LDRC Libel Defense Resource Center

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INSIDE THIS ISSUE

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LDRC Juror Attitudes Study I

Background

Over the past several years LDRC has systematically monitored the results of jury trials in media libel actions. Indeed, LDRC data documenting the fact that jurors have been voting against media defendants in the great majority of recent libel trials, has been one of the central features of the ongoing debate over the impact of libel claims on freedom of speech and of the press in the United States. Jury results have showed some improvement over the past two years -- down from a loss rate approaching 90% during the period 1980-82, to a rate closer to 60% during the period 1982-84. But the loss rate is still unacceptably high -- 75% on average over the past four years -- and losses continue to result in staggeringly large initial juror damage awards, averaging in excess of $2 million per award.

Ironically, despite LDRC's systematic tracking of empirical data on the objectively observable results of jury actions in media libel cases, little is systematically known about the actual, subjective attitudes of jurors in such cases. Why do they vote against the media defendant and for the libel plaintiff in 3 out of 4 cases? Why do they award mega-damage awards including huge awards of punitive damages? It is to shed light on these and related issues, of fundamental importance to an understanding of current trends, that LDRC has embarked upon a series of jury attitude studies, based upon interviews with jurors who have served in actual libel cases.

What follows is a report on the first of these studies. In order to ensure juror confidentiality, and in order to protect the integrity of the litigation process -- an appeal is expected in this first case under study -- the materials that follow do not specifically identify either the litigants or the jurors. It is nonetheless believed that the following report adequately describes the essential character of the litigation as well as the attitudes of the jurors who chose to impose liability and award substantial damages against the defendant newspaper.

Jury Study I

This first LDRC juror attitude study was undertaken in a case that resulted in an adverse jury verdict and an award approaching $1 million, something under half of it denominated as "actual" damages and the greater half, "punitive" damages. The plaintiff was a public official, a prominent former prosecuting attorney. The defendant was a major daily newspaper, generally considered to be a top-flight publication in terms of editorial quality and content.

The libel case that went to trial was actually the second, and in a sense the lesser, of a pair of cases brought against the newspaper by the same plaintiff. Plaintiff was apparently of the view that he and his prosecutor's office was being covered inaccurately and unfairly by the newspaper. In a series of articles, published over a period of at least several months, the newspaper reported on a series of related allegations by other officials suggesting that plaintiff and his office were ineffectual, were politically motivated in their prosecution policy and were soft on white-collar criminals.

Plaintiff's first case was brought based on an article published after plaintiff's resignation as prosecutor in which knowledgeable official sources were quoted as suggesting that if plaintiff hadn't voluntarily resigned he would have been asked to resign by higher authorities.

While plaintiff's first case was still pending, the newspaper published another story erroneously stating that plaintiff's successor, at a press conference, had made specific reference to allegations about plaintiff's allegedly less-than-vigorous pursuit of white-collar crime when suspects were politically well-connected. In fact, plaintiff's successor had not mentioned plaintiff at all at the press conference and his remarks were in fact only generally about politics and prosecutions with no reference to accusations regarding plaintiff. The newspaper contended that the error resulted from an honest mistake by a re-write reporter under deadline pressure who erroneously linked plaintiff to his successor's general comments and then simply inserted as background material the prior allegations about plaintiff based upon the editor's knowledge of the newspaper's prior publications on the subject of plaintiff's performance as prosecutor. When the on-scene reporter read the article the day it appeared she immediately recommended and wrote a correction which was published two days later in an edition with wider circulation than the original publication.

The newspaper moved for summary judgment in both actions. The trial court granted both motions and these orders were affirmed by an equally divided intermediate appellate court. The state's highest court affirmed the grant of summary judgment in the first action. It relied on the fact that one of the defendant's sources for the "resign or be fired" article had come forward -- indeed, had come forward at a deposition noticed by the plaintiff. The court found that defendant had a right to rely on and publish this high official's apparently authoritative statements, absent proof of knowledge of falsity and despite the newspaper's awareness of denials by plaintiff, plaintiff's office and other highly-placed officials. However, the state supreme court reversed the grant of summary judgment in the second action. In a brief section of its opinion, that appears to confuse the fair report privilege with the constitutional actual malice rule, the Court held that the newspaper's conceded error in mistakenly embellishing it's report of the press conference with clearly false and defamatory materials about plaintiff was sufficient to defeat a motion for summary judgment on the issue of actual malice. The court refused to consider, for purposes of summary judgment, the "testimonial" affidavits of the newspaper's reporters in which each of them denied that they ever, in fact, were aware of the falsity of the article as of the time it was published.

At trial, defense counsel had to acknowledge, of course, the central error of the second publication -- that plaintiff and accusations about plaintiff had not been specifically mentioned at the press conference, that the re-write reporter made a mistake and that, in fact, the newspaper voluntarily corrected the error. Having acknowledged the error the defense strategy was, essentially, to defend on the issue of actual malice. The defense argued strenuously that this was not a knowing fabrication; this was an honest error. The re-write reporter and the reporter testified as to how the mistake came to be made and then to be voluntarily corrected. In addition, because the re-write reporter had injected the background material concerning "accusations" about plaintiff into his report, and because plaintiff sought to prove that the underlying accusations were false, defense counsel also had to deal, in some manner, with the issue of the truth or falsity of the "accusations" about plaintiff's performance in office. Defense counsel attempted to tread the fine and difficult line between becoming an advocate of the truth of the underlying accusations and avoiding any concession that they were false. The defense theme was that, true or false, these accusations were in fact being made by

highly-placed public officials and the newspaper was simply reporting on them. Defense counsel spent a fair amount of time introducing into evidence stories from the defendant newspaper -- as well as from other local publications -- reciting these various accusations as proof that, true or false, they were not merely figments of the newspaper's imagination.

On the other side, plaintiff's attorney, having the benefit of defendant's necessary concession of error in linking plaintiff to the press conference, sought to prove falsity and actual malice by casting doubt on the motives and integrity of the newspaper and its sources. At first, plaintiff's counsel attempted to suggest that the reporter had a grudge against the prosecutor because he refused, as a matter of prosecutorial ethics, to leak information to the newspaper. When that strategy failed to make headway, because of the reporter's obvious professionalism and integrity and because of proof that the prosecutor may well have selectively leaked information on other pending cases when it suited his purposes, he shifted ground. Instead, he hammered away at his client's critics, claiming that all of the accusations were based on rumor, supposition, political motivation and not hard fact. He also sought to put questions in the jurors' minds about how the erroneous information in the press conference story could possibly have been inserted unless someone consciously intended to put it in, without justification, in order to harm the plaintiff. Clearly he argued, the newspaper was "out to get" the plaintiff, by consistently printing unsupported, politically-motivated accusations, even when they hadn't been made. As to the correction, this was characterized as simply part of a continuing willful effort by the newspaper to repeat accusations, without any genuine apology, and its placement in an edition with greater circulation was said merely to compound the harm.

On the issue of damages, a stipulation was entered into that plaintiff (who was apparently successful in private practice after resigning as prosecutor -- despite the alleged defamation) was not claiming loss of earnings, but only harm to reputation and related emotional distress. He was even allowed to testify as to the distress that his family and young son had allegedly suffered. On the issue of punitive damages, plaintiff was allowed to introduce evidence of the multi-million dollar worth of the newspaper.

The judge's instructions were actually reasonably good from the defense view, all things considered. Adequate definitions of actual malice, burden of proof and clear and convincing evidence

were provided. Moreover, in addition to the basic legal elements, the judge provided, at defense counsel's request, further elaborations instructing that a mere mistake or lack of good judgment would be insufficient proof of fault; that misquotation or erroneous assumptions were not enough; that mere negligence or sloppiness would not be enough and that hot news could justify more error than might otherwise be acceptible. Finally, the jury was instructed that it could return a verdict based upon the approval of 10 out of its 12 members.

The jury was excused at around 5:00 P.M. and thereupon deliberated for a total of about three hours into the evening, including dinner and a return to the courtroom for a re-reading of the four basic elements of defamation as outlined in the judge's instructions. The judge refused to re-read the entire charge and did not re-read the elaborations on what would or would not constitute sufficient fault. At approximately 8:00 P.M. the jury returned to announce its unanimous verdict in favor of the plaintiff and its award of actual and punitive damage approaching a million dollars.

The LDRC Jury Study

LDRC undertook to study the attitudes of each of the jurors in this case, including the two alternate jurors. Briefs, opinions and the available portions of the trial record* were studied to achieve an independent understanding of the issues, arguments and proofs in the case. A list of the jurors was obtained which provided not only names and addresses but also certain minimal demographic data (e.g., age, marital status, occupation, educational background) of a kind typically provided to attorneys from the court clerk's office regarding all jurors on the venire. Then, using names and addresses, telephone numbers were located for ten jurors, including both alternates. Letters were written to all of the jurors explaining the nature of the LDRC study, asking for their voluntary coperation and promising confidentiality. The ten jurors with numbers were told to expect a followup telephone call. The four jurors without telephone numbers were asked to return a self-addressed reply card with their telephone numbers.

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* Because the trial was only recently completed, the full trial record was not available at the time of the juror interviews. Only the summations, and the judge's instructions were available.

Seven out of the ten jurors (five regulars and both alternates) whose numbers were initially available agreed to meet with LDRC for an interview. These interviews were conducted either in the jurors' homes or their offices and generally lasted between 1 1/2 to 2 hours. A 25-page written script was loosely followed by the interviewer and the interviews were also tape recorded. After this first round of interviews, additional efforts were made to contact the other jurors. As a result, two other jurors were interviewed by telephone. In sum, a total of nine jurors were interviewed in the study -- 7 out of 12 regular jurors and both alternates. Of the five jurors not interviewed, three were spoken to by telephone but declined to be interviewed for a variety of stated reasons; the final two jurors never responded to a series of letters. All of the interviews were conducted within three to four months after the conclusion of the trial, so loss of memory of significant details was not generally a problem in this Study.

The Jury's Verdict

(i) Liability

It appears that the jury deliberated for no more than half an hour on the issue of liability, a portion of that time taken up with a return to the courtroom for a re-reading of portions of the jury instructions. An initial poll among the jurors revealed that, at the outset, nine of the jurors favored plaintiff; only three initially favored the newspaper. LDRC interviewed five of the pro-plaintiff jurors and two out of three of those who initially voted in favor of the defendant. Both alternates indicated that they favored plaintiff as of the time they were discharged. Curiously, although all of the jurors officially joined in the unanimous verdict for plaintiff, both of the initial dissenters interviewed by LDRC indicated that they in fact never changed their views as a result of the brief deliberations on the liability issue. Apparently, they both joined in the verdict simply to make the result unanimous. In any event, in this case under state practice ten jurors could have constituted a binding, non-unanimous verdict.

While each juror expressed his or her views on liability in a somewhat different fashion, the jury's overall view on the liability issue can to some extent be generalized. Most of the jurors went into the jury room with a basic pro-plaintiff reaction to the factual dispute over the truth or falsity of the underlying "accusations" about plaintiff and this basic view decisively colored their brief consideration of the liability issue. In effect, the defense had been drawn into battle over plaintiff's integrity, had become identified with plaintiff's accusers and had quite simply lost the case when it failed to do what it never really tried to do -- i.e., conclusively to establish the truth of those accusations. The jury just didn't believe that the accusations against the plaintiff were true and they held this against the newspaper. Almost all of these jurors failed to distinguish between this factual conclusion and what the defense had argued was the very separate issue of whether the newspaper was aware of this alleged falsity.

