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Chapter 6: Torts

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CHAPTER 6

Torts

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§6.1. Legislation: Introduction. Contrasted with 1973, the 1974 legislative production in the torts area was sparse. The statute of limitations for breach of warranty was increased from two to three years; certain restrictions on the right of a physician to treat a minor for venereal disease without parental consent were removed; interest on damages was increased from 6% to 8%; and the admissibility of itemized medical bills in tort actions for personal injury was enlarged to include actions for personal injury on a contract theory.

§6.2. Warranty actions: Statute of limitations. Section 2-318 of chapter 106 of the General Laws provides that lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller, supplier or lessor of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller, supplier, or lessor might reasonably have expected to use, consume or be affected by the goods. Section 2-318 was amended in 1973 to provide that all actions under the statute must be commenced within two years next after the date of injury. Shortly thereafter the general statute of limitations provisions for tort actions and actions of contract to recover for personal injury were amended to extend the statute of limitations for these actions from two to three years. This statutory conflict was eliminated by a 1974 amendment which provides that all actions under section 2-318 shall be commenced within three years next after the date of injury or damage.

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§6.2. 1 G.L. c. 106, § 2-318.
§6.3. Minors: Treatment for venereal disease. Section 117 of chapter 111 of the General Laws, which authorized a “registered physician or surgeon acting under the authority of the department of public health”¹ to treat a minor for venereal disease without the consent of the minor’s parents if the minor voluntarily appeared for such treatment, was amended by chapter 187 of the Acts of 1974 to delete the language italicized above.² This amendment brings Massachusetts in line with other jurisdictions which have allowed private doctors to treat minors for venereal disease without parental consent.³ It also harmonizes this statute with section 12E of chapter 112, which allows a minor twelve years of age or over to obtain medical treatment for drug dependency without parental consent.⁴

§6.4. Interest on damages. Section 6B of chapter 231 of the General Laws,¹ as amended by chapter 1114 of the Acts of 1973,² provided for interest on damages for personal injury or property damage from the date of the commencement of the action. The rate utilized was 6% per annum, the figure set out in section 6C of that chapter³ in contract actions where no other rate had been established by the parties to the contract. Section 6B was amended in 1974 so as to provide for interest at the rate of 8% per annum from the date of commencement of the action.⁴

The amendment to section 6B did not indicate whether the increase applied to all actions in progress at the time of the effective date of the statute or only to actions commenced after the effective date of the statute. In fairness to defendants in actions in progress at the effective date of the statute, it seems that either the amendment should apply only to actions commenced after the effective date of the statute, or that the 8% rate apply to actions in progress only for the time period after the effective date of the statute.

§6.5. Medical bills: Admissibility in evidence. Section 79G of chapter 233 of the General Laws¹ provided that in

an action of tort for personal injuries, or for consequential damages arising therefrom, an itemized bill for medical, dental or hospital

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¹ G.L. c. 111, § 117 (emphasis added).

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¹ G.L. c. 231, § 6B.
³ G.L. c. 231, § 6C.
⁴ Acts of 1974, c. 224, § 1. Chapter 224 also amended G.L. c. 231, § 6C, increasing the interest rate in contract actions from 6% to 8% where no other rate had been established by the parties to the contract.

§6.5.¹ G.L. c. 233, § 79G.
services rendered to a person injured, subscribed and sworn to under penalties of perjury, by the physician, dentist or authorized agent of the hospital rendering such services, shall be admissible as evidence of the fair and reasonable charge for services . . . .

Written notice of the intention to offer such a bill as evidence together with a copy of the bill must be given to the opposing party or his attorney not less than ten days before trial.

In view of the liberalization in recent years of recovery for personal injury on a contract theory, the limitation of section 79G to tort actions was unnecessarily restrictive. The statute was recently held inapplicable to an action seeking to recover medical benefits under the no fault provisions of section 34A of chapter 90 of the General Laws on the basis that recovery under a personal injury protection insurance policy was a contract action rather than a tort action and that section 79G was expressly limited to tort actions.

Section 79G was amended in 1974 to encompass actions "of tort or contract, or for consequential damages arising therefrom . . . ." This amendment also harmonizes section 79G with the new Massachusetts Rules of Civil Procedure which have abolished the forms of action.

§6.6. Statute of limitations in legal malpractice cases. In Hendrickson v. Sears, the defendant, an attorney, negligently certified to plaintiff, his client, that title to certain real estate was "valid, clear and marketable." Relying upon this certification, the plaintiff purchased the property. Nine years later, while attempting to sell the property, plaintiff discovered the presence of a recorded easement running through the premises. Plaintiff suffered a loss in effecting modification of the easement and in the sale of the property and commenced an action against defendant in the United States District Court for the District of Massachusetts. The district judge, citing a 1966 Massachusetts decision, Pasquale v. Chandler, allowed defendant's motion to dismiss the action on the ground that the limitation period had run. On appeal, the First Circuit Court of Appeals

2 Id.
3 See, e.g., G.L. c. 106, § 2-318.
4 G.L. c. 90, § 34A.
7 See Mass. R. Civ. P. 2: "There shall be one form of action to be known as 'civil action'"
certified to the Supreme Judicial Court\textsuperscript{6} the following question:

Does a client's cause of action against an attorney for negligent certification of title to real estate “accrue” for purposes of Mass. G.L. c. 260 § 2A at the time the certification was given, at the time of discovery of the misrepresentation, or at the time when any misrepresentation should reasonably have been discovered?\textsuperscript{7}

The Supreme Judicial Court answered the question as follows:

A client's cause of action against an attorney for negligent certification of title to real estate does not “accrue” for purposes of G.L. c. 260, §§ 2 and 2A until the misrepresentation is discovered or should reasonably have been discovered, which ever first occurs.\textsuperscript{8}

The policy considerations underlying the statute of limitations are hardly affected by the application of the “discovery” rule\textsuperscript{9} in \textit{Hendrickson}. It is unlikely that defendant-attorney has been prejudiced by the usual vices of time passage such as faulty memories, loss of evidence, or loss or death of witnesses. The case is not the same as a defendant who is sued for negligence arising out of an automobile accident which occurred ten years earlier. The absolute repose rule,\textsuperscript{10} on the other hand, may bar recovery before the client ever realizes a pecuniary loss from his attorney's negligence. Since much of a lawyer's work is designed to achieve long range beneficial results, particularly in the areas of contracts, real estate titles, and estate planning, it is not unfair that the attorney and his malpractice insurer assume the financial loss resulting from negligence related to such work.

The result in \textit{Hendrickson} raises, however, another unrelated problem. The Court in \textit{Hendrickson} rejected defendant's argument that \textit{Pasquale v. Chandler}\textsuperscript{11} was binding precedent that the words “after the cause of action accrues” as used in the Massachusetts statutes of limitation mean immediately after the defendant's negligent performance and not at the time of discovery of such negligence.\textsuperscript{12} Rejection of this argument creates an apparent inconsistency not explicable on policy grounds: as used in legal malpractice cases these words mean that the statute of limitations commences to run when the plaintiff knows or in the exercise of reasonable care should know of the lawyer's negligence; as used in medical malpractice cases these identical words mean that the statute of limitations commences to run at the time of


\textsuperscript{8} Id. at 509-10, 310 N.E.2d at 136.

\textsuperscript{9} Id. at 507-10, 310 N.E.2d at 135-36.

