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LDRC LIBELLETTER

February 1995

ABC LOSES PHILIP MORRIS SOURCE MOTION

Reconsideration Pending

In a decision issued on January 26, 1995, the Virginia Circuit Court in Richmond, Virginia held that defendant-ABC should be compelled to reveal certain confidential sources to plaintiff-Philip Morris in connection with its libel suit against ABC (*Philip Morris, Inc.* v. *American Broadcasting Co., Inc.*, No. 760CL94x 00816-00 (Vir. Cir. Ct. Jan. 26, 1995). Holding that the First Amendment and Virginia law would afford a qualified reporter's privilege, the court concluded that Philip Morris had met its burden and overcome the privilege, showing a compelling need for the identity of the confidential sources with respect to the issue of actual malice.

Of major significance, however, the court held that third-party subpoenas directed toward obtaining reporter telephone, travel, and charge card records to enable plaintiff to identify a reporter's sources, were tantamount to a direct request to the reporter for the sources' identities and that the same qualified privilege against disclosure must apply.

Before the court were two motions: 1) Philip Morris' Motion to Compel ABC to identify its confidential sources and disclose its communications with and about such sources; and 2) ABC's Motion to Quash Letters Rogatory and subpoenas duces tecum served on non-parties by Philip Morris. The 13 non-party subpoenas were requests to AT&T, MCI, NYNEX, American Express, USAir and other such entities for reporter telephone, travel and charge card records, to be used by Philip Morris to trace the ABC reporters' movements during their research of the challenged news report and thereby identify for itself ABC's

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LDRC 50-State Survey — Now in Two Volumes

Due to demand by LDRC membership for more comprehensive coverage of privacy, infliction of emotional distress, breach of contract, and other non-libel issues, LDRC is in the process of creating much expanded outlines on these legal issues. In order to do so, and still retain the depth of coverage for libel -- including the newly developed federal circuit surveys -- we have had to move to TWO VOLUMES. Starting in 1995, LDRC will publish in June the *LDRC 50-State Survey: Media Privacy and Related Law* and in October the *LDRC 50-State Survey: Media Libel Law*.

Both books will enjoy the same successful format as the current LDRC 50-State Survey, providing quick and comprehensive tools for media lawyers. The new volume will offer even more emphasis on statutory citation, often so necessary -- and often on such short notice -- for research in these legal areas.

LDRC 50-State Survey: Media Privacy and Related Law will include newly expanded materials on privacy. The book will contain outlines on all four of the privacy torts, with special materials on eavesdropping, ride-alongs, trespass statutes, right of publicity statutes, and many, many other sub-issues related to privacy law. The new volume will contain coverage of the following areas of law:

- False Light • Private Facts • Intrusion • Misappropriation/Right of Publicity
- Infliction of Emotional Distress • Breach of Contract/Promissory Estoppel
- Injurious Falsehood • Interference with Contract • Prima Facie Tort
- Conspiracy • Conversion • Lanham Act • Fraud • Negligent Publication
- Damages and Remedies • Procedural Issues • SLAPP Suits
- Confidential Sources • Eavesdropping

LDRC 50-State Survey: Media Libel Law will have full substantive and procedural law outlines for all of the states, territories and the federal circuits. It will highlight significant new developments from prior years. It will continue to have analysis of the many, many issues in libel law; such as opinion, fault, privilege retraction and detailed materials on procedural issues such as burden of proof, expert witnesses, summary judgment and appeal.

These two companion volumes should offer LDRC members easy access to vast bodies of law in the ever-expanding universe of media claims. We believe that we are providing you with a service that you have asked for to support your media practices.

The order forms will go out in the next weeks. The forms will allow you to order both volumes or either of the volumes separately. We hope that you will respond promptly so that we know how many of these new volumes to print. We are offering a discount for those of you who order both and do so by May 1.