To the extent the jurors, individually, or during the deliberations, attempted to develop a link between falsity and knowlege of falsity, they bridged the gap based upon a loose theory that the newspaper was, or must have been, "out to get" the plaintiff. Since, however, a number of the jurors believed that the reporter had attempted to be accurate and only a few did not believe the re-write reporter's assertions of honest mistake, this left those jurors who considered the issue to rely on a vague theory that "someone" at the newspaper -- possibly other editors who had not testified at the trial -- had either directly or indirectly influenced, caused, or at least not prevented, publication of the defamatory article. Perhaps because most of the jurors were quite convinced of their basic factual view of the case, perhaps because of the brevity of the liability deliberations, perhaps because of the judge's failure to re-read the detailed distinctions on the nature of actionable actual malice, perhaps because of the lack of need for a unanimous verdict by convincing hold-out jurors, or some combination of these factors, there was never really any serious effort to isolate or define the precise locus of actual malice within the defendant newspaper and then to consider whether this actual malice had actually been proven by clear and convincing evidence.

(ii) Damages

The question of damages took up the lion's share of the jury's deliberations. A number of jurors complained that they had been given little guidance to evaluate the amount of damages. Although a few jurors didn't believe plaintiff had suffered significant damages, most of the jurors did feel that more than nominal damages were appropriate and most wished to award a substantial punitive award to punish (and deter) the newspaper for (and from) what they felt was its improper conduct. However, when, at the outset of the damages phase, one juror suggested an award of $2 or $3 million, most of the jurors professed shock and disagreement with such a large amount. Nonetheless, the jurors ultimately agreed on an award approaching $1 million.

The jury reached its verdict arithmetically. Each juror wrote a suggested lump sum damage amount on a piece of paper. Notably, a few of the jurors who would have favored a far lower award silently increased the amount they initially recorded, in the belief that a lower amount would be rejected by the other jurors. Since only the one highest and one lowest amount were eliminated, and the remaining sums were averaged, this had the effect of increasing the resulting arithmetic award, contrary to the initial views of those jurors. When one juror recalled that the judge's instructions required that actual and punitive damages bear some reasonable relationship to one another, the jury agreed to split the resulting lump sum verdict amount to approximately 45% denominated as actual damages and 55% as punitive damages. While this process of arriving at a damage award would hardly appear to be ideal it is nonetheless not possible to conclude that the award was entirely corrupt. The resulting average, approaching a million dollars, was agreed upon and appeared to satisfy most of the jurors interviewed. Most of the jurors felt that there had been some actual damage, although no one really had any specific piece of evidence as to the amount of such actual damage because in fact they had been provided with no such evidence during the trial.

In sum, it is fair to conclude that the primary basis in the jurors' minds for the huge award was punishment based upon the jurors' view that the newpaper had engaged in willful and reprehensible conduct.

Attitudes toward the Media

There has been much speculation as to whether the average juror will generally be biased against the media defendant in a libel trial. Certainly this first study, of a sampling of one jury, will not definitively answer this question. But the limited data from this study does shed at least some light on this important issue.

Only two of the nine jurors interviewed admitted to having specific negative feelings, pre-dating the trial, about the defendant newspaper. One of these noted his view that the media in general, including the defendant, were becoming too opinionated and unreliable, although he did continue to read defendant's newspaper. The other juror viewed this issue in terms of "liberal" vs. "conservative" media. He found the defendant's newspaper to be too liberal for his taste and had specifically concluded that the newspaper had been "out to get" other conservative politicians whom he favored. He had preferred to read what he considered to be the city's "conservative" newspaper. Interestingly, however, there did not in general seem to be a strong correlation in this limited study between political views or affiliations and attitudes toward the media.

Of the other seven jurors interviewed, four generally read the defendant's newspaper, while three relied only on smaller suburban publications or less news-oriented general interest magazines. None of these seven specifically admitted to pre-existing feelings against the defendant, and four of the seven (including the two who initially voted for defendant) felt that the media do a basically good job and are basically fair, although they recognized the possibility of errors being made. The other three seemed to place more emphasis on the potential of the media to make mistakes and to be unfair.

Despite this mix of views, not all entirely negative toward the media, at least six of the seven jurors interviewed who voted (or would have voted) against the defendant, were willing to believe that a respected big city daily newspaper might be "out to get" a local public official and, as a result, might willfully publish false material, harmful to the plaintiff, with knowledge of its falsity. Moreover, these same jurors were willing, with relative ease, to translate these negative perceptions of the media defendant into a near-million dollar damage award which, almost to a person

and regardless of the strength of the general concerns about bias or unfairness in the media, the jurors intended to infllct punishment and deterrence against this publisher and the media in general.

Demographics*

Perhaps because of the relatively small sampling, perhaps because of the relative homogeneity of this jury, composed primarily of blue collar/middle class suburban jurors, few with post-high school education, or perhaps because most of the jurors became so powerfully persuaded of a basic factual pattern and story which they felt favored the plaintiff, there do not appear to be many significant variations in views that can be meaningfully correlated to demographic variables among the jurors.

(i) Education

The level of the jurors' education does not appear to have meaningfully correlated with their voting. Only four jurors, including one juror to whom we did not speak, were college educated. The remaining jurors, with the exception of one woman to whom we did not speak, had completed high school. Of the three college educated people with whom we spoke, one was one of the three dissenters, one was the person who voted to give the highest damage award, and one voted for plaintiff but wanted to give a relatively low damage award of $100,000. This is not to suggest, however, that a jury composed of perhaps more college educated individuals might not have been somewhat more likely to appreciate the subtle distinctions upon which the defense was relying, or that a jury composed of more persons used to analyzing problems might not have been inclined to seek a more complete and carefully thought through theory of the case, particularly vis-a-vis the issue of actual malice.

* As noted above, some of this data was available to counsel on computer printouts provided by the court clerk for all members of the jury venire panel. Some of these observations are based on the juror interviews. With regard to information developed during the voir dire was apparently minimal. Voir dire was conducted primarily bythe judge. Although the defense attorneys had submitted a list of written questions, most of these were not used by the trial judge and the resulting voir dire was anything but searching. It provided little opportunity to educatate the jurors to the issues in the case or even meaningfully to challenge or strike jurors on the venire panel. The jury selection began the first morning of the trial and the jury had already been seated before lunch.

(ii) Sex

The sex of the jurors does not appear to have been correlated with their voting. Among the women, for example, one woman was a dissenter, one voted to give the highest damage award, and one voted for a more moderate damage award.

(iii) Age

Once again, the age of the jurors does not appear to have correlated definitively with their voting. For example, five jurors, including three to whom LDRC did not speak, were at least 60 years old. In this group was at least one of the three dissenters and one person who voted to give the highest damage award. On the other hand, the two jurors in their twenties (both alternates), both favored plaintiff; one of whom would have given over $1 million and one who would have given only $20,000. Of the three jurors in their thirties, (one of whom favored defendant and two of whom favored plaintiff), one favored a high damage award, one favored a relatively low damage award of $100,000.

(iv) Occupation

Again, no apparent correlation. Of the two dissenters interviewed, one was a retired secretary, the other an engineer. On plaintiff's side were arrayed housekeepers and blue collar workers as well as an executive and two technicians.

(v) Political Affiliation

No apparent correlation. One of the two dissenters was a conservative republican; the affiliation of the other is not known. Those voting for plaintiff were all over the spectrum, including independents, moderates, republicans and democrats, liberals, moderates and conservatives. Of course, overall the jury was on the conservative side and it is, again, unclear what effect a distinctly liberal jury would have had on the jury's overall attitude toward a case such as the one studied.

Attitudes toward the Personalities and Evidence in the Case

In evaluating the juror's attitudes, LDRC also sought to assess to what extent personalities -- of the judge, or the attorneys, or the parties or the witnesses -- and also documentary evidence were or were not issues in the case.

(i) The Judge

Putting aside his substantive rulings, or any subtle influences not consciously noted by the jurors, from all indications the judge was universally viewed by the jurors as fair and impartial. The record revealed that defense counsel registered more objections with the judge than plaintiff's counsel but, at least according to the jurors, the trial judge still managed to maintain a position of neutrality.

(ii) The Attorneys

To the extent that the jurors were not neutral on the subject, those who expressed a preference between the two attorneys generally favored plaintiff's counsel, at least as to style. While the majority of jurors found both attorneys well prepared, three jurors expressed a clear preference for plaintiff's counsel while three others liked them both, but favored plaintiff's counsel slightly. One juror, an alternate, favored defense counsel for his aggressive style, but most of the jurors who favored plaintiff's counsel stressed his calmer, more "low-key" style. Five jurors expressed no preference regarding counsel.

Despite the results of the attorney popularity contest, only one juror admitted to being significantly influenced by her preference for plaintiff's counsel -- indeed, for whatever reason, this juror admitted to having formed her preference on first sight from the moment defense counsel walked into the courtroom. On the other hand, even one of the dissenters preferred plaintiff's counsel and was disappointed that defense counsel had not, in her view, more effectively proven the accusations against plaintiff. While a few of the jurors noted that defense counsel was doing more objecting -- a few specifically recalled and mentioned counsel's objection to a question asked by the judge -- they did not seem to hold this against the defense side of the case.

A number of jurors did become irritated, however, at the length of sidebar conferences, although they again did not appear to blame one side or the other for this. A number of jurors also became either bored or irritated at the lengthy introduction of a long series of newspaper articles by defense counsel, of which few, if any, of the jurors appreciated the relevance. A number of jurors also expressed the feeling that defense counsel seemed to be "on the defensive," but it is not clear to what extent this perception was simply a function of the jury's failure fully to comprehend the limited significance of the concession of error in the press conference article, or whether this "defensiveness" was in evidence as a matter of style throughout the case. In the end, given the majority of juror's strong acceptance of plaintiff's factual view of the case, it is difficult to determine to what extent the juror's perceptions of counsel were influenced by reaction to the factual presentations and to what extent their view of the facts was influenced by counsel's persuasiveness, style and approach.

(iii) The Parties

Given the "unanimous" outcome of the case against the defendant, it is perhaps not surprising that plaintiff (and his supporting witnesses -- see below) generally scored well with the majority of jurors. What is perhaps more surprising is how well defendant's reporter and re-write editor were viewed, personally, considering that the jury ultimately found malice or reckless disregard on the part of the newspaper.

Most jurors and the two alternates liked plaintiff and found him believable. Only two jurors, one of the dissenters and one who favored a relatively low damage award ($100,000), expressed any significant reservations about him. One of the dissenters did not believe him and thought he "looked guilty." The juror who favored a relatively low verdict had mixed feelings about him. This is not to suggest that plaintiff's testimony was fully accepted. In particular, a number of jurors expressed skepticism about plaintiff's damage claims and a number observed the apparent disparity between plaintiff's claims of injury and his well-heeled appearance. Also, a number of the jurors -- even those who seemed to like plaintiff -- were uncertain about the question of plaintiff's role in the leaking of information. But apparently these doubts were not enough to shake the jury's basic conclusion that the accusations against plaintiff were essentially false or

unproven. Indeed many of the jurors who expressed respect for plaintiff, and who voted for him, volunteered the observation that they didn't believe he was by any means perfect. This was such a consistently repeated response that one suspects it was a theme stressed by plaintiff, or his counsel and witnesses, throughout the trial.

The defendant was present at the trial primarily through its counsel and two key witnessess -- its reporter who covered the press conference and the re-write reporter. Interestingly, as noted, despite the adverse verdict, most of the jurors responded favorably to these two defense representatives.