\textsuperscript{10} An “absolute repose” rule imposes an outside time limit after which no action may be brought, irrespective of when the injury is discovered. See \textit{Pasquale v. Chandler}, 350 Mass. 450, 457, 215 N.E.2d 319, 323 (1966).


the physician's negligent performance.\textsuperscript{13} The explanation for this apparent inconsistency lies in the area of statutory interpretation.

In \textit{Pasquale}, the Court was asked by plaintiff to rule that the language of section 4 of chapter 260 of the General Laws,\textsuperscript{14} providing that medical malpractice cases must be commenced within two years "next after the cause of action accrues" means within two years from the time that the plaintiff knows or reasonably should know of the physician's negligence and not from the time of such negligence,\textsuperscript{15} as had been previously held.\textsuperscript{16} The Court indicated that it might have been disposed to reconsider the matter were it not for "recent legislative history."\textsuperscript{17} The "recent legislative history" referred to a bill, House No. 530,\textsuperscript{18} which would have amended section 4 of chapter 260 to provide for a discovery rule in medical malpractice cases with a five year outer limit. The Senate rejected the bill and adopted instead a substitute measure\textsuperscript{19} which merely increased the statute of limitations in medical malpractice cases to three years but otherwise retained the old language of the statute. The Court in \textit{Pasquale} pointed out that this indicated legislative affirmance of its previous acceptance of the Court's interpretation of the word "accrues" in \textit{Capucci v. Barone}.\textsuperscript{20} The difficulty is that while \textit{Capucci} and \textit{Pasquale} were interpreting "accrues" as used in section 4 of chapter 260, the identical words in sections 2 and 2A of chapter 260 were interpreted differently in \textit{Hendrickson}.\textsuperscript{21} Did the legislature really intend these identical words in allied statutes to have one meaning when applied to medical malpractice cases and a different meaning when applied to legal malpractice cases?

One argument justifying \textit{Hendrickson} might be that the Supreme Judicial Court in \textit{Capucci} was not interpreting the word "accrues" but rather was applying common law to an issue left open by the legislature, i.e., whether a cause of action accrues when the defendant's wrongful act causes harm to the plaintiff or when the plaintiff realizes or should realize the existence of the harm. Thus, it was not the rejection of the "discovery" rule by the legislature that had the compelling effect in \textit{Pasquale} but rather that the legislature had relied upon the \textit{Capucci} common law in enacting a three year statute of limitations in

\textsuperscript{13} The federal district judge stated the inconsistency as follows: "There certainly is no valid reason why the legal profession should be treated more harshly than the medical profession as to the date when their members may successfully bar adverse claims under the statute of limitations." Hendrickson v. Sears, 359 F. Supp. 1031, 1033 (D. Mass. 1973).
\textsuperscript{14} G.L. c. 260, § 4.
\textsuperscript{15} 350 Mass. at 455-56, 215 N.E.2d at 321-22.
\textsuperscript{17} 350 Mass. at 456, 215 N.E.2d at 322.
\textsuperscript{19} Senate No. 924 (1965), which became Acts of 1965, c. 302.
\textsuperscript{21} See text at note 8 supra.
medical malpractice cases. To now change this common law would frustrate legislative purpose in medical malpractice cases, a situation not present in *Hendrickson*.

A question for future cases is whether the *Capucci* rule has become frozen into section 4 of chapter 260 of the General Laws. No reasons exist for perpetuating different rules for legal and medical malpractice cases. If the *Capucci* rule was not statutory interpretation but rather the common law supplementation to a statute, it is submitted that the Court should change this common law, particularly since the above-mentioned legislative reliance on *Capucci* has been neutralized by recent legislation providing for a three year statute of limitations in all tort actions.²²

**§6.7. Liability of builder or contractor for negligence.** In *McDonough v. Whalen*,¹ the plaintiff purchased a new house from Fred's Realty Co., the builder. The septic system for the house had been designed by defendant Whalen and constructed by defendant DesVergnes. Six months after the purchase, the lot surrounding the house became flooded and sewage from the septic system was found to be flowing over the land. After several unsuccessful attempts by Fred's Realty Co. to correct the problem, plaintiff brought suit against Fred's Realty Co., Whalen and DesVergnes. While the litigation was pending, Fred's Realty Co. repurchased the property and plaintiff discontinued his action against it. The plaintiff suffered $1,000 out of pocket loss from the transaction.² He amended his declaration against the remaining two defendants to seek recovery for that loss and for "great anguish of mind and embarrassment." The jury returned a verdict for plaintiff against both defendants, awarding $1,000 for property damage and $4,000 for mental anguish. Defendants appealed the denial of their motions for directed verdicts to the Appeals Court, which reversed and ordered judgment for the defendants.³ The court concluded that even if a builder's liability for negligence could be equated to that of a manufacturer, recovery could be had only for personal injury or property damage.⁴ The court further held that property damage did not include either the lessening of the value of the property because the system didn't work or the expenditure incurred in attempting to correct the system.⁵ On further review, the Supreme Judicial Court held that the defendants'

²² Acts of 1973, c. 777, amending G.L. c. 260, §§ 2A, 2B, 4. While this amendment increased to three years the statute of limitations for the other torts described in G.L. c. 260, §4, it did not make any corresponding increase to the three year statutory period for medical malpractice.

² The repurchase price was not disclosed in the record before the Court. Id. at 1001 n.2, 313 N.E.2d at 437 n.2. Claimed damages included loss of use of the property.
⁴ Id. at 686-87, 304 N.E.2d at 201.
⁵ Id.

http://lawdigitalcommons.bc.edu/asml/vol1974/iss1/9
motions for directed verdicts on the counts claiming recovery for mental distress were properly allowed but the motions for directed verdicts on the counts claiming property damage should have been overruled.\(^6\)

There are three essential points in the *McDonough* decision: (1) the liability for negligence of a builder, designer or contractor to persons not in privity with him; (2) the meaning of the term "physical damage"; and (3) the status of recovery for severe emotional distress caused by negligence.

On the first point, the Supreme Judicial Court, expressly overruling a prior case, *Cunningham v. T.A. Gillespie Co.*,\(^7\) held that with respect to negligence, there is no reason to treat the builder, designer or contractor of a realty structure any differently from the manufacturer of a chattel;\(^8\) each is liable for harm proximately resulting from his negligence despite the absence of privity between plaintiff and defendant.\(^6\) On the second point, the Court rejected the conclusion of the Appeals Court on the meaning of physical damage, holding that "the loss of use of the property and the depreciation in its value as indicated in part by the cost of repairs for the septic system" are within the term "physical damage."\(^9\)

On the third issue, the status in Massachusetts of recovery for severe mental distress caused by negligence, the Appeals Court had rejected plaintiff’s claim for such damages on the ground that Massachusetts,


\(^7\) 241 Mass. 280, 135 N.E. 105 (1922), overruled, 1974 Mass. Adv. Sh. at 1003-04, 313 N.E.2d at 438-39. *Cunningham* applied a rule of nonliability to an independent contractor who had completed and turned over the control of allegedly negligent construction work he had done on a city sidewalk before the plaintiff was injured.

\(^8\) See Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), holding the manufacturer of goods liable in negligence for personal injury resulting therefrom despite the absence of privity between plaintiff and defendant. Id. at 103-04, 64 N.E.2d at 700. This rule was later applied to permit recovery for property damage in Brown v. Bigelow, 325 Mass. 4, 88 N.E.2d 542 (1949).

