media defendants, and returning to common law standards for all but clearly political speech. Many of these suggested reforms, while perhaps effective, probably are unrealistic because they stand little chance of wholesale adoption by either the United States Supreme Court or state courts.

Other more current suggestions focus on the constriction or expansion of certain categories of damages. These suggestions spring, in part, from celebrated cases concerning so-called 'mega-verdicts' and, in part, from the realization on all sides that modifying damages may be a feasible means of accomplishing defamation tort reform.

A less recognized, but equally compelling, reason for focusing on the reform of damages in defamation suits is the complex mandate that the United States Supreme Court issued to state courts in Gertz v. Robert Welch, Inc. to restructure awards in suits brought by private plaintiffs. This Article addresses one aspect of the Gertz mandate: the merits of awarding damages solely for mental anguish.

II. BACKGROUND

In Gertz, the Court said that "states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." To satisfy first amendment interests, the Court mandated two restrictions. First, states may


5. Modifying damages as a means of accomplishing defamation tort reform is in the mainstream of ongoing efforts to mitigate the effects of increased litigation and large judgments in other areas. For example, similar reform movements are occurring in the areas of medical malpractice, products liability, and municipal liability.


7. Id. at 347.

8. Id. at 345-46.
“not impose liability without fault.”10 Second, states may “not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”11

Prior to Gertz, private plaintiffs showing less than actual malice could collect presumed, special, and punitive damages. After Gertz, private plaintiffs in a per se case showing less than actual malice are limited to actual damages which must be supported by proof of harm. The Court said that it is constitutionally permissible to award actual damages for mental anguish in a defamation suit.11 The Court, however, failed to give directives regarding a defamation suit in which the plaintiff only asks for damages for mental anguish without proof of harm to reputation. This issue was directly addressed in Time, Inc. v. Firestone.12 In Firestone, the Court held that there is no first amendment requirement of proof of harm to reputation prior to an award of damages for mental anguish.13 Therefore, the states are generally free to decide for themselves whether to allow such damage awards.

It is a virtual certainty that eventually some private plaintiff in almost every state will bring a defamation suit asking for damages for mental anguish without alleging or proving harm to reputation.14 Predicting what state courts will do when faced with this issue as a case of first impression is simply conjecture. What does seem certain is that states allowing awards for damages for harm to mental well-being, without first requiring that plaintiffs prove harm to reputation, will experience an increase in the

9. Id. at 347.
10. Id. at 349.
11. Id. at 350.
13. Id. at 460.
14. The exceptions include the four states that require private plaintiffs to prove actual malice (i.e., actual knowledge of falsity or reckless disregard as to probable falsity). A plaintiff proving actual malice normally is entitled to presumed and punitive damages. See Gay v. Williams, 486 F. Supp. 12 (D. Alaska 1979) (but note that this is a federal court interpretation of what Alaska law likely will be); Diversified Management v. The Denver Post, Inc., 653 P.2d 1103 (Colo. 1982) (applies when the case contains a matter of public concern); Aasco Heating & Air Conditioning Co. v. Northwest Publications, 162 Ind. App. 67, 321 N.E.2d 580 (1974), cert. denied, 424 U.S. 913 (1976); Peisner v. Detroit Free Press, 421 Mich. 125, 364 N.W.2d 600 (1984) (applying negligence standard for matters not truly in the public interest). Six states (discussed infra Part IV) have explicitly addressed awards solely for mental anguish. States that may be leaning in a direction away from such awards based on decisions prior to Gertz include: Connecticut—Urban v. Hartford Gas Co., 139 Conn. 301, 93 A.2d 292 (1951); North Dakota—Waite v. Stockgrowers’ Credit Corp., 63 N.D. 763, 249 N.W. 910 (1933); and perhaps Iowa—Greenlee v. Coffman, 185 Iowa 1092, 171 N.W. 580 (1919). It should be noted, however, that these states may consider awards solely for mental anguish in a new light after Gertz. All other states have not determined this issue since Gertz and their pre-Gertz case law is unclear as to the availability of such awards.
number of libel suits.

The reasons for such an increase are plain. Requiring plaintiffs to prove only harm to mental well-being presents them with a less formidable task than imposing upon them a threshold requirement that they prove harm to reputation before they may prove harm to mental well-being. A plaintiff in a typical defamation suit might fail in his or her attempt to demonstrate harm (or significant harm) to reputational interests, yet still prevail on a claim of harm to mental well-being. Furthermore, plaintiffs who might not bring suit at all because they doubt their ability to demonstrate harm to reputation, or even the existence of a reputation to harm, will be encouraged nonetheless to bring a defamation suit in the hope of securing an award for the mental anguish caused by the defamatory statements.