British Law Rejected Again

By Laura R. Handman

What do the late Armand Hammer and Robert Maxwell, Bianca Jagger, Sylvester Stallone, the Sheik of Dubai and the former Greek Prime Minister all have in common? They all have brought libel suits against U.S. publishers in London. Why? To take advantage of Britain's plaintiff-friendly libel laws and avoid the constitutionally imposed obstacles to recovery under U.S. law.

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THE LDRC ANNUAL DINNER

Presenting LDRC's *William J. Brennan, Jr. Defense of Freedom Award* to

JUSTICE HARRY A. BLACKMUN

LDRC is truly honored to be able to invite all of you to spend this evening with Justice Blackmun as our esteemed guest.

PLEASE NOTE THE DATE:

NOVEMBER 9, 1995
THURSDAY EVENING
8:00 P.M.

THE ANNUAL DINNER HAS MOVED NIGHTS THIS YEAR
-- FROM WEDNESDAY TO THURSDAY --

The Annual Dinner will be preceded by a cocktail reception which, as in past years, will be sponsored by Media/Professional Insurance.

We know that all LDRC members will want to attend this event. We look forward to seeing you there!

Newspaper Negligent Publication Claim Dismissed

By Paul C. Watler

A wrongful death action alleging *The Dallas Morning News* was negligent in publishing address-information on a gang murder suspect, thereby purportedly prompting a fatal retaliatory shooting, was dismissed on summary judgment by a Texas state district judge. *The News* contended it owed no legal duty sufficient to support negligence liability to the plaintiffs and that the First Amendment barred the claims.

The suit, *Natividad Orozco, Sr., et al. v. The Dallas Morning News, et al.*, Cause No. 94-5705, 95th District Court, Dallas County, Texas, arose out of a series of fatal gang drive-by shootings in Dallas shortly after Thanksgiving, 1993. A 16-year old Dallas boy was shotgunned to death as he left a gang intervention meeting at a high school. The victim reportedly attended the meeting because he wanted out of gang life.

Two days later, police arrested four suspects, including Natividad Orozco, Jr., 17, who later was convicted of murder for driving his mother's car used in the fatal shooting. In reporting on the case, *The News* learned from interviews of officers and an official police report the residence address of Orozco. Based on the information from the police, the newspaper accurately reported that the suspect resided in the "700 block of Delaware Avenue."

In the evening of the day of *The News'* report of Orozco's arrest, unknown assailants-- believed to belong to the gang of Orozco's victim--fired on his residence in a drive-by shooting. Later, the assailants rang the doorbell at the Orozco residence. Debra Tames, the adult sister of Orozco, was shot to death when she answered the door and her elementary school age son was seriously wounded.

Tames' survivors--the parents, brothers and nephews of gang murder suspect Natividad Orozco, Jr.--sued *The News* contending the retaliatory shooting was reasonably foreseeable and was proximately caused by the paper's publication of Orozco's street block number. *The News* moved for summary judgment on two principal theories: 1) the common law of Texas imposes no duty on a publisher in the circumstances; and 2) even if such a duty were recognized, the negligence recovery sought by the plaintiffs would be barred by the United States and Texas constitutions.

Under the Texas risk-utility balancing test used by courts of the state to determine threshold duty issues, *see, Greater Houston Transportation Co. v. Philips*, 801 S.W.2d 523 (1990), *The News* argued that the alleged injury was not reasonably foreseeable. The plaintiffs countered with evidence that the newspaper had carried several reports of gang retaliation in the two years before the Orozco incident, thereby allegedly putting the publication on notice that retaliation was foreseeable upon the publication of the gang suspect's street block number.

The News also contended that even if the danger was foreseeable, the social utility of accurate reporting of law enforcement activities concerning youth gangs outweighed the remote risk under the balancing test. The newspaper also contended that the burden of self-censorship that would be imposes on news organization--another factor to be weighed under the risk-utility test -- militated against the recognition of a duty on the part of *The News*.

Conceding the absence of Texas cases supporting is negligence theory, Plaintiffs relied on two earlier decisions from other jurisdictions. *Weirum v. RKO General, Inc.*, 539 P.2d 36 (1975); *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. den'd*, 459 U.S. 1226 (1983).