\(^9\) 1974 Mass. Adv. Sh. at 1004, 313 N.E.2d at 439. If no good reason exists for distinguishing between liability of a manufacturer and that of a builder for negligence, does it not follow that such a distinction is untenable in warranty actions? G.L. c. 106, § 2-318 imposes liability in warranty (as well as negligence) against the manufacturer, seller, lessor or supplier of goods, despite the absence of privity between plaintiff and defendant, if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume or be affected by the goods. Should a statute be enacted so as to impose similar liability upon builders, contractors and designers of realty structures? It might be noted that the statute of limitations under G.L. c. 106, § 2-318, as amended by Acts of 1974, c. 153, is "within three years next after the date the injury and damage occurs," whereas G.L. c. 260, § 2B, as amended by Acts of 1973, c. 777, provides:

Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, \(\text{that in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction or general administration.}\) [Emphasis added.]


under the so-called "Spade doctrine,"\(^{11}\) does not allow recovery for mental distress negligently inflicted in the absence of a physical injury resulting from the negligence.\(^{12}\) The Supreme Judicial Court has on several occasions refused to reconsider the Spade doctrine.\(^{13}\) In McDonough, the Court again declined the invitation,\(^{14}\) but this time justifiably. While there is good reason to believe that the Spade doctrine will ultimately be rejected by the Supreme Judicial Court, such rejection should occur where the defendant's negligent conduct threatens severe physical injury to the plaintiff, not merely property damage. Too great a burden would be imposed were a negligent defendant required to compensate the plaintiff not only for property damage but also for the mental distress accompanying such damage. One can only speculate, for example, about the havoc such a rule would create were it superimposed on the automobile no-fault property statute.\(^{15}\)


In the 1973 decision *Mounsey v. Ellard,\(^{1}\)* the Supreme Judicial Court overruled prior decisions and held that the duty owed by the occupier of property to all lawful visitors on the property is that of reasonable care, irrespective of whether such visitors are considered business invitees, social invitees or licensees.\(^{2}\) The Court in *Mounsey*, however, did not expand the lesser duty of care owed to trespassers, *i.e.*, the duty merely to avoid willful and wanton conduct. In fact, the Court specified its intent not to apply its new ruling to trespassers:

> We feel that there is significant difference in the legal status of one who trespasses on another's land as opposed to one who is on the land under some color of right—such as a licensee or invitee. For this reason, among others, we do not believe they should be placed in the same legal category. . . . The possible difference in classes of trespassers is miniscule compared to the others. *These differences can be considered when they arise in future cases.*\(^{3}\)

The 1974 decision of *Pridgen v. Boston Housing Authority*\(^{4}\) presented the first post-Mounsey case in which a trespasser sought the protection of ordinary care. The plaintiff, a young boy, climbed through an escape

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\(^{5}\) G.L. c. 90, § 340.


\(^{7}\) Id. at 884-87, 297 N.E.2d at 51-52.

\(^{8}\) Id. at 885 n.7, 297 N.E.2d at 51-52 n.7 (emphasis added). Justice Kaplan, in a concurring opinion, disagreed with the exclusion of trespassers from the application of the new rule. Id. at 896, 297 N.E.2d at 57-58 (concurring opinion).

hatch in the defendant's elevator and got on the elevator roof. When one of his friends accompanying him started the elevator, plaintiff slipped and fell into the shaft and was caught on metal brackets extending out from the wall of the shaft. Plaintiff's friends notified his mother who came over to the building and requested the custodian to help her. He responded that there was nothing he could do. She then asked him to turn off "the lights" in the elevator shaft, evidently referring to the electric power. At this point a policeman entered the building and ordered the custodian to turn off "the lights." At a point after she had asked the custodian for help but before the policeman arrived, plaintiff's mother heard the elevator move and heard her son scream. The trial judge directed a verdict for defendant on a count charging willful and wanton conduct but sent to the jury a count charging negligence. In so doing he instructed the jury to determine whether the defendant was negligent by reason of anything which it or its employees did or failed to do after learning that plaintiff had become trapped in the elevator shaft. The jury apparently found that the defendant was guilty of such negligence and returned a verdict for plaintiff. The trial judge took the verdict under leave reserved and later, on motion of defendant, ordered it to be set aside and entered a verdict for defendant.

The Supreme Judicial Court affirmed the direction of the verdict for defendant on the count for willful and wanton conduct; it reversed, however, the trial judge's entry of a verdict for the defendant under leave reserved on the negligence count and reinstated the jury verdict for the plaintiff.

The Pridgen decision is significant in three respects: (1) it extends Mounsey to include imperiled trespassers as persons to whom reasonable care is owed; (2) it overrules previously durable Massachusetts law by imposing a positive duty on the occupier of land to aid an imperiled trespasser; and (3) it demonstrates the significant saving of expense and court time by the skillful utilization by the trial judge of the procedure now known as judgment notwithstanding the verdict.

Prior to Pridgen, Massachusetts common law imposed no duty on a person to render aid to an injured person or one in a position of peril unless some special relationship, such as master and servant, existed.

5 Id. at 247, 308 N.E.2d at 470.
6 Id.
7 Id. at 253, 308 N.E.2d at 473.
8 Id. at 263, 308 N.E.2d at 479.
9 See note 12 infra.
10 See Mass. R. Civ. P. 50. While normally this procedure is used to avoid a new trial where a close question of sufficiency of evidence is present, the trial judge in Pridgen utilized the pre-Mass. Rules of Civil Procedure counterpart of j.n.o.v. to avoid a new trial where it appeared that the Supreme Judicial Court was likely to make new law. Had the Supreme Judicial Court not made new law, the trial judge's post-trial ruling would have been affirmed. When the Court did in fact make new law, it had only to reinstate the jury's verdict based upon an ordinary negligence instruction.
between the parties.\textsuperscript{12} Apparently even a business invit~r-invitee relationship did not create a duty to act;\textsuperscript{13} nor was it relevant that the plaintiff had been injured, albeit non-negligently, by the defendant's instrumentality.\textsuperscript{14} While seemingly harsh, the pre-	extit{Pridgen} no-duty rule had some merit. This is best demonstrated by the fact that under 	extit{Pridgen}'s broad holding, a trespasser is legally entitled to the assistance which would not be his due were he injured while lawfully traversing the public way.

\textit{Pridgen} raises many questions with respect to the application of the ordinary care standard. Is the landowner required to take any risks, even minimal, to satisfy his duty to act? If the landowner, as the result of some prior conduct such as overconsumption of alcoholic beverages, is unable to render assistance, may he be held liable on a finding that such prior conduct was unreasonable? Will the landowner be liable if he lacks the information or skill of a reasonable person so that he fails to render aid, or, while attempting to render aid, does so negligently? Are distinctions to be drawn between residential landowners and business landowners? Are all types of trespassers entitled to the same standard of conduct? For example, while the careless failure to shut off the electric power might render a landowner liable to a child trapped in an elevator shaft, would the same degree of carelessness render the landowner liable to a person who had entered the land to steal his property? While arguably these questions may be subsumed under the question of what constitutes reasonable care under the circumstances, more specificity is required.