As might be expected, both jurors interviewed who favored the defendant viewed favorably both the reporter and the re-write reporter. But even among the jurors interviewed who favored plaintiff, a number found the reporter to be basically believeable, with some of these even expressing the view that she was in fact a good or very competent reporter. Perhaps more significantly, only two of the jurors interviewed expressed the view that it was the reporter who was "out to get" the plaintiff. With regard to the re-write reporter, again a substantial number of the jurors believed his testimony that he had simply made an honest error. Only two of the nine jurors interviewed did not believe his testimony in this regard. These two jurors linked him somehow to their belief that the newspaper was "out to get" plaintiff. The re-write reporter also generated a good deal of sympathy among the jurors, with three or four of them specifically stating that they felt sorry for him, and did not blame him for the defamation. Yet most of those who felt sorry for the re-writer still concluded that his article was published with actual malice. As noted, these jurors blamed editors or "others" at the newspaper who they felt "set up" the re-writer, misled him. Interestingly, the two alternate jurors, while they did believe the re-writer simply made a mistake, seemed to feel that he nonetheless was subject to blame for his role in the publication. It is possible this suggests that during the brief jury deliberations a consensus developed among the pro-plaintiff jurors that, while the re-writer made a mistake, not he but the others were ultimately to be blamed for the publication.

(iv) Plaintiff's Witnesses

As noted, plaintiff's factual story carried the day with most of the jurors so decisively that they did not tarry long over the legal issues. A central reason for this, in addition to plaintiff's own credibility with the jurors, was apparently the testimony of

plaintiff's key witness. These supporters, former colleagues from his prosecutor's office and two judges who served essentially as character witnesses, made a powerful and clearly recalled impact on most of the jurors. In contrast, as noted below, defendant's witnesses seemed to have impressed the jurors far less. Although personalities may also have played a role in this, what emerges most clearly from LDRC's interviews is that the story told by plaintiff's witness made more sense to the jurors and more strongly supported a theory of the case that the jurors found easier to believe and understand.

Plaintiff's story was of a prosecutor and an office trying to go about its business as carefully and professionally as possible. Accusations against the office and the prosecutor were argued to be vague, politically motivated, unsupported and reckless charges that oversimplified a complex situation and that stood in the way of good people trying to do an important and difficult job. The demeanor and personality of plaintiff's witnesses apparently meshed well with this story. According to most of the jurors, his colleagues appeared calm, bright, professional and credible and they gave the jury -- as one juror put it -- a civics lesson. Interestingly, although the prominent judges called as character witnesses didn't appear to hurt plaintiff's case, many jurors thought their testimony was either duplicative or overstated. Apparently, these jurors were already convinced and were in need of no further, generalized support for plaintiff, particularly where it had the ring of overstatement or partisanship.

(v) Defendant's Witnesses

Defendant's witnesses simply did not fare nearly as well as plaintiff's in either persuasiveness or recognition even though -- at least in theory -- they were equally professional, prominent and qualified attorneys and prosecutors whose judgment had apparently been that plaintiff's office was not as effective or as free from question as plaintiff's witnessess had testified. Most jurors did not question the honesty of defendant's witnesses. However, either because of effective cross-examination or because their story was more difficult for them to support or for the jury to believe, or some combination of these or other factors, their testimony simply did not convince the jury and did not even stick with them. The jurors' recall of defendant's witnesses was markedly less sharp than of plaintiff's. In fact not only did the defense lose the battle of choice between stories of the two sets of witnesses concerning the truth or falsity of the underlying accusations, but the defense also

lost the war because, along with this defeat, somehow the message was missed that the newspaper did not intend, or need, to sponsor the ultimate truth of these witnesses' accusations.

Two other factors regarding defense witnesses may also have had a bearing upon the defense's ultimate inability to convince the jury of its view of the key factual issues in the case. The first relates to the reluctant battle over the truth or falsity, or at least the substantiation, of the underlying allegations about plaintiff's performance as prosecutor. A strong theme developed by plaintiff's counsel was to ask of each of the defense witnesses for proof of even one specific allegation of wrongdoing. The jury apparently concluded that the defense witnesses had failed to provide adequate substantiation for these charges. The jury also apparently concluded that this failure was relevant to plaintiff's defamation claim and that the failure should be charged against the defendant. Additionally, plaintiff's counsel successfully suggested to the jury that there were improper political motives for what he argued were these vague, baseless and unsupported allegations.

Thus, despite the fact that few jurors expressly disbelieved the fact witnesses that the defense did put on the stand, plaintiff's counsel was nonetheless able to cast doubt on the authoritativeness of the witnesses' testimony and also to raise questions in the jurors' minds about the motives of certain absent witnesses. This wasn't done so much in the heavy handed manner of asking the jury "where's witness 'Doe'?" Rather, the absence of these other witnesses simply enabled the jury to build its own scenario of intrigue and malicious intent without having to confront additional live witnessess who -- assuming they would have made themselves available to the defense, and assuming they could have believeably denied and counteracted these suggestions -- might have made such loose suspicions more difficult for the jurors to entertain.

Similarly, while not strongly articulated by all of the jurors, the absence of other more highly-placed editors, executives or other witnesses from the newspaper may also have damaged the defense case in general and in particular on the issue of actual malice. To some extent this may have been unavoidable since apparently no one else at the newspaper was in fact directly involved in the preparation of the allegedly defamatory news story. Nonetheless, the absence of other more highly-placed newspaper witnesses arguably took away a certain amount of personality and sympathy from the newspaper in the jurors' eyes, particularly in

light of the personable impression given by plaintiff in the courtroom. Relatedly, it may have supported the belief of many jurors that the erroneous story was published without sufficient checks, balances and supervision by higher officials within the news organization. Finally, it enabled the jurors to imagine a scenario of malice and political intrigue among nameless "others" at the newspaper, an allegation barely suggested and certainly never proven in court, that surely would have been more difficult for the jurors to conjure up if other reasonably sympathetic persons from the newspaper had testified and had been believed.

(vi) Documentary Evidence

Other than the articles in suit, documentary evidence played a remarkably small role in the jury's decisionmaking. As noted, the jury was presented by the defense with a series of articles intended to demonstrate that accusations concerning the prosecutor and his office had long been in circulation, in defendant's newspaper, in other local publications and in at least one independent study. These were thought to support the defense contention that the accusations were not a figment or creation of the newspaper's imagination, that these were accusations and conclusions also reached and reported by others, and that the one error in the press conference article had its source in other accurate reports.

As noted, this defense argument made no headway with the jurors and, indeed, it proved to be counterproductive. Most of the jurors did not understand why they were seeing these articles. One particular independent article, published in a local magazine and containing conclusions or allegations that the defense argued closely paralleled its publications, was given special emphasis by the defense. It is difficult fully to explain how little impact this article had on the jury. Those few jurors who even remembered it, remembered it as being, at worst, neutral toward the plaintiff. Another report, prepared by an independent prosecutor after the defendant's stories ran, likewise had almost a nil effect on the jury, even though the report was not only introduced into evidence, but its author appeared as a witness to testify about his report. Literally, only one of the nine jurors interviewed had any meaningful recollection of the report or its author; most had no recollection of either. Even the one juror who recalled the author, had no recollection of the report which certainly had no effect on his vote in favor of the plaintiff.

The Decisionmaking Process

As noted, the jury's decision had essentially been made before it began deliberations, indeed for most of the jurors, even before they received the judge's instructions on the law. The initial poll was 9 to 3 in favor of the plaintiff. What "deliberation" there was on liability was, at least from the defense point of view, perfunctory and incomplete. Indeed, a number of jurors made note of the fact that they were tired, that they had been dismissed to begin their deliberations at the end of the day and that it was stiflingly hot in the jury room. Despite these unfortunate pressures, the jurors did seem to want to be assured that their strongly held views on the facts of the case could be fit into the judge's instructions, and they requested a re-reading of the instructions. However, it is clear that the jury spent little time actually reviewing or discussing the law or the evidence. Indeed, at least two of the three initial dissenters were never really convinced of the verdict. They simply changed their votes after a very brief deliberation of no more than an hour on the liability issue, in order to make a unanimous verdict. One or two of the jurors interviewed did appear to recognize the need for a specific theory -- beyond the general sense shared by a majority of the jury that the newspaper had been wrong, careless or worse -- linking the admitted error in the press conference article with some proof of actual malice or reckless disregard in the legal sense. For those jurors that link was in short order supplied by the notion of "others" at the newspaper who "must" have known of the error and must have intended to defame the plaintiff. Perhaps if the jurors had been more divided, or more uncertain of their basic perceptions, or if unanimity had been required and one or more of the dissenters had insisted that these alleged links be more carefully scrutinized and subjected to the clear and convincing evidence requirement, the result might have been different. Or at least a more satisfyingly complete deliberation would have occurred.

How it is that so many of the jurors entered the jury room in agreement, prepared to reach a verdict on liability so quickly and with so little meaningful deliberation is not entirely clear. It is clear, however, that the jurors were scrupulously obedient to the judge's admonition not to discuss the case with each other. On the other hand, more than one juror expressed the feeling that they had become convinced at some point during the trial, without any actual discussion, that the other jurors (or at least most of them) had already decided the case and that they were strongly leaning toward

the plaintiff. These jurors admitted to surprise when as many as three of the jurors initially voted for the newspaper. Something in the courtroom, over the 11 days of the trial, must have suggested to these jurors, whether by body language, mood, or whatever, that this was an easy case, that plaintiff was (or should be) winning and that the outcome was a foregone conclusion. On the other hand, the decision was not so clear for all of the jurors. In addition to the three dissenters, one of the jurors interviewed and one alternate were wavering in their support for plaintiff as the trial progressed. While three pro-plaintiff jurors admitted to having favored the plaintiff right from the opening statements, the other pro-plaintiff jurors indicated that they were uncertain of their views during some portion of the remainder of the trial testimony.

Almost all of the jurors had pretty much decided the case before the closing arguments, which had little effect on the jurors, or else which merely solidified their pre-existing views on the issue of liability. Perhaps not surprisingly, those who felt strongly about the lawyers developed those feelings right from the opening statement and stuck with them. The only juror who adamantly disliked defense counsel favored plaintiff from the outset; and one of the two dissenters liked defense counsel from the outset.

Conclusion

It should be noted that, although certain observations made, and conclusions suggested in this study for purposes of illuminating the mass of raw data presented, it is clear that any ultimate conclusions regarding the general attitudes of libel jurors or the population as a whole, must await further studies that provide a broader, more diverse and more reliable sample base. LDRC is currently preparing an additional number of in-depth case studies of juror attitudes in actual recent libel cases. Initially, these are being funded and will be presented in conjunction with the ANPA/NAB/LDRC Libel Trial Symposium, to be held at the Chicago Hyatt Regency Hotel on August 21-23, 1985. (See additional information on the Symposium accompanying this Bulletin). Thereafter, the series of LDRC studies may be separately published, either in the LDRC Bulletin or in the forum of a special report.

JUROR PROFILES

(i) Jurors providing complete information

A

Juror A is a 69-year-old woman. While she only has a high school education, she was well spoken although somewhat vague in her responses. She is a retired secretary, lives in a comfortable middle class home and neighborhood, and considers herself a conservative Republican. She was among the three jurors who intitially voted with the defendant and she was one of the last to hold out against the verdict. Indeed, although she joined in the verdict, she continues to indicate serious reservations both as to the finding of liability and as to the amount of damages awarded.

A disagreed with most of the jurors because she was never fully convinced the plaintiff proved his case. She changed her vote because another man who also initially voted for the defendant changed his vote. Not wanting to be the only juror favoring the defendant and wanting to avoid a hung jury, she changed her vote.

A felt the plaintiff wasn't being honest and sometimes looked guilty. She had read about him in the defendant-newspaper before the trial and had vaguely heard of plaintiff's father (a local politician). She did not believe that he favored people in his own party.