For its constitutional argument, *The News* principally relied upon *Florida Star v. BJF*, 491 U.S. 524 (1989). Here, because it was undisputed that the suspect's address was accurately reported and lawfully obtained from official public records, the state could not impose negligence damages because a compelling interest of the highest order was absent. Plaintiffs responded by contending that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) constitutionally permitted the negligence recovery they sought as they were not contending that liability without fault should be imposed.

At the summary judgment hearing on January 20, 1994, the court noted that it found no legal duty was owed by the newspaper. The plaintiffs have stated their intention to appeal.

The Dallas Morning News was represented by Paul C. Watler shareholder at the firm of Jenkens & Gilchrist, P.C. of Dallas.

LDRC wants to acknowledge and thank our spring 1995 Brooklyn Law School interns — Suzanne Brackley, John Maltbie, and Robert Sommer — for their fine efforts and participation in LDRC's many on-going projects and especially for their contributions to the *LibelLetter*.

LDRC 1995 Bulletin No. 1 Reports on Right of Publicity Restatement

The quarterly LDRC BULLETIN began its 1995 volume with a comprehensive analysis of the "Right of Publicity" sections of a recently released RESTATEMENT on the law of unfair competition. *See The Right of Publicity and the New RESTATEMENT (THIRD) OF UNFAIR COMPETITION* (Issue 1995-1, January 31, 1995). The new RESTATEMENT, officially published by the American Law Institute (ALI) on December 28, 1994, represents the first time that the ALI has recognized a full-blown commercial "right of publicity."

The LDRC BULLETIN reviews the development of the right of publicity, reports on the drafting process of the RESTATEMENT, and analyzes the potential impact of the RESTATEMENT on this still-evolving body of law. An Appendix to the the BULLETIN also reproduces a series of position papers prepared by media and advertising groups commenting on an earlier draft of the RESTATEMENT and includes a "redlined" comparison of these sections and the final RESTATEMENT, revealing that some useful revisions resulted.

Nevertheless, the BULLETIN concludes many of the policy choices adopted in the new RESTATEMENT reflect an expansive approach to the right of publicity, undertaking to resolve issues as yet undetermined in most jurisdictions. The RESTATEMENT is thus likely to remain a hotly controverted document — one presenting issues which practitioners and courts will be called upon to debate and resolve in the years ahead.

Among the key features of the right of publicity RESTATEMENT, according to the LDRC report, are the following:

⇒ On perhaps the single most controversial issue in publicity law, commentary to the RESTATEMENT would recognize that the right of publicity can be inherited by one's heirs. The tentative draft had strongly favored this position. However, the final RESTATEMENT offers a somewhat more balanced treatment of the subject than had the previous draft, with a more explicit acknowledgment that the question of whether such a "descendible" right exists remains unsettled in most jurisdictions.

⇒ Although the majority of jurisdictions that have considered this issue have refused to treat the right of publicity as a descendible interest unless its originator had exploited it during his or her lifetime, Commentary to the RESTATEMENT rejects such a requirement.

⇒ Both the draft and the final RESTATEMENT extend the scope of an individual's right of publicity beyond the elements traditionally recognized at common law. For example, the RESTATEMENT provides that the right of publicity may be violated not only by use of an individual's "name and likeness" but also by the use of "other indicia of identity." Commentary to the RESTATEMENT suggests that such indicia might include imitations of voice, sound, character, or performing style. Such an extension would represent a far broader application of the publicity right than publishers and advertising groups believed was warranted under existing law.

⇒ However, the final RESTATEMENT was also revised to clarify the constraints imposed on the right of publicity by the First Amendment. Indeed, the final text includes the explicit acknowledgment that "the right of publicity is *fundamentally constrained* by the public and constitutional interest in freedom of expression."

⇒ First Amendment limitations are also recognized in the general exemption for use of an individual's identity for "news reporting, commentary, entertainment, or in works of fiction or nonfiction." The final RESTATEMENT also added that the "scope of activities embraced within this limitation has been broadly construed."