As regards the duty to act, the landowner should be required to take minimal risks to aid the imperiled trespasser. All conduct involves some risk of injury to the actor; he may, for example, fall down a flight of stairs while going down to shut off the electric power. Such risk would certainly not excuse non-performance. The landowner, however, should not be required to aid the imperiled trespasser where to do so would create a substantial risk of serious bodily harm. Further, the trespasser should be required to take the \textit{private} residential landowner as he finds him. He should not, for example, have the right to demand that such landowner be sufficiently sober in the privacy of his home that he may, without substantial risk to his person, go into a swimming pool to rescue the trespasser. Nor should the trespasser be in a position to demand that such a landowner have the information and skill of a reasonable person. As

\textsuperscript{12} In Osterlind \textit{v.} Hill, 263 Mass. 73, 160 N.E. 301 (1928), the defendant rented a canoe to the decedent. The canoe overturned and the decedent, after hanging on to the canoe for approximately one half hour and making loud calls for assistance which the defendant heard and ignored, was obliged to release his hold, and was drowned. The Court held that the defendant was under no duty to aid the decedent and hence was not liable in the action. Id. at 76, 160 N.E. at 302. See Lacey \textit{v.} United States, 98 F. Supp. 219 (D. Mass. 1951). \textit{Osterlind} was expressly overruled in \textit{Pridgen}. 1974 Mass. Adv. Sh. at 259 n.7, 308 N.E.2d at 477 n.7.

\textsuperscript{13} See McLean \textit{v.} The University Club, 327 Mass. 68, 72, 97 N.E.2d 174, 178 (1951), containing dictum that no duty existed on the part of a business invit~r to call a doctor for its ill invitee.


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regards the private residential landowner in the privacy of his home, the trespasser should only be legally entitled to a good faith attempt on the part of the landowner to assist him where the landowner is aware of the trespasser’s peril and where such attempt does not create a substantial risk of serious injury to the landowner.

It does not, on the other hand, seem unfair to impose upon the occupier of business property the duty of ordinary care to assist the imperiled trespasser, again with the caveat that the attempt does not involve a substantial risk of serious bodily harm to the actor. The business occupier and his employees should possess the information and skill relative to their activities around the business area to be capable of exercising ordinary care.

The Court’s holding in *Pridgen* goes far beyond what was required to answer the question before it. This broad approach is quite similar to that taken by the Court in the *Mounsey* case. In *Pridgen* the defendant’s employee was in control of the instrumentality which was about to cause injury to the imperiled trespasser. Only he, with his knowledge of the location of the switch, was in a position by the exercise of due diligence to prevent the harm. The nexus, imposing the duty of ordinary care, arguably should have been this control element rather than the negative relationship of landowner-trespasser. In fact, a fair rule might impose a duty on any person who is in control of an instrumentality which has caused, or is about to cause, injury to a third party, to at least make a good faith attempt to prevent such injury or render aid, irrespective of where such incident occurs.  

§6.9. Pain and suffering: Motor vehicle tort cases. Section 6D of chapter 231 of the General Laws precludes recovery for pain and suffering “[i]n any action of tort brought as a result of bodily injury . . . arising out of the ownership, operation, maintenance or use of a motor vehicle” unless the reasonable and necessary medical expenses incurred are in excess of five hundred dollars or unless at least one of five other conditions exists. In 1971 in *Pinnick v. Cleary*, the Supreme Judicial Court

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15 See L.S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942) for an application of this “control” rule. A department store was held liable for an *aggravation* of the injuries caused when a 6 year old child caught his hand in an escalator under the control of the defendant store, even though it had been conclusively established that the store had not been negligent with respect to the choice, construction, or manner of operating the escalator. Id. at 95, 40 N.E.2d at 337-38.
upheld section 6D against constitutional attack, emphasizing that the elimination of minor claims for pain and suffering based upon an objective standard was a necessary corollary to the legislature's attempt, by the Personal Injury Protection Statute (No-Fault), to reduce motor vehicle tort litigation. During the 1974 Survey year, the case of Chipman v. Massachusetts Bay Transportation Authority raised the issue of whether section 6D applies to a plaintiff who is injured as the result of the operation or use of a motor vehicle under circumstances where she has no recourse to "no-fault" benefits.

The plaintiff in Chipman was injured while boarding defendant's bus as the result of negligence by defendant's servant. In her personal injury action she sought and recovered damages for pain and suffering although she neither had medical expenses in excess of five hundred dollars nor satisfied any of the other five conditions set out in section 6D. Plaintiff was not covered by any of the provisions of "no-fault" because neither she nor any member of her household owned a motor vehicle. Defendant is exempted from the insurance requirements of chapter 90 of the General Laws. Further, the "assigned claims plan" did not apply because plaintiff was not injured by an unlawfully uninsured motor vehicle or by a "hit and run" driver or by an out-of-state car. Defendant appealed, claiming that section 6D applies in any action of tort arising out of the operation or use of a motor vehicle; its terms do not restrict its application to motor vehicle accidents wherein the provisions of "no-fault" are applicable.

The Supreme Judicial Court in Chipman held that a plaintiff who has no recourse to "no-fault" personal injury protection benefits is not barred under section 6D from recovering for pain and suffering when the uninsured defendant is expressly exempted from the "no-fault" scheme by section 1A of chapter 90. The Court noted that although a person may be denied the benefits of the "no-fault" scheme, there is no indication that the legislature intended to impose upon her its burdens. The Court pointed out that its decision is restricted to the facts of the case. Whether a defendant is protected by section 6D in other respects was not then being decided by the Court.

4 360 Mass. at —, 271 N.E.2d at 610-11.
6 G.L. c. 90, § 1A.
7 G.L. c. 90, § 34N.
9 It appears reasonably clear that a person who was unable to recover "no-fault" benefits because of a deductible (G.L. c. 90, § 34M) or because the policy excluded recovery where the injured person's conduct contributed to his injury in one of the ways listed in the definition of "personal injury protection" set out in G.L. c. 90, § 34A (operating under the influence of alcohol, etc.), would be bound by the conditions set out in § 6D. A closer question is whether a person who is precluded from recovering "no-fault" benefits because he is entitled to payments under G.L. c. 152, § 15 (workmen's compensation) is nevertheless limited by the conditions set out in § 6D in an action against a negligent third party.
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The result in Chipman appears correct. Despite the seemingly broad language of section 6D, the Court properly considered the section in light of its purpose as an adjunct to the “no-fault” statute. In fact, about the only point which might have raised doubts on the matter was the total physical separation of section 6D (chapter 231 of the General Laws) from the “no-fault” statute (chapter 90 of the General Laws). Despite this separation, the argument seems compelling that if the legislature intended section 6D to apply even where the injured party has no recourse to no-fault benefits, it logically would have made section 6D apply in all personal injury cases and not merely in motor vehicle tort cases.