To date, suggestions by courts and commentators for resolving the issue of whether such awards should be allowed, or what limitations or threshold requirements should be placed upon them, are confusing and contradictory. Such divergent opinions can be attributed partially to a misunderstanding of the admittedly abstruse language the United States Supreme Court used and partially to a lack of careful analysis by state courts and commentators of the more subtle issues involved. Additionally, the commentators who have analyzed this issue have advocated their own particular approaches. In this Article, the authors discuss alternative approaches from a neutral point of view. The authors also objectively analyze the underlying issues involved in the adoption of any approach.

III. Gertz and Firestone: A Constitutional Green Light for Mental Anguish

The paths of defamation, infliction of mental anguish, and the first amendment all crossed in Gertz. Legal scholars and courts cite Gertz

15. Historically, courts were reluctant to redress mental injuries in regular tort actions. This reluctance was due, in part, to the difficulty of proof of harm or of assessment of damages. Mental distress was viewed as metaphysical or too subtle and speculative to be measured.

Today, however, courts generally agree that mental suffering is no more difficult to estimate in financial terms, and no less real an injury, than physical pain. W. KEETON, D. DOBBS, R. KEETON & D. OWENS, PROSSER & KEETON ON THE LAW OF TORTS § 12, at 55 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Courts were even more reluctant to recognize that a legally protected interest in peace of mind should be accorded independent legal protection. Rather, mental distress was woven into other torts, particularly the torts of invasion of privacy and assault. Id. Gradually, state courts are recognizing infliction of mental distress as a cause of action in itself. When it is recognized, the tort usually concerns a case of "intentional infliction of mental suffering by conduct of a flagrant character." Id. at 57. Generally the defendant is liable "for conduct exceeding all bounds usually tolerated by decent society," if this behavior causes "mental distress of a very serious kind." Id. at 60. An even more
most frequently for establishing a 'fault threshold' for private plaintiffs suing media defendants in matters of general public interest. Of greater importance for this discussion is the Court's modification of the types of damages and the proof requirements in such suits. Unfortunately, the Court's language may have caused confusion over precisely what the new standards mean, particularly regarding awards for mental distress.

The problems surface in the Court's use of the terms 'injury,' 'harm,' (or 'loss'), and 'damage(s). According to the Restatement (Second) of Torts, 'injury' is typically defined as the "invasion of any legally protected interest of another."18 'Harm' means any "loss or detriment in fact sustained through such invasion."17 'Damages' refers to "a sum of money available to a person injured by the tort of another."18

In its discussion of damages in Gertz, the Court indicated that while there is a "strong and legitimate state interest in compensating private individuals for injury to reputation," this interest "extends no further than compensation for actual injury."19 Unless a plaintiff is able to show actual malice, the Court said that presumed or punitive damages are not allowed.20 Noting that traditionally publication of a defamatory statement leads to the presumption of injury, the Court rejected the common law practice of allowing substantial damages for harm to reputation without proof that this harm actually occurred.21 The Court stated:

The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood . . . . Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.22

Apparently the Court meant to say that it is not constitutional (and not fair) to award damages to a plaintiff who has suffered injury to reputation through the negligent publication of a defamatory statement unless the plaintiff can demonstrate that he has suffered actual harm. Problems in interpretation arise because the Court tends to use the term 'injury'

---

17. Id. § 7(2).
18. Id. § 12A.
19. 418 U.S. at 348-49.
20. Id. at 349.
21. Id.
22. Id.
when it seems to mean 'harm.' Thus, the quotations from the Court's opinion in the paragraph above arguably should read "compensating private individuals . . . extends no further than compensation for actual harm" (rather than injury) and allowing "presumed damages invites juries to punish . . . rather than to compensate . . . for harm sustained . . . ." (rather than injury).23

The Court concluded that plaintiffs who do not show actual malice must be limited to "compensation for actual injury."24 The Court stated:

We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.25

Again, it is clear that the Court's language loosely equates 'injury' with 'loss' (or 'harm') in describing the four types of harm for which a court will permit a private plaintiff in a defamation action to obtain damages.

The confusing language in Gertz has caused miscalculation on the parts of courts and legal scholars.26 This is particularly true in defamation suits in which plaintiffs seek damages for harm to mental well-being without first proving harm to reputation.

The Court had the opportunity to address this issue in Firestone.27 Paradoxically, while the Court clarified its intent, the Court's language may have created an even greater misunderstanding. Petitioner, the Court said, apparently was arguing that:

The only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an

23. Accord Zimmerman, Curbing the High Price of Loose Talk, 18 U.C. DAvis L. Rev. 359 (1985). The author says that "[b]y the phrase 'actual injury' the Court meant proof of harm . . . ." Id. at 371 n.44.
24. 418 U.S. at 349-50.
25. Id.
27. 424 U.S. at 460.
action for defamation as that term is meant in *Gertz*.