A felt sorry for the re-write reporter and thought he was sincere. She felt that the reporter was a good, believable witness. The other witnesses that she remembered, such as two plaintiff's staff attorneys, were good and effective. The only ineffective witness that she remembered was the judge that rambled. She had little or no memory of other witnesses. She did not think the editors were particularly involved in putting the story in the paper because of the deadline pressure to get the story out.

A preferred plaintiff's attorney to defendant's attorney. Plaintiff's attorney was well prepared, persuasive and had good witnesses. Defendant's attorney was less prepared and should have had better witnesses to back up the truth of his accusations against the plaintiff.

Concerning the exhibits, the earlier articles published in the defendant newspaper influenced A. She wondered why the earlier suit by the plaintiff against the newspaper was dropped. Other articles such as an article in another local publication concerning the effectiveness of the plaintiff as prosecutor and a report by an independent prosecuting official on the effectiveness of various prosecutors, including the plaintiff were not important to her.

A felt plaintiff's attorney was more effective in closing argument than defendant's attorney even though she did not believe his argument. She vaguely remembers the opening.

A felt that she understood the jury instructions. She felt that the plaintiff had to prove that he was not guilty -- presumably of being soft on white collar crime, etc. -- and that the defendant had to prove that its accusations were true. She felt that the story was not entirely false and certainly there was no knowledge of falsity or reckless disregard.

As to damages, A felt the plaintiff had not lost income and he didn't seem to have personally suffered although his family suffered because of the article.

A is a long time reader of the defendant newspaper. She also watches TV news, 60 Minutes and reads magazines such as Time. She basically believes the media is fair although it can sometimes be biased.

B

Juror B is a 63-year-old college educated woman who immigrated to the United States 40 years ago and still speaks with a slight accent. She lives in a well-kept home in an upper middle class neighborhood where she works as a homemaker. She considers herself politically independent. She is one of the eight jurors who initially voted for the plaintiff.

B basically believed that the defendant was out to get the plaintiff. While she felt sorry for the re-write reporter personally, she believed that he was set up by the newspaper. She reasoned that if he really made this type of mistake he would have been fired from the paper unless the editors were out to get the plaintiff.

B liked the plaintiff. He was well spoken, a believable witness who was victimized. She believed that he and his family were devastated by the article. She hadn't heard of him before the trial. She didn't think he had to prove that he was a good prosecuting attorney because it was unnecessary to respond to these accusations.

B liked most of the witnesses she remembered. She thought that the reporter came across well and was confident, one prosecuting official was effective but was caught lying because his testimony was refuted, and the judges were impressive. She only remembered the other prosecuting officials and the plaintiff's staff attorneys vaguely or not at all.

B liked both lawyers and thought that both were well prepared. She liked plaintiff's attorney because he was distinguished and low-key whereas she simply stated that she liked defendant's attorney even though he had a difficult case.

The exhibit that influenced her most was the defamatory article itself. She liked the blowups. She feels that the retraction was too small and should have been on the front page immediately. The earlier articles and lawsuit made her wonder why that case was dismissed. The article in a local publication concerning the effectiveness of the plaintiff as prosecutor and an independent report did not influence her at all.
B had already made up her mind before the closing although she felt that both lawyers did well in that segment of the trial. Since defendant's attorney apologized and admitted the error in the opening she was confused as to the purpose of the trial.

B believes that the reckless disregard standard had been met in the case because the editors must have known the truth and because they were out to get the plaintiff. The fact that this story was "hot news" did not persuade her to favor the defendant because she believes that a newspaper as powerful as the defendant newspaper should forego deadlines if they have doubts as to the truth of a story.

B wanted to give the highest damages of all the jurors. It is unclear whether the number she initially mentioned was $2 or $3 million, and during the interview she seemed reluctant to be specific about the figure. While she recognized that the plaintiff didn't suffer economic loss, she felt he was entitled to compensatory damages because his political career was hurt because he might have been Governor and that he and his family were

devastated. She was more interested in sending a message to the defendant and giving punitive damages than in giving compensatory damages.

B reads the defendant newspaper, watches TV news and reads other national news magazines. She believes that the press has the ability to go after someone unfairly.

C

Juror C, chosen by the jurors as their foreman, is a 36 year old college-educated male who works in the subscription department of a major publication and who considers himself a conservative Republican. He is one of the eight jurors who initially voted for the plaintiff.

C basically believed that the defendant was out to get the plaintiff. While he didn't blame the re-write reporter because the re-write reporter was just a "kid" who made a mistake, he did blame the editors for not having checked the story more thoroughly.

C had mixed feelings toward the plaintiff. He basically thinks the plaintiff did his job as prosecuting attorney.

C had positive feelings toward two of plaintiff's staff attorneys as witnesses. He felt that one of them, as the plaintiff's associate, gave insights into what the plaintiff did as the prosecuting attorney and the other gave a very professional presentation even though he was discredited on cross-examination. He thought that the reporter, the author of an independent report and a third plaintiff staff attorney were not important or strong. He doubts the credibility of the other prosecuting officials, one of whom was discredited on cross-examination. He would like to have seen the editors as witnesses. C preferred plaintiff's attorney to defendant's attorney even though he thought that both were well prepared. He thought that most jurors had the same opinion of the attorneys. He thought defendant's attorney was a good lawyer, but had a tough case.

C's favorite exhibits were plaintiff's attorney's charts and he was impressed with plaintiff's attorney's discrediting of defendant's attorney's chart during closing arguments. He was not impressed either with articles in other publications, or earlier defendant newspaper articles because the media just reported each other and

perpetuated the false reporting about the plaintiff. He was not impressed with the retraction because he believed that one cannot retract the harm done.

C thought that the closing just served as a recap and as a platform for the attorneys to personally attack one another In particular, he noted that defendant's attorney attacked plaintiff's attorney.

C felt that the judge did not spend enough time explaining the five elements of the charge to the jury. While he wanted to consider the five elements carefully, some jurors did not want to do so. He believed that there was reckless disregard. The fact that this story was "hot news" was irrelevant for him because an article must still be checked through the editorial process before it is printed.

C wanted to award only $1 in compensation because the plaintiff apparently was a "millionaire" and lost no income. In determining the damage awards, he considered the plaintiff's legal fees and the defendant newspaper's wealth. He thought that the award had to be large enough to "send a message" to the defendant. He believed that an award too small would be meaningless to a large paper like the defendant. He personally favored a $100,000 award.

C reads the defendant newspaper regularly but he thinks that the defendant, like the media in general, has "gotten worse" in the last ten years because there is more emphasis on opinions and less emphasis on facts.

D

Juror D is a 25-year-old high school educated man who works as a meat slicer and who considers himself an independent conservative. He was an Alternate juror.

D apparently would have voted for the plaintiff had he deliberated with the jury, although he was wavering back and forth in his views, until the end of the trial. He basically felt that the defendant had committed a "crime," admitted its guilt and therefore should pay.

D liked the plaintiff and believed that he was "innocent". He thought that the plaintiff seemed like a nice guy and the witnesses suggested that he did a pretty good job. He reasoned that if this were not the case, the plaintiff would not have paid money to

lawyers to bring the case. He had never heard of the plaintiff before the trial but believed that the plaintiff was a pretty good prosecuting attorney.

D believed the re-write reporter made a mistake but felt that he should pay for it. He believed the reporter transmitted correctly. But he suggested that both knew more than they were telling. He generally believed all the witnesses because he felt they wouldn't lie on the witness stand. He was especially impressed with one of the prosecuting officials who he thought would be a good lawyer, and with the judges who he thought were well respected. He was not persuaded by a second prosecuting official and does not remember the other witnesses.

D liked both lawyers because both did their homework. He found that defendant's attorney's aggressiveness caught his attention more than plaintiff's attorney's style.

D did not remember the exhibits except for the blowups. He did not feel that the earlier lawsuit was important.

D would have ignored all five of the judges instructions because otherwise, with all the technicalities, no one could be guilty. He did not understand the five elements of the charge.

D would have found the defendant guilty had he been in the jury room. He would have given the plaintiff only $20,000 and was surprised at the large size of the verdict.

At the opening D favored the defendant, but by the end, he favored the plaintiff.

D does not read the defendant newspaper. He does read the a local county newspaper and a weekly tabloid. He watches TV news. He's not sure if the media are generally fair or unfair.

E

Juror E is a 36-year-old woman who attended some college and works as a telephone operator, and considers herself an inactive Republican (not liberal or conservative). She was one of the eight jurors who initially voted for the plaintiff.

E basically felt that the defendant was out to get the plaintiff. She did not feel that the case was about the plaintiff's attitude toward white collar crime, but rather was about the truth or falsity of the article.

E was impressed with the plaintiff because he was calm, friendly and in the courtroom the whole time. She sympathized with him, especially about his children being ridiculed at school because of the article. She did not think he was soft on white collar criminals or politically motivated in his prosecutions. She had never heard of him before the trial.

E didn't believe the re-write reporter because he said that he never makes mistakes. She reasoned that this was obviously false because all humans make mistakes. She felt that the reporter was a good reporter but had a vendetta against the plaintiff.

E was most impressed with one of plaintiff's staff attorneys as a witness because as a plaintiff associate he gave valuable insight into the plaintiff. She was surprised that judges would testify. She was least impressed by one of the prosecuting officials because he "put the plaintiff down." She had little or no recollection of other witnesses. She would like to have had the state's Governor testify because there was disagreement among the jurors as to what he said.

E adamantly disliked defendant's attorney from the first time she saw him. She thought he was cocky and he consistently objected to what the judge said. The only positive remark she made about defendant's attorney was that he was well-prepared. She liked everything about plaintiff's attorney and would hire him as her lawyer if she needed one.

Concerning exhibits, E would have liked to have known more about the earlier articles published in the defendant newspaper and felt like asking questions about them. She was not influenced by the other articles. She was not impressed by the retraction because the defendant could not have retracted the damages already done to the plaintiff. She was aware that the reporter's notes could have been exhibits had there not been a constitutional objection to their being admitted into evidence. She did not think that they would have been important.

E felt both sides openings were too long and legalistic. After the opening she already sided with the plaintiff but ultimately these

initial remarks were not that influential in her decision making. She had made up her mind before the closing which was also too long.

E still feels, even after the jury deliberation, that she does not understand libel law or how to measure damages. She feels the defendant was reckless because the editors must have known the story was false. She believes that defendant's attorney had the burden of proof.

E wanted to compensate the plaintiff for the emotional damage to his son and for the eight years it took the plaintiff to pull his life together. She was not sure whether the plaintiff lost income as a result of the story. In granting damages, she wanted the award to be large enough so as to teach the defendant a lesson.

E reads a local county newspaper and watches TV news. She does not read the defendant newspaper and only reads the paper for neighborhood news. She does not think that just the defendant is capable of making mistakes. She believes that all papers sometimes err.

F

Juror F is a 27 year old woman, a high school graduate and an X-ray technician in a state hospital who considers herself a conservative Democrat. She was an Alternate juror.

F would have voted for the plaintiff had she not been an alternate. She felt that the newspaper knew they were wrong and put into their story just what they wanted in it -- presumably for malicious motives. She would have awarded $1 million in damages. She felt that the $800,000 jury verdict was too low.

F liked the plaintiff and believed him primarily because the testimony of others supported him. She believed that his office got things done and that he was not soft on white collar crime.

While F felt sorry for the re-write reporter, she felt that with his educational background he should have not made the mistake. She felt that the reporter was very defensive and unnatural.

F had a better impression of the plaintiff after hearing testimony from plaintiff's staff attorneys. She thought that one of the other

prosecuting officials was an informative witness by showing that the plaintiff might be soft on white collar crime even though she did not believe him. She thought that the judges were sincere and another of plaintiff's staff attorneys was nervous. She did not recall other witnesses.