§6.10. Defamation: Constitutional protection. In New York Times Co. v. Sullivan, the United States Supreme Court held that the constitutional guarantees provided by the First and Fourteenth Amendments to the United States Constitution require a rule that prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, i.e., with knowledge that it was false or with reckless disregard of whether it was false or not. The New York Times rule was subsequently expanded to cover all public figures rather than solely public officials. New York Times was further expanded by the 1971 Supreme Court decision Rosenbloom v. Metromedia, Inc., which held that the First Amendment protects all discussion and communication involving matters of public or general concern without regard to whether the persons involved are famous or anonymous. In Rosenbloom, the Court held that a libel action by a private individual against a radio station for defamatory falsehood in a newscast relating to his involvement in an event of public or general concern could be sustained only on clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. The reason for this shift in focus from “public figure” to “issues of public or general concern” was stated by the Court as follows: “If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”

2 U.S. Const. amend. I, XIV.
5 Id. at 43-44.
6 Id. at 52.
7 Id. at 43, In the 1974 decision Stone v. Essex County Newspapers, Inc., 1974 Mass. Adv. Sh. 693, 311 N.E.2d 52, the Massachusetts Supreme Judicial Court held that the First Amendment privilege established in Rosenbloom applies even where the defendant has misidentified the plaintiff as the person who was involved in the matter of public concern. Id. at 697-98, 311 N.E.2d at 56. The Court in Stone also held that the “reckless
In the 1974 decision *Gertz v. Robert Welch, Inc.*, the Supreme Court reexamined *Rosenbloom* and significantly limited its scope. The plaintiff-petitioner in *Gertz* was an attorney who was representing the family of a young man who had been shot and killed by a policeman. The defendant-respondent publishes a monthly magazine setting forth the views of the John Birch Society. The defendant published in its magazine a defamatory article about the plaintiff. In plaintiff's libel action against defendant, defendant moved for summary judgment relying upon the *New York Times* standard as applied to public figures. Defendant claimed that plaintiff could not make a showing of malice and submitted the affidavit of its managing editor which denied knowledge of the falsity of the statements in the article and claimed reliance upon the author's reputation and the editor's prior experience with the accuracy and authenticity of the author's contributions to the magazine. The trial judge denied the motion for summary judgment as well as a motion for a directed verdict subsequently made. Following a jury verdict for plaintiff, the trial judge entered judgment for defendant notwithstanding the verdict, accepting defendant's contention that the *New York Times* standard applied to any discussion of public issues without regard to the status of the person defamed therein. This conclusion anticipated the holding of the United States Supreme Court in *Rosenbloom*. Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. In the interim *Rosenbloom* was decided. The Court of Appeals affirmed the trial judge's entry of judgment notwithstanding the verdict on the basis that *Rosenbloom* required the application of the *New York Times* standard whenever the publication or broadcast was about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed. The United States Supreme Court granted certiorari to reconsider "the extent of a publisher's constitutional privilege against liability for defamation of a private citizen."

The modification of the *Rosenbloom* rule brought about by the Supreme Court in *Gertz* was articulated in the opinion as follows:

We hold 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. This approach provides a more disregard for truth or falsity" standard established in *New York Times* and *Rosenbloom* is a subjective rather than an objective test. Id. at 699, 311 N.E.2d at 57. The test is not whether the information was available which would cause a reasonably prudent man to entertain serious doubts as to the truth or falsity of the statement. "To negate the privilege the jury must find that such doubts were in fact entertained by the defendant, or by the defendant's servant or agent acting within the scope of his employment." Id.

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equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.12

Thus, under Gertz, the New York Times standard applies with respect to public officials and public figures while the states are free to establish the standard for private persons, short of strict liability, where the discussion involves a matter of public concern. Such standard will be either some degree of negligence or the New York Times standard, adopted as a matter of state law. The Court's reasoning in Gertz is that most public persons voluntarily assume that role and consequently invite attention and comment; such invitation entails assumption of the risk of defamatory comment. Public officials run the risk of close scrutiny and the public has a vital interest in their personal attributes, which are germane to the fitness of the individual for office. Many public figures have become such by thrusting themselves into public controversies in order to influence their resolution. The private person has sought no such public scrutiny with its accompanying risk of unfavorable comment by the media. Further, the private person does not normally enjoy the greater access to channels of effective communication enjoyed by public officials and public figures; rebuttal is consequently more difficult.13

This modification of Rosenbloom by Gertz was not unconditional. The Court held that where liability is established under a standard less demanding than the New York Times standard, punitive damages are not recoverable and compensatory damages may be had only for "actual injury."14 The "actual injury" requirement, according to the Court, does not limit damages to out-of-pocket loss.15 The Court described recoverable damages as follows:

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.16

Is Gertz a reasonable adjustment of the rights of the private person to his good name and the need for a free flow of information in matters of public concern? Unfortunately, ambiguity in the majority opinion in Gertz precludes a clear answer to the question. The limitation

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13 Id. at 344-46.
14 Id. at 349.
15 Id. at 350.
16 Id.
on recovery of damages to only actual injury seems to be a fair compromise of competing interests in a non-malicious publication involving a matter of public interest. "Actual injury," however, requires further clarification. While the Court points out that out-of-pocket loss is not necessary, and that customary types of harm resulting from defamation, such as mental suffering, loss of reputation and standing in the community and humiliation are compensable, the Court does not clearly answer a critical question: may at least nominal damages for loss of reputation be recovered where the statements are defamatory on their face, without the necessity of producing either witnesses who will testify that they held or now hold the plaintiff in less esteem because of the defamatory statements or similar evidence? Will the victim of public statements, defamatory on their face, who seeks only the protection of his good name, be denied judicial vindication because he can neither produce such evidence nor establish malice on defendant's part? Confusion on this point stems from the fact that in one portion of the opinion dealing with the damages issue, the Court is critical of the traditional rule of libel law whereby the existence of injury is presumed from the fact of publication. The opinion's emphasis then shifts to the idea that states have no substantial interest in securing for plaintiffs gratuitous awards of money damages "far in excess of any actual injury." This second point, while no doubt accurate, is a non sequitur. The non-malicious defamer of private persons deserves constitutional protection against the recovery of excessive damages or damages based upon fictitious claims of injury where a matter of public interest is involved; such protection does not, however, require that the one defamed be denied the op-

17 The dissenting opinion of Justice White interprets the majority opinion as clearly precluding the recovery of nominal damages for a libel, defamatory on its face, without such evidence, where plaintiff cannot establish liability on a New York Times standard:

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable per se. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle; recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false.

418 U.S. at 375-76 (dissenting opinion).

18 Id. at 349.

19 Id. (emphasis added).
portunity to restore his reputation by a recovery of nominal damages simply because no witness testifies that he held such person in lower esteem because of the libel. The point needs clarification. Further, where only nominal damages are sought, as in cases where plaintiff is only attempting to save his reputation, it is unnecessary to impose even a negligence standard. A sensible compromise would allow plaintiff to recover nominal damages for loss of reputation on a strict liability standard and allow recovery of damages for such items as mental suffering on a state-established standard short of strict liability.

**STUDENT COMMENT**

§6.11. **Defamation: Use of extrinsic facts in publication innocent on its face: Need for proof of special damages: Sharratt v. Housing Innovations, Inc.**¹ John Sharratt Associates, Inc., of which registered architect John Sharratt is the principal stockholder, entered into a written contract with the Lower Roxbury Development Corporation² to design a project known as "Madison Park Houses." The firm of Samuel Glaser and Partners was named as an associate architect.³ Defendant Housing Innovations, Inc. was named a consultant on this project⁴ and two of its employees put together a promotional brochure which stated that the [architects for the Madison Park project are Samuel Glaser and Partners.⁵ There was no mention of John Sharratt Associates in the brochure.

