THROUGH A GLASS, DARKLY

clar•i•ty \ 'klar- t-e \ n [ME *clarite*, fr. L *claritat-claritas*, fr. *clarus*] : the quality or state of being clear.

In *New York Times v. Sullivan*,[1] the U.S. Supreme Court set forth the standard of proof required of a public official in a defamation action. Actual malice, the Court stated, must be demonstrated with "convincing clarity." Ten years later, in *Gertz v. Robert Welch, Inc.*,[2] the Court described the same standard, but with slightly different terminology—recovery by a public official would be permitted only on a showing of "clear and convincing proof" of malice.

During the past dozen years many courts—state and federal—have applied the *New York Times* and *Gertz* standard (some even noting that "clear and convincing" and "convincing clarity" are essentially interchangeable terms), but two courts—the Vermont and Hawaii Supreme Courts—have synthesized the variant descriptions into a remarkably redundant hybrid. Actual malice, both courts have declared, must be proved with "clear and convincing clarity."[3]

Again during the last term the Supreme Court reviewed the *Times/Gertz* standard. In *Anderson v. Liberty Lobby, Inc.*,[4] it indicated that "clear and convincing" and "convincing clarity" were one and the same. And once again another court took the next step.

Recently, in *Ashby v. Hustler Magazine, Inc.*,[5] a federal appellate court confronted the "actual malice" standard and revived the Vermont/Hawaii synthesis. Judge Krupansky cited *Anderson v. Liberty Lobby* for the principle that "the trial court must determine if the plaintiff has produced sufficient evidence from which a reasonable jury could find that the plaintiff had demonstrated actual malice with clear and convincing clarity."

By now it should be clearly and unambiguously clear: proof of malice with muddy, murky or turbid clarity is insufficient. The re-

1. 376 U.S. 254, 280, 285-86 (1964).

2. 418 U.S. 323, 342 (1974).

3. Burns v. Times Argus Ass'n, Inc., 139 Vt. 381, 388, 430 A.2d 773, 777 (1981); Fong v. Merena, 66 Hawaii 72, 74, 655 P.2d 875, 876 (1982).

4. 106 S. Ct. 2505, 2512 (1986).

5. 802 F.2d 856, 860 (6th Cir. 1986).

quirement of proof by "clear clarity" is—according to the Sixth Circuit—the law of the land.

Thomas A. Woxland[6]

6. Assistant Director, University of Minnesota Law Library.