The court in *Firestone* said that in *Gertz*, "we made it clear that states could base awards on elements other than injury to reputation . . . . Because respondent has decided to forego recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her."

The trial court charged the jury that it "should award . . . compensatory damages in an 'amount of money that will fairly and adequately compensate her for such damages . . . which are a direct and natural result of the alleged libel . . . .' There was competent evidence introduced [of] . . . the extent of respondent's anxiety and concern . . . ." The Supreme Court found no reason to question the trial court's determination.

While its language in *Firestone* is confusing, the Court appears to be saying that there is no first amendment objection to a state allowing a defamation plaintiff to collect damages for any reasonably foreseeable proven harm caused by negligent publication of a defamatory falsehood.

**IV. REACTIONS OF STATE COURTS AND LEGAL COMMENTATORS**

What appeared at first blush to be an interesting problem in semantics quickly became a matter with serious practical implications as legal scholars and lower courts recognized that, after *Gertz* and *Firestone*, most states would have to decide whether to allow such damage awards, as well as the ramifications of allowing such awards. The problems raised by these awards have not gone unnoticed and, in fact, have created some rather sharp debate among courts and legal scholars. Unfortunately, the arguments and opinions are anything but clear. Because of the partisan nature of their discussions, the courts and commentators have, in fact, actually aggravated an already complicated situation. To cut through this Gordian knot, the authors have categorized these arguments and opinions into three general approaches; the parasitic approach, the common law approach, and the independent approach.

**A. Parasitic Approach: Proof of Harm to Reputation Required**

An approach that could be characterized as prodefendant minimizes the chances of a defamation suit for damages based solely on mental anguish. David Anderson, Professor of Law at the University of Texas at
Austin, espouses this approach. Although Anderson is by no means clear, and indeed is somewhat reckless in his disregard for the more subtle issues, his position seems to be that no plaintiff should be entitled to damages for mental anguish unless the plaintiff can first prove harm to reputation. Anderson and those advocating a similar approach apparently justify their position by their belief that mental anguish damages are 'parasitic' to the original defamation cause of action.

According to Anderson, the Court fails in its attempt to normalize defamation law in *Gertz* because of the 'expansiveness' of actual injury. The logic of *Gertz*, says Anderson, "that only the states' substantial interest in protecting reputation could justify the speech-inhibiting effects of libel law," is lost in *Firestone* because a plaintiff can recover for other kinds of harm as well. Anderson says that in *Firestone* there is no:...

Anderson gives five reasons why his approach should be adopted by state courts.

First, most states already have several bodies of law that compensate persons for mental suffering. Most notable are the tort actions of assault and intentional infliction of emotional distress. To make the same injuries compensable under the rules of defamation circumvents the rules developed for these other tort actions and abandons their underlying policies.

Next Anderson argues that a separate tort action strictly for mental anguish would not carry the same weight as defamation when balanced against the first amendment interest of a defendant. His third reason for requiring proof of harm to reputation as a precursor to an award of damages for harm to mental well-being is "to ensure that an injury exists. Tort law historically has refused to compensate emotional injuries alone,

---

33. Id. at 757.
34. Id. at 756.
35. Id. at 757.
36. Id. at 757-58.
37. Id. at 760-61.
38. Id. at 761.
in part because of the inability to determine objectively whether the injuries have occurred... [T]ort law still exhibits considerable uneasiness about compensating purely emotional injuries."

Fourth, Anderson says, "emotional injuries always have been regarded as parasitic to the defamation claim," citations cited both Prosser and the Restatement for support. Finally, Anderson claims that awarding damages solely for mental anguish would defeat an actual-injury standard. A plaintiff in a defamation suit can argue in almost all situations that the statement caused him anguish. A rule requiring actual injury, but allowing a plaintiff to satisfy it by showing emotional harm alone, does nothing more than "prescribe a litany for the plaintiff to recite."43

Since Gertz, two states have explicitly adopted an approach similar to Anderson's. In Gobin v. Globe Publishing Co.,44 the Kansas Supreme Court faced the third appeal of a defamation suit concerning a newspaper article charging cruelty to animals. Defendant newspaper appealed, based on plaintiff's lack of a claim of damage to reputation.45 Plaintiff cited Firestone as support, but the Kansas court disagreed, holding that:

Damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation... under our law... It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander.46

The Arkansas Supreme Court, in Little Rock, Newspapers, Inc. v. Dodrill,47 followed a similar path. "It is settled law that damage to reputation is the essence of libel and protection of the reputation is the fundamental concept of the law of defamation... An action for defamation has always required this concept of reputational injury and recovery for mental suffering alone has not been allowed."48 The court added:

To allow recovery in a defamation action where the primary element of the cause of action is missing not only sets the law of defamation on end, but also substantially undercuts the impact Gertz seeks to effect... To totally change the character of defamation to allow recovery when there has been no loss of the former right would be an unjustified

39. Id. at 762.
40. Id.; see PROSSER & KEeton § 111, at 771; RESTATEMENT (SECOND) OF TORTS § 623 (1976).
41. Anderson, supra note 32, at 762.
42. Id. at 763.
44. Id.
45. Id. at 6, 649 P.2d at 1243.
47. Id. at 29, 660 S.W.2d at 935.
fringement on the First Amendment.48

In France v. St. Clare's Hospital & Health Center,49 a New York intermediate appellate court held that "absent proof of harm to his reputation a plaintiff now may not recover on a claim of a defamation unless, of course, he can prove malice."50 The court added:

Without proof of any actual injury, plaintiff is left to argue that where, as here, the statement is defamatory per se he need not allege or prove special damages. But this precise principle was rejected by the Supreme Court in Gertz . . . . Thus, by naked allegations of libel, per se, plaintiff attempts to bootstrap claims for emotional distress. These claims are not compensable, however, since such damages are recoverable in a defamation action only when concommitant with a loss of reputation.51

B. The Common Law Approach: Harm to Reputation Presumed

Other courts and commentators follow an alternative approach that views damages for harm to mental well-being as more independent of proof of harm to reputation. This approach, which generally resembles the common law, is best illustrated by the opinion of Maryland Court of Appeals in Hearst Corp. v. Hughes.52 In Hearst, the court addressed an appeal by a private figure who contended that "the trial court erred in awarding damages for emotional distress without proof that the broadcast impaired Hughes' reputation."53 The court of appeals characterized the appeal as based exclusively on the argument that, following Gertz, "as a matter of state law... actual harm to reputation be proved before any compensatory damages for any harm... be awarded."54

The court concluded that Firestone expressly permits a state to award damages for any actual and foreseeable harm, specifically including emotional distress, without first proving harm to reputation.55 The court added that under Maryland common law, nothing "bars awards of damages based on proven harm"56 which, the court said, is exactly what Gertz allows as well.

The appellant argued that Maryland should follow the lead of the Kansas Supreme Court in Gobin.57 The Maryland court, however, said:

48. Id. at 31, 660 S.W.2d at 936.
50. Id. at 4, 441 N.Y.S.2d at 82.
51. Id. at 5-6, 441 N.Y.S.2d at 82.
52. 297 Md. 112, 466 A.2d 486 (1983).
53. Id. at 117, 466 A.2d at 488-89.
54. Id.
55. Id. at 126, 466 A.2d at 493.
56. Id.
57. Id. at 129, 466 A.2d at 495.
This approach, in our view, fails to respect the centuries of human experience which led to a presumption of harm flowing from words actionable per se... Defendants in negligent defamation cases are protected by the prohibition against liability without fault. They have no exposure to punitive damages. There is no exposure to general damages based on presumed harm. With the possible exception of nominal damages, compensatory damages are limited to compensation for harm proven and found as a fact.68

The court added:

Victims of defamation can reasonably become genuinely upset as a result of the publication. If such persons can convince a trier of fact that their emotional distress is genuine and can prove the other common law and constitutionally required elements of a negligent defamation case, we see no social purpose to be served by requiring the plaintiff additionally to prove actual impairment of reputation.69

The Maryland Court of Appeals rejected the concept that there can be no defamation action without proof of harm to reputation. "Absent defamatory words of some type there is no tort of defamation. But here there is a publication of false and defamatory matter from which harm to reputation is presumed. The tort is defamation even though the harm proven to satisfy Gertz is emotional distress."69

The Maryland court discounted the parasitic approach by distinguishing between presumed and actual harm to reputation.61 Anderson and state courts adopting a similar position argue that Gertz demands a finding of actual harm to reputation before a plaintiff can be awarded damages for any other kind of harm suffered as a result of the defamation.62

The Maryland Court of Appeals' logic is more like that of Paul LeBel, Associate Professor of Law at the College of William and Mary.63 In an adversarial response to Anderson, LeBel argues that Gertz neither requires nor suggests such a drastic change in the common law.64 According to LeBel, any requirement for reputational harm in a defamation suit is met by a continuation of the common law presumption of harm to repu-