Sharratt and his company brought an action in superior court for libel against Housing Innovations, in which Sharratt alleged that the brochure, by failing to identify him as the principal architect of the project, was false and defamatory. He claimed that the false identification of Samuel Glaser and Partners as the sole architect attacked his veracity and credibility since he had informed those with whom he had business dealings that he was the architect for Madison Park. Consequently, his standing as an architect was impaired.⁶ General damages were alleged, but no special damages were claimed.⁷ The de-

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² Id., 310 N.E.2d at 344.
³ Id.
⁶ Id. at 579, 310 N.E.2d at 346.
⁷ General damages necessarily or usually follow from the facts alleged as a cause of action, and thus need not be claimed in the complaint beyond a bare statement of amount in order to be proven and recovered at trial. The jury is permitted to decide the amount to be awarded without any evidence as to amount having been introduced. Special damages must be specifically claimed and described if recovery for them is to be allowed, and must be pecuniary in nature. See generally C. McCormick, Handbook on the Law of Damages § 8, at 32-33 (1955); W. Prosser, Handbook of the Law of Torts § 112, at 754, 760 (4th ed. 1971) [hereinafter cited as Prosser].
fendants demurred on the ground that the complaint failed to state a cause of action. The superior court sustained the demurrer, holding that the statement in question was not defamatory, and that even if the statement were defamatory, it was libelous "per quod" since it was innocent on its face, and in such a case the complaint must allege special damages to withstand demurrer.

The Supreme Judicial Court reversed and held that a statement innocent on its face may be proven to be defamatory through the use of extrinsic facts. The Court reasoned that in view of the well-established common law principle that a plaintiff in a libel action may introduce in the pleadings the circumstances surrounding an ambiguous statement in order to show that the statement was understood in a defamatory sense, it would be unfair to deny another plaintiff the same opportunity merely because the words alleged to be defamatory appear to be innocent to the general public, even though they were clearly understood to be defamatory in a particular community. Concluding that the distinction between libel per se and libel per quod is irrelevant to the issue of pleading special damages, the Court further held that all libel is actionable per se. Thus, Sharratt eliminated the requirement of pleading special damages in a case of libel per quod.

This casenote will take the position that the Supreme Judicial Court's refusal to adopt the narrow and rigid view of libel per quod urged by the defendants represents an enlightened approach to the law of libel, and

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8 Under the new Massachusetts Rules of Civil Procedure, which went into effect on July 1, 1974, the demurrer has been replaced by a motion for judgment on the pleadings under Rule 12(b)(6) and (c). Mass. R. Civ. P. 12(b)(6), (c).

9 A complaint in a tort action alleging special damages contains an allegation of the facts which constitute the tort and a recital of the consequences of those acts which are the basis for the special damages. This list of consequences is preceded by the phrase "per quod" from the Latin "whereby," as in "whereby the plaintiff suffered damage in such and such . . ." Sometimes the phrase is used simply as the name of that clause of the declaration, or, as in the case of libel per quod, is incorporated into the name of a cause of action which requires proof of special damage. See Black's Law Dictionary 1293-94 (4th ed. 1968).

10 1974 Mass. Adv. Sh. at 578, 310 N.E.2d at 346. The Court reasoned that the facts pleaded tended "to show that [the statement in the brochure that Samuel Glaser and Partners were the architects for the project] . . . could be understood as referring to the plaintiff," in spite of the objections of the appellees that no Massachusetts case recognized such a right to recover for silence as defamation. Id. at 579, 310 N.E.2d at 346. The Court pointed out that extrinsic facts could be used to show that the statement refers to the plaintiff. Other jurisdictions have argued that "words spoken of and concerning one person may be capable of conveying a defamatory meaning about another person." 1 F. Harper & F. James, Jr., The Law of Torts § 5.7, at 366 (1956) [hereinafter cited as Harper & James] and cases cited therein. See, e.g., Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331 (C.A.), in which a picture of plaintiff's husband with a Miss X and an announcement that they were engaged, when published in a newspaper, was held to libel the plaintiff since her neighbors could infer from it that she and her husband were not actually married. Id. at 340, 355.


12 Id. at 581, 310 N.E.2d at 347.
that the Court correctly decided to allow the introduction of extrinsic facts to show the libelous nature of a statement innocent on its face. It will then discuss the Court’s abolition of the requirement that special damages be pleaded in libel per quod actions, and the effect on this aspect of the decision of the recent United States Supreme Court case of Gertz v. Robert Welch, Inc.\(^{13}\) in light of the current application of the commercial speech doctrine in libel cases.

The first issue faced by the Court was whether extrinsic facts can be applied to render an apparently innocent publication libelous, or whether they can only be used to interpret an already ambiguous publication.\(^{14}\) The alleged libel at issue in *Sharratt*, the statement that the “[a]rchitects for the Madison Park project are Samuel Glaser and Partners,”\(^{15}\) was conceded to be a publication innocent on its face. The defendants pointed out that allegations of libel per quod had been sustained in previous Massachusetts decisions only in those instances in which the publications at issue were capable of two meanings—one innocent, one defamatory\(^{16}\)—without reference to extrinsic facts. Although there was no authority directly on point, the defendants urged that this prior related case law be interpreted to preclude the application of a libel per quod theory to a publication which, absent reference to extrinsic facts, is capable of only an innocent meaning.\(^{17}\) The defendants’ argument appears to have been based, however, solely on the happenstance that in prior Massachusetts cases of libel per quod the statements at issue were ambiguous on their face.\(^{18}\) Furthermore, the defendants did not argue

\(^{13}\) 418 U.S. 323 (1974).


\(^{15}\) Id. at 576, 310 N.E.2d at 345.

\(^{16}\) Id. at 577, 310 N.E.2d at 345.

\(^{17}\) Id.

\(^{18}\) Id. The cases cited in *Sharratt* provide a good illustration of the basis for the defendants’ assumption. In Lyman v. New England Newspaper Publishing Co., 286 Mass. 258, 190 N.E. 542 (1934), the Court said: “If the words of a libel are clearly defamatory, no innuendo is necessary; if incapable of a defamatory meaning, innuendo will not make them so; but if reasonably susceptible of two or more meanings, one of which is defamatory, an innuendo may be necessary.” Id. at 261, 190 N.E. at 543. The defendants in *Sharratt* argued that this language indicates that a publication must at least be ambiguous on its face to be actionable. However, it has always been clear that an “innuendo,” the statement in the complaint of the alleged defamatory meaning of the publication, cannot add a defamatory meaning not already present, but this meaning which is present can be inferred from both the publication and the extrinsic facts known to the reader (which are set forth in the inducement). See generally Harper & James, supra note 10, § 5.9, at 373; M. Newall, Slander and Libel § 252, at 291 (4th ed. 1924); W. Odgers, A Digest of the Law of Libel and Slander 109 (6th ed. 1929); Prosser, supra note 7, § 111, at 749. This would seem to imply that the real question is whether the statement is ambiguous in light of the extrinsic facts. A case which might be cited for this more liberal position is Ingalls v. Hastings & Sons Publishing Co., 304 Mass. 31, 22 N.E.2d 657 (1939), in which the Court said “a demurrer to a declaration in libel cannot be sustained, nor can a case be withdrawn from the jury, unless the words ... are incapable of a defamatory meaning.” Id. at 34, 22 N.E.2d at 659.
any sound policy reasons why this happenstance should be hardened into common law doctrine.