F liked plaintiff's attorney more that defendant's attorney. Plaintiff's attorney was calm, professional and believable whereas defendant's attorney was not effective, had "an attitude" and came on too strong.

Concerning the exhibits, F liked the blowups. The earlier defendant newspaper articles made her wonder about the earlier suit and that the defendant was downgrading the plaintiff again. While she believed that an article in another local publication was basically favorable towards the plaintiff, she believed that defendant's attorney tried to twist the meaning by quoting out of context. She thought that the retraction was not effective because it restated the same facts as the original article.

While F made up her mind before the closing arguments, she was glad that both sides made their presentations because they reviewed all of the information. She thought that both sides made effective closing arguments.

F found the instructions hard to understand and confusing.

F generally does not read newspapers or magazines, except perhaps a weekly tabloid. She watches TV news nightly and watches Nightline. She believes that the media generally do a good job but that they have the power to twist facts to their advantage. She had not read the defendant newspaper before the trial because she found it boring.

G

Juror G is a 66-year-old high school educated man who works as a machinist for a large corporation. He lives in a small, clean, inexpensive home in a lower middle class neighborhood. He considers himself a liberal who is affiliated with the Republican party in local political elections but who votes democratic in national elections. He was one of the eight who initially voted for the plaintiff.

G basically believed that the defendant newspaper and the state's Governor were out to get the plaintiff.

G liked the plaintiff and found him completely believable. He thought that the plaintiff was a victim. He did not know that the plaintiff was a prosecuting attorney but had heard of him and his father (a local politician).

G believed that the re-write reporter made an honest mistake and had no knowledge of the error. However, he felt that the reporter was part of the Governor's "gang" that was out to get the plaintiff. He believed that the defendant was part of a political scheme with the Republican Governor to get the plaintiff out of political life.

G was very impressed with one of plaintiff's staff attorneys who appeared to be honest and intelligent. G found another prosecuting official impressive, though not a credible witness. He found the two judges somewhat convincing. He was not as impressed with a second plaintiff staff attorney and had little or no memory of other witnesses.

G liked both plaintiff's attorney and defendant's attorney and thought both were well prepared. He though that plaintiff's attorney was a little better on cross-examination.

G was very impressed with the use of blowups. He did not remember the earlier defendant newspaper articles from the trial, but did remember the information from his own reading of the newspaper at the time they were published. He did not find the retraction effective because it was not in the same place and the same size as the original article. The other articles were not significant to him.

G had already made up his mind before the closing to favor the plaintiff. He was the juror who devised the scheme for remembering the 5 elements. He believed that the defendant did have reckless disregard when it printed the article because it was against the plaintiff politically.
While G had heard of $1 million settlements, he wanted to give the plaintiff $600,000. He warned jurors against awarding the plaintiff over $1 million so as to avoid an appeal of the verdict.

He considers himself a "newshound" and reads all of the local and national papers as well as watching the TV news. He still reads the defendant newspaper and likes it. He basically approves of media

investigations because they keep people in political office honest. However, he thinks that mistakes, such as in this case, should be corrected.

H

Juror H is a 39-year-old college educated man who works as an engineer for a federal agency. He is one of the three jurors who initially voted against the plaintiff. Although he ultimately joined the "unamimous" verdict, he in fact never changed his view that the plaintiff had not proven his libel claim. Indeed, he now feels like "kicking himself" for officially voting for the plaintiff.

H was never convinced that the plaintiff proved his case because the plaintiff never established that the defendant "willfully" printed the false article. H was also never convinced that the plaintiff was actually damaged by the article since he continued to make good money as an attorney.

H believed that the plaintiff was a truthful witness. He also believed the testimony of the re-write reporter and the reporter. He believed that the re-write reporter just made a mistake in reporting. He had no particular impression of any individual witnesses except that they were all generally truthful.

H liked both defendant's and plaintiff's attorneys.

Concerning the exhibits, H believed that the plaintiff's prior suit against the defendant newspaper did involve mistaken reporting about the plaintiff, but this did not influence his view of the case. He has little memory of the magazine article and could not recall which side it in fact supported. He recalled nothing about the independently published report on the effectiveness of the plaintiff. Unlike many of the other jurors, he believed that the retraction was satisfactory.

H favored the defendant from the early stages of the trial. He thought that the plaintiff never proved that the defendant acted with "maliciousness."

H had difficulty understanding the judge's instructions because they were long and detailed. He expressed concern that the judge had not re-read and clarified the instructions and was particularly concerned that the re-reading did not include the detailed instructions which supplemented and amplified the four basic elements.

H wanted to keep the damage award low. However, in the initial round he voted for a damage award between $300,000 and $400,000 in order to balance the very high award favored by some of the jurors. H was aware of large verdicts in civil cases but had never heard of a million-dollar jury libel verdict although he was aware, for example, of the Burnett case.

H regularly reads the defendant newspaper but dislikes television news because it concentrates too heavily on private disasters. He believes that the press basically does a good job even though they occasionally make mistakes.

I

Juror I is a 52-year-old, high-school educated technician for the telephone company, married with two children living at home. He initially declined to discuss the case with LDRC, feeling that LDRC, as a media-sponsored organization, would not be objective in its study or would use it for purposes he did not wish to support. But later he agreed to be interviewed by telephone because LDRC had already interviewed many of the other jurors. He considers himself to be a conservative.

I voted for the plaintiff, although he claims not to have finally decided until the end of the case. He felt the defendant's story was defamatory and there were no checks and balances that any responsible organization should impose on what they put out.

I believed that the defendant was definitely "out to get" the plaintiff. This conclusion was based on the testimony and also on his previous experience with the defendant -- e.g., its treatment of a former Mayor.

I was born and raised locally but had never heard of the plaintiff. He found the plaintiff to be honest and forthright, although he is sure that the plaintiff is a "political" animal like everyone else. While he believed the reporter and thought she was a very competent reporter, he didn't believe the re-write reporter's story and was strongly suspicious of how the "erroneous" items, which he felt the re-write reporter knew nothing about, got into the story. He became convinced, although he could point to no specific evidence, that directly or indirectly, the re-write reporter was "influenced" by "others" at the defendant newspaper to, in effect, get the plaintiff. This belief was exacerbated by the absence of editor-witnesses.

I thought both of the attorneys were effective and capable, although he was critical of the objections and lengthy sidebars and was highly aware of peripheral activities in the courtroom although he claims they did not influence him. For example, he commented on plaintiff's attorney bringing in his daughter; on another lawyer of the defense counsel who, he felt, was giving everyone the "fisheye;" he noted mention of Catch 22, a book he had been reading. He agreed with the other jurors that the trial judge was "eminently" fair. I felt that the issue of white collar crime was not especially relevant to the case, but that nothing was proven against the plaintiff. While he did not believe any other of the witnesses were lying, he simply felt that they were repeating hearsay without substantiation. Regarding witnesses, he was not at all impressed with the judicial character witnesses; he felt that one of the plaintiff's staff attorneys gave a "good civics lesson" but that his testimony was not particularly relevant to the issue of actual malice. He was the only juror to clearly remember the author of the independent report as a witness, although he did not remember the actual report, perhaps because he heard something (post-trial) about what he viewed as this author's "extreme" liberal views as a law professor at a local university. He recalled the magazine story (they "spin a good yarn") but felt it was neutral in terms of the case.

I agreed with almost all the other jurors that the correction was inadequate and "not definitive enough". He felt it was an ineffective repetition of the libel which simply "muddied the water" without an apology. He also recallled (incorrectly) that the correction has been published on Saturday when most people don't read the papers.

I found the judge's instructions to be confusing and difficult to remember.

Regarding damages, although I was opposed to an award of $2 million, he felt that the $800,000 was proper based upon what he estimated was 1% of the defendant newspaper's total worth. The plaintiff's actual dmages were to his political aspirations to oppose the state's Governor. He also wanted to award punitive damages to punish the defendant "so they don't do it again." He was aware of million-dollar verdicts in civil cases, but not in libel cases although he had heard generally of the Burnett case, for example, and recalled the settlement of another local libel case, although not its amount.

Certain arguments relating to the "media/non-media" and the "commercial-economic/other speech" distinctions in briefs for reargument filed by Petitioner Dun & Bradstreet and amici on petitioner's behalf are summarized and quoted from in LDRC Bulletin No. 12, at 39-43:

> "In its Supplemental Brief on Reargument, Petitioner Dun & Bradstreet argued three main points. First, that Gertz had already 'struck the proper balance,' presumably for all parties, 'between the interest of free speech and the legitimate state interest in compensating defamation plaintiffs for actual injury.' Second, that the Sullivan and Gertz limits on defamation damages 'should apply irrespective of the "non-media" status of the speaker or the "commercial or economic nature" of his speech.' Third, and relatedly, that 'there is no sound basis for distinguishing speech of a "commercial or economic nature" from other speech' for these purposes."
>
> "In an amicus brief submitted by Dow Jones on reargument, a compelling case was made against both the media/non-media and the commercial-economic/other speech dichotomies. As to media/non-media, in addition to several arguments against according certain speakers greater coverage than others, Dow Jones emphasized the difficulty and inappropraiteness of distinguishing between 'media' and 'non-media' defendants for these purposes. As to any distinction based upon speech about 'commerce' or 'economics,' Dow Jones reminded the Court of the crucial difference between commercial speech (i.e. advertising which 'does no more than propose a commercial transaction') and editorial speech (i.e., 'informational rather than propositional' communication.

> "In another amicus brief submitted on reargument, the Information Industries Association also presented persuasive data bearing upon the invalidity of the media/non-media and commercial-economic labels in the defamation context. This is particularly true, the brief pointed out, in light of the current and future explosion and diversification of traditional and non-traditional information and distribution technologies."

While the parties and amici delved into content of the libelous material to the extent that they did address the "commercial-economic/other" distinction, no one approached the question from the perspective of attempting in a general way to distinguish between matters of public and private concern. Despite this background, Mr. Justice Powell (who of course was also the author of Gertz) chose to follow a completely different analytical course, the implications of which are not completely clear from his opinion, and cannot be fully ascertained at this time. Writing for the plurality, in an opinion which surprisingly seems to move away from the central premises of Gertz, Justice Powell analyzed the case as follows. He began by stating that the Supreme Court had never before considered whether the Gertz balancing test measuring the state's interest in protecting reputation against the constitutional interest in protecting free expression should apply to defamatory statements involving "no issue of public concern." He proceeded to apply the balancing test, and found that in such a case the state interest, already established as "strong and legitimate" in Gertz, should prevail because it is speech on "matters of public concern" that is "at the heart of the First Amendment protection." (First National Bank of Boston v. Belotti, 435 U.S. 765, 776 (1978) quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)).

Going counter to established precedent, as pointed out by Mr. Justice Brennan (see below), Justice Powell then stated -- almost conclusorily -- that the credit report here at issue "concerns no public issue." It was speech solely in the individual interest of the speaker and its specific business

audience." As such, he added, it was not a contribution to free public debate about public commercial issues, and furthermore, being motivated only by the desire for profit, such limited credit reporting is unlikely to be deterred by the threat of libel suits.

Mr. Justice White's concurring opinion and Mr. Justice Brennan's dissent both noted with some surprise the approach adopted by the plurality. Based upon their understanding that Gertz had always been "intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance." (emphasis added) In response, Justice Powell argues that Gertz only held that the protections of New York Times do not extend as far as Rosenbloom v. Metromedia 403 U.S. 29, 44 (1971), had suggested (i.e., to libels of any individual so long as the defamatory statements involved a "matter of public or general interest"), and that, "[l]ike every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern. . . . Nothing in our opinion indicated that this same balance [between state and First Amendment interests] would be struck regardless of the type of speech involved."