58. Id.
59. Id. at 130, 466 A.2d at 495.
60. Id. at 127, 466 A.2d at 493.
61. Id.
64. Id. at 784.
This presumed harm flows from the injury caused by the negligent publication of false and defamatory statements. A technical presumption of harm does not mean a return to the presumed damages that Gertz specifically disallows. In this approach, proof of harm to reputation is still required to obtain damages for harm to reputation. A presumption of harm, however, clears the hurdle that Anderson would erect as a prerequisite to damage awards for proof of other kinds of harm such as emotional distress.66

C. The Independent Approach: Harm to Reputation Unnecessary

A third approach, suggested by the Court in Gertz and arguably followed in Firestone, is the elimination of presumed or proven harm as a prerequisite to an independent award of damages for harm to mental well-being.67 This approach presupposes that the focus of a cause of action is on the invasion of the legally protected interest (the injury) rather than on any ensuing harm. In a private figure defamation suit, injury occurs with the negligent publication of a defamatory falsehood. Prior to Gertz, a plaintiff showing such injury was entitled to a presumption of harm that led to a request for presumed damages in a per se case. The Court in Gertz apparently felt that compensating a plaintiff for presumed harm was inappropriate and, therefore, changed the common law to require proof of harm prior to receiving damages.68 The Court said, however, that a plaintiff may recover damages for harm other than harm to reputation, provided plaintiff can demonstrate such harm.69 Some, but not all, of the other types of harm suggested by the Court were out-of-pocket loss, humiliation, and mental anguish and suffering.70

Extending this line of reasoning to its logical conclusion, a plaintiff arguably does not have to show proven or presumed harm to reputation in order to collect damages in a defamation suit. Plaintiff must prove only a negligent publication of defamatory falsehood and any reasonably foreseeable ensuing harm—including mental anguish.71

To date, no state court has explicitly adopted this independent approach, although the approach may have been the rationale behind the Supreme Court's decision allowing Mrs. Firestone to continue her defamation suit despite her decision to forego all claim of damages for harm

65. Id. at 784-88.
66. Id.
67. 424 U.S. at 460; 418 U.S. at 349-50.
68. 418 U.S. at 349-50.
69. 418 U.S. at 350.
70. Id.
71. See infra Part VI.
to reputation. It also may be the logic behind *Rennier v. State*,\(^72\) in which the Louisiana Court of Appeal found little damage to plaintiff's reputation, but stated that "[T]he record contains . . . testimony of Rennier concerning his humiliation and embarrassment of driving without a license and the subsequent explanation of the word 'perjury' on his motor vehicle record."\(^73\) The Louisiana court found for appellant on the basis that state precedent "has extended defamation damages to include damages based on elements other than the injury to reputation . . . ."\(^74\) Other state courts have established that *Firestone* is controlling in their jurisdictions\(^75\) without discussing the presumption of harm issue, while Oregon has adopted a similar position in private-figure suits against nonmedia defendants.\(^76\)

V. ANALYSIS OF THE THREE APPROACHES

With the exception of those states that have adopted standards similar to actual malice for all defamation plaintiffs or that have already changed their damages standards regarding mental anguish, all states will face the task of deciding what to do when a plaintiff sues for defamation without showing harm to reputation. For analytical purposes, the authors have reduced the three approaches to formula form.\(^77\)

The parasitic (or defendant-oriented) approach can be constructed as: \(P\) (a private figure plaintiff) + \(D\) (a media defendant) + falsity + a per se defamatory statement + at least negligence (but less than actual malice) + proof of harm to reputation = an opportunity to prove any other reasonably foreseeable harm such as mental anguish + an opportunity to win damages for any proven harm. While not necessarily ruling out the other kinds of damages awards discussed in *Gertz*, the defendant-oriented approach would require a plaintiff to demonstrate actual harm to reputation before allowing any attempt to prove any other kind of harm. This approach clearly would eliminate suits such as Mrs. Firestone's despite the Supreme Court's holding that such suits pass constitutional muster.

The common law (more middle-of-the-road) approach can be formulated as: \(P\) (a private figure plaintiff) + \(D\) (a media defendant) + fal-
sity + a per se defamatory statement + at least negligence (but less than actual malice) + a presumption of harm to reputation = an opportunity to prove any reasonably foreseeable harm such as harm to reputation or mental anguish + an opportunity to win damages for any proven harm. The hypothetical construct 'presumption of harm' distinguishes the second approach. This construct would be of theoretical interest only, except for the possibility that a court could treat it as a rebuttable presumption. Such a rebuttable presumption creates an opportunity for a defendant to demonstrate that harm to reputation should not be presumed because the plaintiff has no reputation to be harmed in this case. This approach ameliorates the problems of awarding damages to notorious or infamous plaintiffs who have no reputation left to harm.78 Because a presumption of harm to reputation serves as a threshold in this approach, a successful rebuttal would prevent any effective attempt to prove harm to mental well-being.