It is submitted that the Court correctly decided to allow the introduction of extrinsic facts. Had it held to the contrary, it would have overlooked the main purposes of the law of defamation, namely, compensation for harm done and restoration of reputation through the public vindication of a successful libel suit. A publication is no less harmful from the mere fact that, standing alone, it is completely innocent if the relevant community understands it as defamatory in the light of extrinsic facts.

The second issue faced by the Sharratt Court was whether a plaintiff is required to plead and prove special damages in an action for libel per quod. Although the Massachusetts law on this issue was unclear prior to Sharratt, there was some support from other jurisdictions for such a requirement. The Court refused to adopt a requirement

22 See Ingalls v. Hastings & Sons Publishing Co., 304 Mass. 31, 22 N.E.2d 657 (1939) (immaterial whether special damage alleged if publication libelous on its face); Robinson v. Coulter, 215 Mass. 566, 102 N.E. 938 (1913) (question whether special damage sufficiently alleged could not be later raised in case where not raised on demurrer); McLaughlin v. American Circular Loom Co., 125 F. 203 (1st Cir. 1903) (letter susceptible of defamatory meaning is actionable if special damage is alleged and proved).

The Restatement (First) of Torts § 569, at 166-67 (1938) states the traditional rule:

One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom.

Dean Prosser, as Reporter, sought to have the Restatement changed to read as follows:

(1) One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is (a) Libel whose defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement, or (b) Libel or slander which imputes to another (i) A criminal offense, as stated in § 571, (ii) A loathsome disease, as stated in § 572, (iii) Matter incompatible with his business, trade, profession or office, as stated in § 573, or (iv) Unchastity on the part of a woman, as stated in § 574. (2) One who publishes any other defamation is subject to liability only upon proof of special harm as stated in § 575.

Restatement of Torts § 569, at 83 (Tent. Draft No. 11, 1965). Due in part to the controversy, the change was not then adopted. In 1966 a compromise solution was tenta-
of proof of special damages; it held instead that plaintiffs in cases of both libel per se and libel per quod can recover presumed damages.\textsuperscript{24} It is submitted that this decision was correct because there is no convincing reason to recognize a distinction between libel per se and libel per quod in regard to damages. The reasons hypothesized by various commentators for the development of the distinction in other jurisdictions do not withstand analysis.

One such reason is judicial confusion with regard to the meaning of per se. In the law of slander, per se meant that the publication fell into a particular category of defamation so heinous that damages were presumed to result.\textsuperscript{25} The label in no way related to whether extrinsic facts were needed to make out the defamatory meaning of the publication. Slander that did not fall into one of the "per se" categories required that special damages be pleaded and proven, regardless of whether the publication was defamatory on its face or only in light of extrinsic facts. Some courts did not understand this use of "per se" and indiscriminately added this damage-related meaning to its "meaning on face" use in libel.\textsuperscript{26} A second reason suggested is confusion between injurious falsehood, which requires proof of damage, and libel.\textsuperscript{27}

A third and more substantial reason hypothesized for the development of the requirement of proof of damage in libel per quod cases is that libel per quod is more like slander than libel in that the extrinsic facts are generally not published in the same way as the libel, but are spread by word of mouth.\textsuperscript{28} They will supposedly be known to relatively fewer people, and therefore the libel supposedly will be less likely to do harm.\textsuperscript{29} However, the actual result is not less likelihood of any harm, but rather that the harm is likely to be less extensive. This is

\textsuperscript{24} 1974 Mass. Adv. Sh. at 581, 310 N.E.2d at 347.
\textsuperscript{25} Prosser, supra note 7, § 112, at 754.
\textsuperscript{26} Eldredge, The Spurious Rule of Libel Per Quod, 79 Harv. L. Rev. 733, 736 (1966).
\textsuperscript{27} Injurious falsehoods need not put the plaintiff in a "bad light," and indeed, can even be flattering. Prosser, supra note 7, § 128, at 916. Therefore, it is reasonable to require proof of damage because one would not ordinarily expect damage to result from a non-defamatory statement. The difference between "injurious falsehood" and libel per quod is that in libel per quod the plaintiff must prove that the statement had a defamatory meaning. Id. § 111, at 746.
\textsuperscript{28} Henn, Libel-By-Extrinsic-Fact, 47 Cornell L.Q. 14, 48 (1961); Prosser, Libel Per Quod, 46 Va. L. Rev. 839, 849 (1960).
\textsuperscript{29} Prosser, More Libel Per Quod, 79 Harv. L. Rev. 1629, 1647 (1966); Prosser, Libel Per Quod, 46 Va. L. Rev. 839, 849 (1960); Note, 48 N.C.L. Rev. 405, 411 (1970).
necessarily so since once a plaintiff shows that a statement was published to third persons who were aware of facts that gave the statement a defamatory meaning, he has proved that some defamation has occurred. That the extrinsic facts are spread by word of mouth goes to the extent of the defamation, not to its existence. An argument could be made that the jury should be able to take this into account in assessing damages, but to require the plaintiff to prove special damages is not appropriate, it is submitted, when at least some damage can be presumed from the fact that someone understood the publication to be defamatory in light of facts known to him.

Fourthly, it has been noted that judges are disinclined, as a matter of policy, to allow a plaintiff a recovery without a showing of harm. The nature of libel, however, is such that real harm may be impossible to prove and, in particular, may not manifest itself in the financial damage which is necessary to claim special damages. Furthermore, to require proof of special damage would prevent a libel victim from bringing an action to clear his name, even if he wants no money damages.

Finally, it has been argued that the requirement of proof of special damages is necessary to prevent self-censorship by media publishers who might make statements which are innocent in themselves but which become defamatory because of extrinsic facts known to the reader but not to the publisher. It is submitted that this argument is without merit. Self-censorship will not occur unless a publication is not innocent on its face or unless the publisher is aware of the extrinsic facts since otherwise he would probably not suspect an item to be defamatory.

However, even if Sharratt would have created problems for innocent publishers, any such potential problems have been eliminated, at least where the media is concerned, by the United States Supreme Court in Gertz v. Robert Welch, Inc., decided two months after Sharratt, which established that the damages aspects of cases such as Sharratt cannot apply to cases involving freedom of the press.

Gertz arose out of the defendant's publication of an article in American Opinion, an outlet for the views of the John Birch Society, accusing the plaintiff, an attorney, of being a communist and the architect of an alleged "frame-up" of a police officer on murder charges. The Supreme Court held that a plaintiff who is not a public official or a public figure cannot be held to the strict standards of proof applied in New York Times Co. v. Sullivan and Curtis Publishing

34 376 U.S. 254 (1964). New York Times held that a public official cannot recover for libel unless he can prove that the defendant published the defamatory statement with knowledge of its falsity or with reckless disregard of whether it was false or not.
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Co. v. Butts, but rather that he has a choice. He must prove either: (1) that the defendant published a defamatory falsehood about him with knowledge of its falsity or in reckless disregard for its truth or falsity, in which case the plaintiff may recover presumed damages, or (2) that the defendant was negligent in publishing the defamatory falsehood and that this publication caused actual damage to the plaintiff. Any impact which the damages aspect of Sharratt might have had on cases deriving from media news stories is thus clearly eliminated.