Justice Brennan's opinion, for the four dissenters, attempts to make the case for protection even of such limited-distribution, commercial credit reports as the one in Dun & Bradstreet. Justice Brennan reasoned as follows. The First Amendment requires significant protection from defamation law's chill for a range of expression far broader than simply speech about pure political issues (citing as an example Time v. Hill, 385 U.S. 374, 388 (1967)). A general proscription against regulation permeates First Amendment jurisprudence (citing Speiser v. Randell, 357 U.S. 513, 520 (1957)) (balancing state efforts to ensure loyalty against First Amendment guarantees of freedom of speech). In libel law as in all other situations in which government regulates speech (obscenity, consumer protection, etc.), any restraints on free speech must be "narrowly tailored to advance a legitimate government interest." (citing Lowe v. SEC, ___U.S.___, (1985)(publisher of securites newsletter need not be registered with SEC and cannot be enjoined from publishing newsletter) (White, J., concurring in the judgment)). Remedies for

defamatory falsehood may thus reach no farther than is necessary to protect the legitimate interest involved, and so plaintiffs who do not prove actual malice must be restricted to conpensation for actual injury under Gertz. Presumed and punitive damages are not narrowly tailored to advance the legitimate state interest in compensating the plaintiff, for they are frequently arbitrary and bear no necesary relationship to the actual harm caused (citing Mr. Justice Harlan's opinion in Rosenbloom v. Metromedia, supra, at 349-50). According to Justice Brennan, "The requirement of narrowly tailored regulatory measures always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than actual malice."

Unlike the plurality opinion, the dissent also grappled with the two main questions which were originally thought to be at issue in the case: the media/non-media distinction and the status of commercial-economic speech. As to the former, Justice Brennan asserts that such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual," (citing First National Bank of Boston v. Bellotti, supra, at 777), and points out that in view of the speed of the technological and economic evolution of the communications industry, any distinction "would likely be born an anachronism."

He then evaluates the status of commercial and economic speech and in so doing establishes the standing of the credit report in question as a "matter of public importance" (even though he does not consider such a finding necessary to bring the case under Gertz). He notes that "[i]n evaluating the subject matter of expression, the Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience," Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-502; AFL v. Swing 312 U.S. 321, 325-326 (1941); Thornhill v. Alabama, 310 U.S. 88, 101-103 (1940). Speech about commercial and economic matters is an important part of our public discourse, likely to influence our voting and to help us cope with life in our society, he suggests. Like the news

about a labor union dispute in Thornhill, supra, information about bankruptcies is particularly a matter of public concern because of the enormous effect such an event may have upon the community. Also, "[i]t is difficult to suggest that a bankruptcy is not a subject matter of public concern when law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record." [citing Cox Broadcasting Co. v. Cohen, 420 U.S. 469 (1975)].

As to "commercial speech," properly defined as advertisements that "do no more than propose a commercial transaction," it may be more closely regulated than other types of speech (citing Pittsburgh Press Co. v. Human Relations Comm'n, 43 U.S. 376, 385 (1973)) but still receives substantial First Amendment protection (citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 53 U.S.L.W. 4587 (5/28/85, No. 83-2166) (attorney advertising)). Credit reporting is not commercial speech, but even if it were, "it would still be entitled to the substantial protections the First Amendment affords that category."Additionally, Justice Brennan notes, the common law of most states acknowledges a qualified privilege for reports like that at issue here, precluding recovery for false and defamatory credit information without a showing of actual malice, often defined as per the New York Times formula.

Perhaps the most startling (although not necessarily the most meaningful substantively) opinion is the concurring opinion of Justice White - at least for the almost venomous antipathy it reveals toward the press and the hard-won constitutional First Amendment protections that have been achieved over the past two decades. Justice White concurs in the judgment because, for either of two reasons, he believes that Gertz should not apply in this case: "First, I am unreconciled to the Gertz holding and believe that it should be overruled. Second, as Justice Powell indicates, the defamatory publication in this case does not deal with a matter of public importance." (The second reason seems misplaced, as Justice White had already stated that he thought Gertz applied to private matters as well.)

Justice White's opinion is an homage to the common law of libel and a strongly-worded castigation of the media. His decision that Gertz should not be applied is not surprising

given his almost equally vigorous dissent in that case, but more startling is his suggestion that New York Times should be reconsidered. A libel plaintiff's main interest, he asserts, is in clearing his name. The burden of proving actual malice is so heavy that a public official or public figure plaintiff is extremely unlikely to get a judgment vindicating him, whether because of summary judgment, burden of proof at trial, or an appellate review overturning a favorable verdict. The plaintiff is unlikely to be able effectively to counter the "lie" in the press, he adds. "The New York Times rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with reasonable effort to investigate the facts."

The reason we accept this, he continues, is that the truth might not flow freely in the face of the threat of damages liability. However, he says, the Court could have provided the press with the requisite "breathing room" by limiting recoverable damages, scrutinizing and possibly even prohibiting punitive damages, but allowing a plaintiff who proved falsity at least to have a judgment to that effect. As to the argument that even if it had to pay only actual damages the press would be unduly chilled, he draws a comparison with commercial enterprises, which must pay for the damage they cause as a cost of doing business. (He neglects to mention, of course, that the products of such businesses are not generally the object of particular constitutional concern and protection.) He adds, "[a]lso it is difficult to argue that the U.S. did not have a free and vigorous press before the New York Times rule was announced."

With respect to the media/non-media distinction, in Justice White's lacerating words: "I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech....[I]t makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation."

Mr. Chief Justice Burger's brief concurring opinion restates his opposition to Gertz, and "agrees generally" with Justice White's observations concerning New York Times, although apparently on a narrower basis, focussing on the possibility of incorporating an objective, "reasonable care" standard into the definition of "reckless disregard," rather than the current subjective standard of actual malice.

It is of course impossible to predict the effects of this decision by a fragmented Court. Despite its evident potential for a negative impact, it is reassuring to note that all of the opinions either explicitly say (Brennan, White) or seem implicitly to assume (Powell, Burger) that there should be no distinction between media and non-media defendants with respect to the application of Gertz. Thus, in this sense, the Dun & Bradstreet case, for all of its adverse fallout, may also at least have the benefit of bringing within constitutional libel doctrine a large body of libel defendants whose status or fate as arguably "non-media" defendants was previously uncertain at best. It is also possible to hope that future decisions will develop a narrow definition of "matters of private concern," thereby perhaps at least limiting the decision to the extent possible to its own facts.

McDonald v. Smith, 53 U.S.L.W. 4789, (6/18/85, No. 84-476)

McDonald v. Smith is another case which does not directly involve a "media" libel action of the type faced by traditional publishers, broadcasters, and journalists, but which may have an indirect bearing upon libel law in a general sense. Both Time in the Sharon case and CBS in the Westmoreland case argued that there should be an absolute privilege for comments about the official actions of high government officials. These arguments were rejected in Sharon and deferred in Westmoreland, both at the trial court level. In light of later developments in the two cases, there will be no further consideration of those contentions.

McDonald v. Smith had the potential to open the door to an expansion of the New York Time v. Sullivan principles with respect to traditional libel cases by establishing the first absolute immunity under the First Amendment, at least with respect to those communications made pursuant to the Petition

Clause of the U.S. Constitution. But this the Supreme Court refused to do. Nonetheless, the decision at least implicitly reinforces the New York Times formula, perhaps very fortunately so in the light of the two concurring opinions in Dun & Bradstreet (see above).

In McDonald, the defendant wrote a letter to the President (then President-elect) of the United States, with copies to certain other interested government officials detailing his objections to Smith's possible appointment as a United States attorney. After he failed to secure the appointment, Smith sued for libel. McDonald asserted his continuing belief that the statements in his communications to the President were true, and were certainly not knowingly or recklessly false. However, because as an individual citizen he does not have libel insurance to pay the costs of his defense, which in a complex libel trial could be enormous, McDonald sought to establish an absolute privilege under the Petition Clause of the First Amendment. The privilege sought would have applied whenever a citizen in good faith requested governmental action from a government official with the authority to take such action.

The Fourth Circuit rejected defendant's Petition Clause argument. In the Supreme Court, the majority opinion, delivered by Mr. Chief Justice Burger, reaffirms an 1845 Supreme Court decision in White v. Nicholls (3 How. 266 (1845)) that a similarly positioned defendant's petition was actionable if prompted by "express malice," which the Court says can now be correctly defined as "actual malice" under New York Times v. Sullivan. Despite a one hundred and forty years of constitutional and First Amendment developments, "[n]othing presented to us," according to Justice Burger, "suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered; we are not prepared to conclude, 140 years later, that the framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in the exercise of that right. The Petition Clause . . . was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. (See Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967). These First Amendment rights are inseparable, Thomas v. Collins, 323 U.S. 516, 530 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions."

Justice Brennan's concurring opinion (joined by Justices Marshall and Blackmun) elaborates upon the interrelationship among the freedoms of speech, press, and petitioning the government without differing in result from the majority opinion. Significantly, however, Justice Brennan's analysis did conclude by expressly suggesting that "expression falling within the scope of the Petition Clause" is "fully protected by the actual malice standard set forth in New York Times Co. v. Sullivan." In contrast, Justice Burger, speaking for the majority, did not appear quite as clearly to hold that all publications made under the Petition Clause are, as a matter of federal constitutional right, at least qualifiedly privileged under Times v. Sullivan. Nonetheless, even Justice Burger did seem to suggest that without a state common law privilege equivalent to that provided in Sullivan, enforcement of a libel claim might be constitutionally suspect when applied to a publication made under the Petition Clause:

> "Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; 'malice' has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with New York Times Co. v. Sullivan, 376 U.S. 254 (1964), as 'knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand.' We hold that the Petition Clause does not require the State to expand this privilege into an absolute one."

There was no dissenting opinion. Mr. Justice Powell did not take part in the decision.

Cases Taken -- Summary and Analysis

By its grant of two petitions late in the 1984-85 Term, the Supreme Court has already assured that next year's Term will be another important one for the law of libel. Unlike the two cases decided this Term, which presented relatively unusual issues certainly not in the mainstream of media libel law, the two cases now pending both present highly significant media issues for resolution by the Court. In Liberty Lobby v. Anderson the continued efficacy of the summary judgment mechanism in disposing of libel actions is to some extent called into question. In Philadelphia Newspapers v. Hepps the Court will consider the potentially significant issue of burden of proof of truth or falsity. Because the two cases are so important, a more detailed description of the background of the cases, and excerpts from the relevant cert. petition and jurisdictional statement, follow.

A. Philadelphia Newspapers, Inc. v. Hepps, 485 A.2d 374, 11 Med.L.Rptr. 1841 (Pa. 1984), probable jurisdiction noted, 53 U.S.L.W. 3890 (6/25/85, No. 84-1491)

The Hepps case, ironically, comes to the Supreme Court from a still relatively rare (see LDRC Bulletin No. 11 at 6-7) initial jury verdict in favor of a media defendant, the Philadelphia Inquirer. Plaintiff's central appeal issues, on its direct appeal to the Pennsylvania Supreme Court, were the trial judge's instruction to the jury placing the burden of proof of falsity on the private figure plaintiff and the judge's grant of a directed verdict on the issue of the insufficiency of proof of actual malice for purposes of plaintiff's claim for punitive damages. The Supreme Court of Pennsylvania reversed the favorable judgment and verdict, holding that Pennsylvania by statute places the burden of proof of truth on the defendant and that this statute is not unconstitutional under the First Amendment at least as it applies to a private figure's libel action under the constitutional standards set forth in Gertz v. Robert Welch.*

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* The Pennsylvania Supreme Court did, however, affirm the trial court's directed verdict on the punitive damages issue, a holding that is the subject of a cross-petition still pending in the U.S. Supreme Court -- see listings, infra.