The independent (plaintiff-oriented) approach can be described as: $P$ (a private figure plaintiff) + $D$ (a media defendant) + falsity + a per se defamatory statement + at least negligence (but less than actual malice) = an opportunity to prove any reasonably foreseeable harm such as harm to reputation or mental anguish + an opportunity to win damages for any proven harm. This approach, requiring neither a presumption of harm nor proof of harm to reputation as a precursor to a claim of harm to mental well-being, provides the greatest protection for the plaintiff. The rationale for this approach centers on the basic fairness of allowing a plaintiff who can show injury (negligent publication of a defamatory falsehood) to prove, and be compensated for, any reasonably foreseeable harm.

VI. DISCUSSION

Some commentators would like to disregard this entire issue, arguing that whatever tort it is, "it is not the tort of defamation"79 unless plaintiff proves harm to reputation. While this argument has a certain superficial appeal, under the common law of most states it does not withstand careful scrutiny. Injury to reputation springs from negligent publication of defamatory falsehoods (at least in matters of public interest with a media defendant). Once a plaintiff can demonstrate the publication of a defamatory falsehood, most states probably will say that the case is one of defamation regardless of the final decision on the availability of damages for mental anguish.

The bedrock issue for those arguing for the adoption of one approach over another is their assessment of the state’s proper role in protecting an individual from the effects of defamation versus protecting the freedoms of speech and press. The most stringent protection for the speech side of the equation would prohibit damages for mental anguish entirely. Failing that, the best approach for those arguing in favor of maximizing unfettered speech is to require plaintiffs to prove harm to reputation before being permitted to prove harm caused by mental anguish. State courts may accept this approach if they are reminded of their obligation to protect the speech interests of the defendant as well as the rights of the plaintiff. Most state constitutions contain provisions protecting free speech. These provisions may be used to buttress the argument that to protect the defendant there should be a showing of harm to reputation before awarding damages for mental anguish. Additional support can be found in the arguments that fairly determining damages for mental anguish is a difficult task, and that the state has little interest in protecting anything other than reputational harm in a defamation suit. There also may be some merit to the concern that a court might use the remedy of damages solely for mental anguish in order to punish unpopular defendants.

The defendant-oriented argument, which interprets Gertz or the common law to mean that there must be a prerequisite showing of harm to reputation, probably will not be effective despite the acceptance of such arguments by courts in three states. In the future, courts deciding this issue probably will be more receptive to a plaintiff’s argument that Gertz calls only for the elimination of presumed damages on constitutional grounds of fairness. Despite some imprecision in its language, the Supreme Court does not say, nor does logic dictate, that the traditional common law presumption of harm to reputation need be changed as well, so long as this presumption does not lead to damages absent proof of harm.

The second, more middle-of-the-road approach partially satisfies both sides of the equation, but only if the presumption of harm postulated in this approach is made rebuttable. If not, this approach is, in effect, identical to the third, more plaintiff-oriented approach discussed below. An irrebuttable presumption would provide no further protections of speech beyond the constitutional protections in Gertz and Firestone. To make the presumption rebuttable, however, would require convincing a state court to make modifications in existing common law. The admissibility at

80. See, e.g., Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979). The Oregon Supreme Court eliminated punitive damages based on its interpretation of the state constitution.
81. See supra Part IV.
common law of evidence of the 'libel-proofness' of a plaintiff or the assertion that a plaintiff in a case has no reputation to harm generally is allowed, but only to mitigate damages. A court usually will not allow such evidence to show a lack of reputational harm. The basic concept of a presumption of harm being rebuttable, however, does not seem that difficult for courts or litigants to accept. Proving that the plaintiff suffered no reputational harm might be a difficult task for the defendant, but there seems little reason for not allowing the defendant to attempt to prove this lack of harm. Courts could provide redress to a plaintiff through increased damages when the defendant, without a proper foundation for the charges, attempts to prove that the plaintiff has no reputation to harm.

A state court that believes that the first amendment (as delineated in Gertz and Firestone) adequately safeguards free speech interests may adopt some variation of the independent, plaintiff-oriented approach. If the essence or gravamen of a defamation action is the injury caused by false and defamatory statements, then little attention need be paid to arguments that a plaintiff must show either presumed or proven harm to reputation before a court will allow a recovery of damages for other harm. Logically, if a defendant negligently makes a false and defamatory statement, then it seems just to hold him or her liable for any reasonable and foreseeable harm that a plaintiff can prove to the satisfaction of the court. Advocates of this independent approach might respond to arguments that recovery for mental anguish is best left to other torts, or that it should be a separate tort, by replying that these arguments actually have little bearing on whether mental anguish should be part of the defamation cause of action. Observations that, historically, mental anguish was parasitic or not recoverable in defamation, even if accurate, would not be the dispositive factor for state courts adopting this third approach because of the Court's modifications of the common law in Gertz.