The question of whether the damages aspect of Sharratt retains any vitality depends on whether Gertz is extended to apply to cases not based on media news stories. The various opinions in Gertz give little support to the likelihood of such an extension. Although the majority opinion never says that it is restricting its broad holdings to media cases, it does refer to the projected defendants as “publishers and broadcasters.” Furthermore, the concurring opinion of Justice Blackmun and the dissent of Justice Brennan repeatedly refer to “the media” when they speak about the interests of possible defendants. Justice White, on the other hand, said in his dissent that the decision requires the plaintiff “in each and every defamation action” to prove culpability on the part of the defendant, possibly implying that not only media cases are involved. Justice Douglas in his dissent did not address this issue, but stated that the First and Fourteenth Amendments render all libel actions unconstitutional. The opinions of a significant majority of the Court thus support the probability that Gertz will not be extended to non-media cases.

The contention that Gertz does not eliminate the impact of Sharratt in non-media cases is strengthened by the way the commercial speech doctrine has been applied in non-media libel cases by several of the United States Circuit Courts of Appeals. The strict standards applied in New York Times and Curtis Publishing Co. were held not to apply in those cases. Several of the United States Circuit Courts of Appeals have drawn distinctions in libel cases between private subscription credit reports and other published statements. In Grove v. Dun &

35 388 U.S. 130 (1967). This case extended the New York Times standard of proof to public figures who were not public officials.
36 418 U.S. at 346.
37 Id. at 349. This is also known as “New York Times” or “actual” malice. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
38 418 U.S. at 349. Although the Court held that such a plaintiff could also recover punitive damages, id., a plaintiff in Massachusetts cannot recover punitive damages in actions of libel or slander. G.L. c. 231, § 93.
39 418 U.S. at 347, 350.
40 See, e.g., id. at 343.
41 Id. at 353.
42 Id. at 361.
43 Id. at 370.
44 Id. at 358-60.
Bradstreet, Inc.,45 the Third Circuit held that the defendant's publication, which was a private subscription credit report, was not entitled to the extended constitutional protection of the standard of proof established by the Supreme Court in media cases.46 The court felt that there was a rational distinction between "a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience."47

The first basis for the court's decision in Grove was its holding that the credit standing of a small brick and tile brokerage company was not a matter of public interest under Rosenbloom v. Metromedia, Inc.48 The second basis of the court's decision was that such a publication was a different kind of medium and hence did not merit such protection.49

This decision by the Third Circuit has been followed by the Fifth,50 Seventh51 and Tenth52 Circuits in other cases involving private subscription credit reports. The Court of Appeals for the Fifth Circuit pointed out that the second basis for the Grove decision and those which followed it really derives from the lesser degree of protection given commercial speech53 under the 1942 case of Valentine v. Chrestensen.54

If these cases are still good law, Gertz probably will not be held to apply to cases such as Sharratt when the scope of the publication is limited and the publication is a commercial one dealing not with public economic policy but with the making of private economic decisions.55

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49 438 F.2d at 437.
51 Oberman v. Dun & Bradstreet, Inc., 460 F.2d 1381 (7th Cir. 1972).
54 316 u.s. 52 (1942).
55 See Note, First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants, 47 S. Cal. L. Rev. 902 (1974). But see Adey v. United Action for Animals, 361 F. Supp. 457 (S.D.N.Y. 1975), aff'd, 493 F.2d 1397 (2d Cir. 1974), in which the district court refused to recognize an exception to First Amendment protection in libel of a public official for "private libel." Plaintiff, a scientist and consultant to NASA, sued United Action for Animals (UAA) for allegedly libelous statements attacking his character and professional qualifications with respect to his involvement in the space program. The statements appeared in a UAA publication mailed to members and other specially selected recipients, and was not distributed publicly. 361 F. Supp. at
However, there is considerable basis for the argument that these decisions may soon be overruled. First, the Supreme Court in Gertz refused to follow the most widely-held understanding of its decision in Rosenbloom v. Metromedia, Inc. The Court in Gertz held that the conditional constitutional privilege given in New York Times and Curtis Publishing Co. to a newspaper or broadcaster who publishes a defamatory falsehood about a public figure will not be extended to defamatory falsehoods about private persons concerning matters of public interest. Thus the first basis for the circuit court decisions has been eliminated.

Secondly, there have been Supreme Court cases since Valentine which affirm the doctrine giving lesser protection to commercial speech, but also seem to call the future viability of that doctrine into question. Valentine itself was a short, unanimous opinion upholding an ordinance which prohibited the distribution in the streets of commercial and business matter. It contained the bold statement that “[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” There is no mention of why this is so, and no citation to earlier cases.

Seventeen years later, in Cammarano v. United States, the Court held that no First Amendment question was presented by a regulation denying a tax deduction for sums expended in the promotion before the legislature of measures which would economically benefit the individual taxpayer doing the promoting. Justice Douglas, concurring on the grounds that deductions are a matter of grace, not of right, called for a reconsideration of Valentine on the grounds that the First Amendment is not restricted to the expression of political ideas and philosophical attitudes or to the arts, but rather “comprehends every sort of publication which affords a vehicle of information and opinion.”

Later still, the Supreme Court denied certiorari in Grove v. Dun & Bradstreet, Inc., mentioned above. Justice Douglas dissented from this
denial partly because of his belief that neither the commercial form nor the commercial content of a publication make it less deserving of First Amendment protection. He reasoned that speech directed at private economic decision making cannot be less important than political expression. "When immersed in a free flow of commercial information, private sector decision making is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources." While he does not doubt that an adverse credit rating can cause injury, his position is that the injured party "can inform his suppliers and creditors that a report is misleading." Justice Douglas may be alone in this view, but it has been suggested that his analysis and reasoning throw some doubt on the present vitality of Valentine. 

Finally, in 1973 in Pittsburgh Press Co. v. Pittsburgh Commission on Civil Rights the Supreme Court upheld against First Amendment challenge an ordinance which had been interpreted as forbidding newspapers to allow employers "to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions . . . ." The Court based its holding upon an application of the commercial speech doctrine first enunciated in Valentine. However, the Court took pains to limit that doctrine, pointing out that under New York Times Co. v. Sullivan, not all advertisements are commercial speech. "The critical feature of the advertisement in Valentine . . . was that . . . it did no more than propose a commercial transaction . . . ." An advertisement expressing an opinion on a public economic issue would be protected.

The argument was made by petitioner newspaper in Pittsburgh Press that commercial speech should receive more protection than Valentine would suggest, on the basis that "the exchange of information is as important in the commercial realm as in any other." The Court responded:

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is . . . illegal commercial activity under the Ordinance. We have no doubt that a

65 Id. at 905. Justice Douglas also based his dissent on his belief that all libel actions are unconstitutional under the First and Fourteenth Amendments. Id. at 899.
66 Id. at 905.
67 Id. at 906.
70 Id. at 379.
71 Id. at 384-89.
72 Id. at 384.
73 Id. at 385.
74 Id.
75 Id. at 388.
newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics . . . . . . Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.76

The Court thus chose to make its decision on the limited ground of illegality of what was being advertised, rather than by generally and broadly upholding Valentine without discussion, as it did in Cammarano. Therefore, while Valentine and the credit rating cases which depend on it have not yet been overruled, there may be room, given the language of the Court, for the inference that the commercial speech doctrine may be due for reconsideration. Any such reconsideration may have as one of its results the application of Gertz to all libel actions and hence the total elimination of the damages aspect of Sharratt.

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76 Id. at 388-89.