It will be recalled that the Supreme Court had previously granted certiorari to consider the issue of burden of proof in Wilson v. Scripps-Howard Broadcasting Co. -- see LDRC Bulletin No. 2 at 27-28 and No. 3 at 26. However, Wilson was dismissed from the Court's docket, and therefore never decided on the merits, when the parties settled that action. Here is how LDRC described the implications of that grant of cert. in 1981:

> "The recent grant of certiorari by the Supreme Court in Wilson v. Scripps-Howard Broadcasting Co. presents a seemingly technical legal issue. Yet burden of proof is an issue that could readily be used, if the Court were so disposed, as the occasion either to reaffirm and strengthen constitutional doctrine, or else to retreat (at least to some extent) from constitutional rulemaking in favor of state discretion in the libel field.
>
> The central question presented in Wilson, according to the petition for certiorari, is whether the Sixth Circuit "err[ed] in holding that the First and Fourteenth Amendments. . . require that private figure libel plaintiffs bear the burden of proving the falsity of a defamatory communication in contravention to state law?" Since "falsity" is an essential element of the cause of action for defamation, how this question is answered may have profound implications. (Note that the petitioner appeared to concede that a public figure may bear the burden of proof, but that a private figure should not; Scripps-Howard argued that the burden "rests squarely on the plaintiff, whether he is classified as a 'public' or a 'private' figure.)
>
> In its opposition to the Wilson petition, Scripps-Howard argued in favor of the Sixth Circuit's holding, relying upon what it viewed as the clear implication of prior Supreme Court rulings, including most prominently New York Times v. Sullivan; Gertz v. Robert Welch; and Herbert v. Lando, 441 U.S. 153, 175-76 (1979). It also cited what

> was asserted to be an unbroken line of precedent in the prior decisions of "all other federal appellate courts and state courts of last resort that have directly ruled upon the issue," -- see case citations in Bulletin No.2 at pp. 27-28. In support of this "consensus" of lower courts, Scripps-Howard also adverted to the Restatement (Second) of Torts, §580 B, Comment j (1977) which states that "in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication." Scripps-Howard distinguished five cases seemingly to the contrary cited in the Petition, primarily on the ground that four of them involved non-media defendants."

Since 1981, LDRC has continued to report on developments regarding burden of proof based on its annual 50-State Survey. In Bulletin No. 13 LDRC reported (at page 3) on the status of burden of proof.* According to the 1983 Survey at least 31 jurisdictions imposed the burden of proof of falsity upon the plaintiff in a libel action, nearly all in reliance upon their interpretation of constitutional requirements. There were, however, 12 jurisdictions that continued to impose at least the initial burden of proof of truth upon the defendant.

The most recent 1984 Survey reflected little additional development in this area. However, the Illinois Supreme Court did specifically rule for the first time that the burden of proof on the issue of falsity rests with the plaintiff. And LDRC noted, based upon its Pennsylvania Survey report, that the Supreme Court of Pennsylvania was expected to follow suit in this case, then pending. LDRC concluded that, overall, there appeared to be a continued steady, if gradual movement toward placing the burden of proving falsity on the plaintiff in conformity with constitutional principles.

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* Note that this LDRC report did not specifically distinguish between treatment of public and private figures for this purpose.

Unfortunately, as it turned out, the Pennsylvania Court did not adhere to these trends, thus prompting the appeal that has now been granted by the Supreme Court. The questions presented by the appeal were stated as follows in the Jurisdictional Statement submitted to the Court on behalf of Philadelphia Newspapers, Inc., by David Marion, Sam Klein and Katherine Hatton of Kohn, Savett, Marion & Graf in Philadelphia.

> "Did the Supreme Court of Pennsylvania err in upholding the constitutionality of a Pennsylvania statute which required a defendant publisher to bear the burden of proving the truth of its publication as a defense to a private figure defamation action?
>
> May a private figure libel plaintiff recover damages from a newspaper defendant without proving the falsity of the complained-of publication?
>
> Can the falsity of a publication constitutionally be presumed solely from the defamatory character of the words used?"

The Kohn, Savett brief summarized the status of the burden of proof issue specifically with regard to private figure libel actions as follows:

> "Courts throughout the country have been grappling with the issue of whether private libel plaintiffs must prove falsity -- and reaching widely divergent results -- since this Court decided Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Decisions in 12 jurisdictions seem to require that a private defamation plaintiff prove falsity;[4] two

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[4] Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 A.2d 1317 (1982); Harrison v. Washington Post Company, 391 A.2d 781 (D.C. 1978); Smith v. Taylor County Pub. Co., Inc., 443 So.2d 1042 (Fla. Dist. Ct. App 1983); Applestein v. Knight Newspapers, Inc., 337 So.2d 1005 (Fla. Dist Ct. App. 1976); Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292 (1975); Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Brennan v. Globe Newspaper Co., 9 Med.L.Rptr. (BNA) 1147 (Mass. Super. 1982); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493 (Mo. Ct. App. 1980); *(footnote con't next page)*

states require the plaintiff to prove falsity where the publication involves matters of public interest;[5] and two additional states have suggested that plaintiff must prove falsity.[6] In addition to Pennsylvania, four states appear to have retained the common law presumption that defamatory words are false and that, if raised, the defense of truth must be proven by the defendant.[7] Within some jurisdictions, decisions on the burden of proof issue appear to conflict.[8] And finally, 27 jurisdictions have not

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4 (con't) Madison v. Yunker, 589 P.2d 126 (Mont. 1978); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979); Hersch v. E.W. Scripps Co., 3 Ohio App. 3d 367, 445 N.E.2d 670 (1981); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977).

5 Ross v. Gallant, Farrow & Co., 27 Ariz. App. 89, 551 P.2d 79 (1976); Fairley v. Peekskill Star Corp., 83 App. Div. 2d 294, 445 N.Y.S.2d 156 (1981).

6 Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 188 Cal. Rptr. 762 (1983); McCall v. Courier Journal and Louisville Times Co., 623 S.W.2d 882 (Ky 1981), cert. denied, 456 U.S. 975 (1982).

7 Gobin v. Globe, 229 Kan. 1, 620 P.2d 1163 (1980); Rogozinski v. Airstream by Angell, 152 N.J. Super. 133, 377 A.2d 807 (1977), modified, 164 N.J. Super, 465, 397 A.2d 334 (1979); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Denny v. Mertz, 106 Wis. 2d 141, cert. denied, 456 U.S. 883 (1982).

8 Compare Elliot v. Roach, 409 N.E.2d 661 (Ind. App 1980) (Defendant bears burden of proving truth) with Local 15 v. International Brotherhood of Electrical Workers, 273 F.Supp. 313 (N.D. Ind. 1967) (Applying Indiana law) (plaintiff must prove falsity); compare Trahan v. Ritterman, 368 So.2d 181 (La. App. 1st Cir. 1979) (falsity presumed where words are defamatory per se) with Ward v. Sears, Roebuck & Co., 339 So.2d 1255 (La. App. 1st Cir. 1976) (plaintiff must prove falsity); compare Wilson v. Scripps-Howard Broadcasting Company, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981) (plaintiff must prove falsity) with Memphis Pub. Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978) (defamatory statements are presumed false).

> decided post-Gertz, whether the media defendant bears the burden of proving truth.[9]"

The Philadelphia Newspapers brief then summarized the significance of placing the burden of proof on the libel defendant under the Court's First Amendment precedents:

> "The First and Fourteenth Amendments to the United States Constitution Mandate that No Liability be Imposed Upon Speech Not Proven to be False.
>
> In Bose Corporation v. Consumers Union, ___ U.S. ____, 80 L.Ed.2d 502 (1984), this Court re-emphasized that in cases raising First Amendment issues appellate courts are obligated to ensure that there is no "forbidden intrusion on the field of free expression." Id. at 515, citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
>
> Gertz recognized, however, that even purely private speech is deserving of constitutional protection, holding that only "false statements of fact" published with "fault" were outside the sphere of the protected zone. 418 U.S. 323, 340, 347 (1974). Conversely, because truthful speech cannot be deemed to be outside of the zone of legitimate expression, such speech is entitled to full constitutional protection. Moreover Gertz recognized that because it is necessary to provide "breathing space" for the exercise of First Amendment freedoms, N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963), even false statements of fact are entitled to constitutional protection if made without fault. Gertz, supra, 418 U.S. at 347.

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[9] Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Maine, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

Under the Pennsylvania Burden of Proof statute, the validity of which was upheld by the Pennsylvania Supreme Court by the judgment now under review, liability may be imposed without proof that the publication is outside of the protected zone, i.e., false. The logic of Gertz, however, requires that no liability be imposed unless plaintiff is able to demonstrate, by either clear and convincing evidence or, at a minimum, a preponderance of the evidence, that the publication is false.

Following Gertz, the Restatement (Second) of Torts §580B, comment j, recognized that the burden of proving falsity must be placed upon plaintiff. And the Court of Appeals of Maryland, addressing the issue directly in Jacron Sales Co., Inc. v. Sindorf, 276 Md. 580, 350 A.2d 688, 689 (Md. 1976), stated that, "under the negligence standard which we adopt here, truth is no longer an affirmative defense . . . but instead the burden of proving falsity rests upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity."

[T]he Sixth Circuit's decision in Wilson v. Scripps-Howard, supra, confirms that the Gertz fault requirement imposes the burden of proving falsity on the private figure libel plaintiff. Addressing the issue of "whether in light of Gertz the First Amendment controls the question of who has the burden of proof on the issue of truth or falsity when the plaintiff is not a public figure," the Sixth Circuit held that "[a]s a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity." 642 F.2d 371, 374, 376 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981). Its reasoning, id. at 375 (emphasis added)(footnote deleted), was as follows:

"It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining whether the statement was false. The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false. The two elements of carelessness are inevitably linked, for a defendant should not be liable if it "took every reasonable precaution to insure the accuracy of its assertions." Gertz, supra, 418 U.S. at 346. Fault then must be held to consist of two elements: carelessness and falsity.*

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* [Editor's Note: With regard to the implications of the Gertz "fault" requirement, at least when a negligence standard applies as it does in most jurisdictions, it is noteworthy also to recall LDRC's findings suggesting that a verdict based upon negligent fault provides no meaningful basis for appellate review, and probably indicating that juries may be assuming fault from proof of falsity -- see LDRC Bulletin No. 6 at 42-23 and No. 11 at 21. If this is so, any additional dilution of the private figure plaintiff's burden on the issue of falsity would likely further undermine the significance of a finding of "fault" under Gertz.]

B. Anderson v. Liberty Lobby, Inc., 736 F.2d 1563, 10 Med.L.Rptr. 1001, 53 U.S.L.W. 2262 (D.C. Cir. 1984), cert. granted, 53 U.S.L.W. 3847 (6/4/85, No. 84-1602)

Anderson v. Liberty Lobby comes to the Supreme Court after the District of Columbia Court of Appeals reversed a District Court's grant of summary judgment. The trial court had based its judgment regarding these statements on a finding that the plaintiffs could not prove the existence of actual malice.