VII. Other Critical Issues

Those advancing one of the three general approaches, or one of their own hybrid models, must address several additional critical issues. For the most part, these issues have not been addressed by courts or commentators.

A. How Much Is Enough?

Crucial to the advocates of the defendant-oriented, parasitic approach

83. Id. at 847-88.
is whether proof of harm to reputation is simply a threshold requirement, or if 'reasonable,' 'substantial,' or some other specified amount of proof of harm is necessary. 64 Neither courts nor commentators have dealt with this issue adequately. If proof of harm to reputation is simply a threshold requirement, then it is not the protective device envisioned by its advocates. True, plaintiffs would have an additional evidence burden compared to the other approach, but arguably only any reasonable demonstration of harm would be necessary. This could be provided, for example, by just one witness willing to testify that he or she thought less of a plaintiff as a result of the defendant's statement. Such testimony would provide proof of harm to reputation, and, even though de minimis, possibly could open the door to substantial damages for any other proven harm, including mental anguish. If this is the intention of the advocates of a threshold showing of harm to reputation, then in reality the requirement is little more than an empty, formalized ritual.

If more than a minimal showing of harm is desired, then a court will be faced with the task of determining and justifying the showing that is required. 65 It is not that unusual to condition awards of damages for one kind of harm on the demonstration of some other harm, but this is normally a procedural matter requiring only a threshold showing. Generally, the amount of harm is used only in setting the amount of damages awarded for that harm and perhaps in mitigating awards for other harm. The amount of harm, however, is rarely, if ever, used to determine whether the plaintiff has actually suffered some other harm. A case-by-case interpretation would create an added variable in the already complex area of defamation litigation. Those opposing any major showing of harm to reputation before gaining an opportunity to demonstrate other harm

84. See Anderson, supra note 32, at 764-67. Anderson divides harm to reputation into four categories: interference with plaintiff's existing relations, interference with future relations, destruction of a favorable public image previously existing, and creation of an unfavorable public image where none existed. He says that his approach "requires proof of some harm to reputation in every case. Thus, even if the proposal failed to control the size of verdicts, it still would serve an important function by screening out cases in which no proof of any injury to reputation exists." Id. at 763. This would imply proof of reputational harm more analogous to a threshold screening device than a substantial barrier that could only be overcome with difficulty. Yet it seems hard to believe that Anderson and other adherents of the parasitic approach would argue for a less than substantial showing of one of the four types of harm to reputation. This proof, says Anderson, could be a showing of anything constituting special damages, proof that the seeds of serious doubt have been planted in the minds of associates that harm the relationship, or proof that a relationship has been seriously disrupted. Id. at 767-68.

85. Courts also must determine what standard of proof is required. Most courts probably will adopt a preponderance of the evidence standard if their states have adopted negligence. Van Alstyne apparently would recommend the 'clear and convincing' standard, applicable in an actual malice situation, in all cases. Van Alstyne, supra note 3, at 793.
almost certainly will argue that this requirement seems a much greater change in the law than the Court required or anticipated in *Gertz*.

**B. Do Historical Differences Matter?**

State courts are accustomed to dividing the common law of defamation into per se and *per quod* suits as well as categorizing them either as libel or slander. Those arguing that a suit in which the merit of allowing awards solely for mental anguish is an issue need to address these historical differences.

To date, all cases (since *Gertz*) and almost all of the commentary directly bearing on this issue have dealt with libel *per se*. At common law, a plaintiff in a *per se* case often could expect presumed damages (and perhaps punitive damages as well if a court treated defamation *per se* as evidence of common law malice). Many states, however, often limited a plaintiff with a slander *per quod* case to an award of special damages, usually defined as out-of-pocket loss. Damages solely for mental anguish were not compensable in any case. Logically, if courts maintain these historical differences in current defamation law (*postGertz*), then those arguing in favor of the second approach (harm to reputation presumed) probably would endorse the first approach (threshold proof of harm to reputation required) in a slander *per quod* situation. The second, common law approach postulates harm to reputation, but treats it as a presumption arising from the injury. If a court requires proof of harm—as does the common law for slander *per quod*—then a plaintiff logically must prove harm to reputation before a court will allow proof of harm to mental well-being.

Litigants should be aware that neither the Supreme Court nor most states have said whether *Gertz* applies at all in slander *per se*, slander *per quod*, or libel *per quod* situations. If *Gertz* does not apply, then historical differences could matter, and a court might not allow damages solely for mental anguish under existing common law.