> "If lack of investigation does not constitute malice, it follows a fortiori that a plaintiff cannot succeed in proving malice when the defendant has conducted a thorough investigation, and uncovered a host of articles published in a variety of widely circulated newspapers and periodicals.
>
> Because Bermant [writer of the articles] thoroughly investigated and researched the articles, the plaintiffs cannot prove the existence of malice, and therefore defendants' motion for summary judgment should be granted. Bermant's reliance upon numerous sources -- The Washington Post, The Washington Star, The Los Angeles Times, National Review, True Magazine, the Congressional Record, Imperium, press releases of the Anti-Defamation League, as well as the several individuals interviewed -- negates a finding of malice. The Court, in examining the affidavit of Bermant, finds that as a matter of law the information contained within these sources substantiates each allegation contained in the articles. That some of the assertions in the defendant's articles may be false, does not create a factual issue as to malice, especially in light of defendants' finely etched effort presenting in careful detail the journalistic research underlying each statement."

Ironically, although it mentioned in passing the clear and convincing evidence standard, the District Court, from all appearances, did not even feel it necessary to rely on the absence of clear and convincing proof in granting summary judgment, since it had found, as noted above, that there was quite simply an absence of any meaningful proof of actual malice.

In the Court of Appeals, a 3-judge panel in an opinion written by Judge Scalia (and joined in by Judge Edwards and District Judge Harris, sitting by designation) reversed the grant of summary judgment as to 9 out of 30 alleged libels.

Its primary dispositive holding was, in effect, that summary judgment on the issue of actual malice could only be granted, at least as to certain statements in the publication, if the clear and convincing standard of proof were incorporated into the analysis at the summary judgment stage.* This, the Court held, despite substantial precedent to the contrary, to be inappropriate.**

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* The Court of Appeals also disposed of certain claims on the following grounds: lack of defamatory meaning; constitutional protection for opinion, and complete absence of factual support for the claim of actual malice as to certain of the published statements.

** The Court of Appeals also rejected an argument, not reached by the District Court, that summary judgment could be granted on the ground that plaintiff was "libel proof," holding that "none of the opinions that appellees cite -- all decisions of federal courts interpreting the law in the absence of state court guidance -- extend the libel-proof doctrine as far as appellees would go. In fact, the Second Circuit, an early proponent of the doctrine, has narrowed it to the facts presented in its earlier cases. See Buckley v. Littell, 539 F.2d 882, 889 (2d Cir. 1976). Because we think it [the libel-proof plaintiff doctrine] a fundamentally bad idea, we are not prepared to assume that it is the law of the District of Columbia; nor is it part of federal constitutional law."

While the Court of Appeals came down hard on two libel defense theories, its refusal to apply the "clear and convincing evidence" standard to a motion for summary judgment is potentially far more troublesome than its view that the libel-proof plaintiff doctrine (relatively infrequently asserted as a defense) is a "bad idea." The Court held the New York Times v. Sullivan requirement that a public figure plaintiff prove actual malice with "convincing clarity" inapplicable to motions for summary judgment. The Court stated:

> "With regard to the 'clear and convincing evidence' requirement, the issue can be framed as follows: whether, in order to deny the defendant's motion for summary judgment, the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with 'convincing clarity.' We conclude that the answer is no. Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well. It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions -- marshalling for the court all the facts supporting his case, and seeking to contest as many of the defendant's facts as possible. Moreover, a 'clear and convincing evidence' rule at the summary judgment stage would compel the court to be more liberal in its application of that provision of FED. R. CIV. P. 56(e) which states that the court 'may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.' In other words, disposing of a summary judgment motion would rarely be the relatively quick process it is supposed to be."

The Anderson cert. petition, submitted to the court by Laura B. Hoguet of White & Case, David J. Branson and Alan R. Friedman of counsel, attacks the judgment on both the summary judgment and the libel-proof fronts, with Questions Presented as follows:

> "1. Can the constitutional requirement that evidence of actual malice in a public figure libel case be 'clear and convincing' be disregarded for purposes of a defendant's motion for summary judgment?
>
> 2. Does the First Amendment require that a defendant's motion for summary judgment in a public figure libel action be granted when no more than nominal damages could be awarded after trial because the plaintiffs' reputations had previously been so diminished, by their own statements and those of others about them, that the statements they now challenge could not cause further harm?"

LDRC studies (the first covering 1980-82 and the second 1982-84) have shown that summary judgment is a well accepted element of the constitutional arsenal protecting freedom of speech and of the press in the libel field. As noted in Study #6 (Bulletin No. 12, at 1):

> "Overall, the LDRC data reveals that defendants' summary judgment motions prevailed in just under 75% of the cases studied during the 1982-84 period. This success rate is down only slightly from the 75% shown in LDRC's 1980-82 Study.
>
> At the trial court level there has also been no significant change in the success rate of summary judgment. The current Study reveals that defendants have been granted summary judgment in 80% of the cases at the trial level up fractionally from the earlier Study which showed a success rate of 79%.

> "On appeal, the success rate of summary judgment is down, but only by 4%, from the 70% success rate of the earlier period. Still, substantially more than 6 out of 10 defendants' summary judgments are granted after appeals have been completed."

These high success rates are particularly notable with respect to public-official and public-figure plaintiffs even in the wake of the potentially inhibitory footnote 9 of Hutchinson v. Proxmire. Nonetheless, the Court of Appeals in Anderson cites Hutchinson as authority for denying the clear and convincing standard in summary judgment:

> "[I]f summary judgment were supposed to be based on a 'clear and convincing' standard, it is hard to explain the Supreme Court's statement questioning the asserted principle that in public figure libel cases 'summary judgment might well be the rule rather than the exception,' and affirming to the contrary that '[t]he proof of "actual malice" . . . does not readily lend itself to summary disposition.' Hutchinson v. Proxmire, 443 U.S. 111, 120 & n.9 (1979). There is slim basis for such a statement if, in order to survive a motion for summary judgment, the plaintiff must establish an arguably 'clear and convincing' case."

The Anderson petition retorts:

> "The Court of Appeals erroneously interpreted this caution as license to dilute the constitutionally-required 'clear and convincing' burden of proof and thereby favor libel plaintiffs at the summary judgment stage -- a result this Court could scarcely have intended by the Hutchinson footnote."

Putting the Hutchinson footnote into perspective, LDRC's statistics show that:

> "With regard to the specific precedential effect of Hutchinson, Federal courts cited Hutchinson in only 6% of the cases in the current Study, while state courts cited Hutchinson in only 7% of the cases. Thus, the frequency with which Hutchinson was cited by both federal and state judges has in fact decreased substantially since the 1980-1982 Study where federal judges were citing Hutchinson in 30%, and state judges in 12% of their summary judgment rulings."

Furthermore, the LDRC Study showed:

> "Although Hutchinson specifically questioned the availability of summary judgment when actual malice is at issue, 71% of defendants' summary judgment motions still prevail when the dispositive issue is actual malice, although this figure is down from the unusually high 83% rate found in the earlier Study.
>
> Relatedly, when motions for summary judgment are made in cases involving public official or public figure plaintiffs, they were granted in 80% of the cases, up from 74% in the earlier Study. Summary judgments in private figure cases were down, however, to 65% from 75%."

Nonetheless, one cannot be sanguine about the intentions of the Supreme Court with regard to arguable "procedural" protections such as summary judgment. As recently as 1984 Calder v. Jones [104 Sup. Ct. 1482, 10 Med.L.Rptr. 1401] echoed Hutchinson in its refusal to allow procedural safeguards to be added to the substantive protections of the First Amendment. Justice Rehnquist's observations on this point in Calder are worth quoting in their entirety:

> "[T]he potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. [Citing Sullivan and Gertz.] To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, e.g., Herbert v. Lando, 441 U.S. 153 (no First Amendment privilege bars inquiry into editorial process). See also Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (implying that no special rules apply for summary judgment)." 10 Med.L.Rptr. at 1405.

Moreover, removal of the clear and convincing element at the summary judgment stage would potentially have a far more adverse affect than the Supreme Court's previous generalized statements of antipathy to summary judgment in libel actions. Thus, LDRC studies have shown that application of the "clear and convincing evidence" standard has been a vital element in the granting of summary judgment in recent years. As LDRC reported in Study #6 (Bulletin No. 12 at 6):

> "As was noted in the previous LDRC Study, in many cases, after discovery, the record is simply devoid of facts or evidence suggesting the existence of actual malice, where that is the dispositive issue on the motion for summary judgment. In those situations it is clear that under even the most grudging standard, the grant of summary judgment is required. As in the previous Study, in many other cases the additional constitutionally-based requirement that actual malice must be

> established by 'clear and convincing' evidence, or with 'convincing clarity,' continues to play a significant role in the grant of summary judgment in such cases. Thus, in as many as 28 of the cases studied, that high quantum of evidence was expressly noted and relied upon in connection with the grant of summary judgment. In only a small handful of cases (5/28) did the court discuss the 'clear and convincing' standard, but yet not grant the motion."

Similarly, in LDRC's first summary judgment study (Bulletin No. 4 (Part 2) at 5, in as many as 31 of the 66 cases in which actual malice was the dispositive issue adverted to, or specifically relied upon, the Court referred to the requirement that actual malice be proved with "convincing clarity" or by "clear and convincing" evidence, in granting the motion for summary judgment. Indeed, more courts mentioned this requirement than cited or discussed Hutchinson footnote 9.

The Anderson petition concludes by highlighting the constitutional and practical necessity of the exacting standard of clear and convincing evidence in public-official and public-figure cases to prevent self-censorship (or the "chilling of the press") in matters of public interest.

> "The same First Amendment concerns that compel independent judicial review of a finding of actual malice by clear and convincing evidence at the trial and at the appellate stage of a litigation require application of the evidentiary standard at the summary judgment stage. 'Convincing clarity', this Court said in Bose, is a question of constitutional law as well as of fact and it is such on a motion for summary judgment just as much as at any other point in the case. Summary procedures are indeed especially important to the preservation of First Amendment rights in public figure libel cases because

of their role in cutting off unfounded claims before harassment occurs and expression is chilled. As the court said in McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1467 (D.C. Cir. 1983), quoting Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert denied, 385 U.S. 1011 (1967): 'For the stake here, if harassment succeeds, is free debate . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open . . .' Id. at 1467

'The requirement that actual malice be proved with convincing clarity is a fundamental element of the Times v. Sullivan holding -- a holding this Court has repeatedly affirmed 'as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures.' Herbert v. Lando, 441 U.S. 153, 169 (1979). The Court's decision in New York Times Co. v. Sullivan suggests no rationale for limiting application of the convincing clarity standard to only some stages of a public figure libel case. Yet it is precisely this limited application that the Court of Appeals' decision mandates. In suspending application of the 'convincing clarity' standard of proof until after trial has commenced, the Court of Appeals holding guts the protection provided in New York Times Co. v. Sullivan and required by the First Amendment.

"Under FED. R. CIV. P. 56(c) a party seeking to defeat a motion for summary judgment must show 'sufficient evidence supporting the claimed factual dispute' so as to 'require a jury or judge to resolve the parties' differing versions of the truth at trial.' First National Bank v. Cities Service, 391 U.S. 253, 288-89 (1968). Implicit in this rule is the requirement that the standard of proof applicable at trial also applies at summary judgment. The Court of Appeals' holding is similarly contrary to the black letter rule of law that if a party moving for summary judgment would have been 'entitled . . . to a directed verdict at trial, he is entitled to a summary judgment under Rule 56.' United States v. General Motors Corp., 518 F.2d 420, 442 (D.C. Cir. 1975). This rule has been applied to civil cases of all kinds.[3] It is clear, simple and, prior to the Court of Appeals' decision, unexcepted."

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[3] See, e.g., First National Bank v. Cities Service, supra, 391 U.S. at 288-89 (1968); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944); Southmark Properties v. Charles House Corp., 742 F.2d 862, 877 (5th Cir. 1984); Schultz v. Newsweek, Inc., 668 F.2d 911, 918 (6th Cir. 1982); Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980); Roberts v. Browning, 610 F.2d 528, 532 (8th Cir. 1979).