---

87. Id. at 94.
88. Id. at 96-98. Some jurisdictions treat all libel suits alike once libel has been proved. Thus, libel *per quod* (libel not evident on its face), if proved through extrinsic evidence, is treated in the same manner as libel *per se*. Other jurisdictions treat libel *per quod* as they do slander *per quod*. This means that the plaintiff is limited to special damages. A third approach is to treat libel *per quod* as if it were slander *per quod* unless it falls into one of the four slander *per se* categories, in which case it would be treated in the same fashion as libel *per se*. 
C. Do Defendants and Issues Matter?

_Gertz_ concerned a media defendant, and the Court's opinion specifically refers to publishers and broadcasters of defamation. Commentators and state courts have been divided regarding whether _Gertz_ applies to a private plaintiff suing a nonmedia defendant. While the United States Supreme Court (and the better logical argument) seems to be leaning in the direction of treating all defendants alike, courts that choose to treat nonmedia defendants differently will most likely maintain existing common law standards. If _Gertz_ does apply, it makes little sense to distinguish the cases by the requirements for obtaining damages for harm to mental well-being.

In _Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc._, the Supreme Court held that _Gertz_ does not apply unless the subject matter of the defamatory statement involves a matter of general public interest. A state court is free, of course, to apply _Gertz_ to all private figure cases. If it does, then the approach adopted concerning damages for mental anguish logically would be the same for all issues, regardless of whether they are of private or public interest. For states not choosing to adopt _Gertz_ standards in cases relating to purely private matters, the existing common law most likely would be followed.

D. Does Retraction Matter?

At common law, retraction of the defamatory statements usually served to mitigate the amounts and kinds of damages available. While _Gertz_ and other first amendment-related opinions by the Supreme Court may have rendered many state retraction statutes obsolete, some retraction statutes still bear directly on damages for mental anguish. These statutes provide that if a defendant publishes a retraction, a plaintiff is limited to special damages. Because courts have never considered damages for mental anguish as constituting a part of special damages, such retraction statutes apparently would prevent a plaintiff from bringing a suit solely for mental anguish.

89. 418 U.S. at 332.
90. See _Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc._, 472 U.S. 749 (1985), in which at least five members of the Court seem to agree that _Gertz_ applies to all defendants in matters of public interest.
91. B. SANFORD, _supra_ note 78, at 86.
93. _Id._ at 756.
94. B. SANFORD, _supra_ note 78, at 481.
E. What is Proof of Harm to Mental Well-Being?

While there is no hard-and-fast rule regarding what constitutes proof of harm to mental well-being, Gertz mandates that all damages must be based on proof of actual harm. A plaintiff, therefore, must be able to demonstrate by testimonial or physical evidence that he or she has suffered mental anguish. Simple allegation probably will not suffice. Mrs. Firestone, in addition to her own testimony, introduced evidence (from physicians and acquaintances) of her mental distress. It remains unclear, however, how much proof a court will require when the potential for mental anguish generated by the defamatory statement is obvious to the trier of fact. Most courts probably will not allow awards based solely on a plaintiff's resentment generated by the defamatory statement or permit recovery merely for hurt feelings—regardless of the strength of the evidence presented.

VIII. Conclusion

Eventually, the courts must settle the issue of allowing damages solely for mental anguish on a state-by-state basis. The approach adopted will expand or constrict the number of defamation suits. The approach that a state adopts is predicated upon striking the balance thought proper between protecting plaintiffs from harm versus protecting defendants' speech. A defendant may well be on shaky legal ground in basing his or her argument for the adoption of the defendant-oriented, parasitic approach on the simple rationale that somehow defamation requires proof of harm to reputation. Unless strong arguments are made in favor of the state's duty to protect speech, state courts may well decide that it seems just to hold a defendant liable for any reasonably foreseeable harm caused by the negligent publication of false and defamatory statements.

95. 418 U.S. at 350.
96. Anderson, supra note 32, at 771. Anderson says that there are two kinds of mental anguish: the mental anguish caused by knowing that defamatory statements are in circulation and the mental anguish arising from the hurt feelings and sense of outrage caused by knowledge of the contents of the defamatory statements. He claims that the first is reputational and the second is not compensable in a defamation suit. Surely, however, this is too limited a definition of mental anguish. Sanford, for one, suggests that emotional anguish could include "family problems, emotional or mental difficulties (especially those requiring the care of a psychiatrist or psychologist), and physical illness attributable to stress . . . ."
B. Sanford, supra note 78, at 363.
97. Anderson, supra note 32, at 772. Anderson argues that the jury can interpret mental anguish claims through their own experiences, but can award damages only on the evidence offered, basing their judgment on the credibility of the plaintiff and his or her witnesses.
All parties to such future suits would be advised to study and respond to the critical, underlying issues involved which, for the most part, both courts and commentators have ignored to date.