⇒ While the new RESTATEMENT provides that use of identity for purposes of trade is ordinarily actionable, First Amendment limitations are also reflected in the RESTATEMENT's recognition that in distinguishing "protected editorial" from "unprotected trade" uses, "it is the nature and content of the use and not merely its physical form that is controlling." Thus, for example, whether a calendar should be classified as a trade or an editorial use will depend upon whether an advertising or communicative aspect predominates in the content of the particular calendar under review and not merely on the fact that the publication is labeled as — or is in the form of — a calendar.

⇒ Finally, the new RESTATEMENT recognizes broad remedies, in terms of the available damages and with respect to injunctive relief.

Newsroom Search Found Unlawful

Broadcaster Citicasters, Inc. has obtained an injunction against local law enforcement officials directing them to return a videotape seized in a search of the broadcaster's facilities found to violate the Privacy Protection Act of 1980, 42 U.S.C. Sections 2000aa-2000aa-16. *Citicasters* v. *McCaskill*, No. 94-0748-CV-W-2 (W.D.Mo. February 1, 1995) The defendants were a police officer, a prosecuting attorney, and the members of the Board of Police Commissioners of Kansas City, Missouri. They obtained a search warrant pursuant to which they seized a videotape from the plaintiff, which operates a television station in Kansas City, as evidence in a criminal prosecution. The defendants had not sought to obtain a subpoena for the tape.

The prosecuting attorney was the only one found liable under the Privacy Protection Act of 1980 for damages. The other defendants were found to be protected under the doctrine of sovereign immunity. Plaintiff was given leave to amend its complaint to assert a claim against the police officer in his individual capacity. The court dismissed plaintiff's claim under 42 U.S.C. section 1983 against all defendants, failing to find that the broadcaster's constitutional rights had been violated.

The seized videotape had been obtained by Citicasters from a private citizen who inadvertently photographed an abduction by a man subsequently accused of the murder of the abductee. The citizen provided the tape to Citicasters, but retained the original himself. He was not a local resident and apparently was unavailable to local law enforcement.

Portions of the videotape were broadcasted on television. When contacted by law enforcement, Citicasters had offered to allow the police to view the entire tape, but would provide a copy only if subpoenaed.

The defendants, Ronald Parker, a police officer and Claire McCaskill, a prosecuting attorney for Jackson County Missouri, instead obtained a search warrant. In accordance with the warrant, Parker seized the videotape and its copies as evidence. In response, Citicasters filed suit against Parker, McCaskill and the individual members of the Board of Police Commissioners of Kansas City, Missouri under the Privacy Protection Act of 1980 and 42 U.S.C section 1983.

The Privacy Protection Act

The Privacy Protection Act of 1980 states in part that "it shall be unlawful for a governmental officer or employee in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials . . . possessed by a person in connection with the purpose to disseminate to the public a newspaper, book, broadcast, or other similar forms of public communications in or affecting interstate or foreign commerce . . ." (Slip op. at 3) "Documentary materials" as defined under the Act includes videotapes.

The Privacy Protection Act was enacted in response to the Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). In *Zurcher*, the Court upheld a search of a university newspaper's offices for all photographs and negatives, published and unpublished, in connection with an investigation of the assault of police officers at a local demonstration. Holding that "the courts may not, in the name of Fourth Amendment reasonableness, forbid the States from issuing warrants [to search the property of persons] not reasonably suspected of criminal involvement," *Id.* at 560, the Court declined "to reinterpret the {Fourth] Amendment to impose a general constitutional barrier against warrants to search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the insurance of search warrants." *Id.* at 567.

The court easily held that the

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Colorado Opinion Case

The United States Supreme Court has denied review of *Keohane V. Stewart*, 882 P.2d 1293 (Colo. 1994), letting stand an award of $17,500 to Judge Paul J. Keohane in his slander suit against Stephen Stewart, a local councilman. *Stewart* v. *Keohane*, 63 U.S.LW. 3559 (U.S. Jan. 23, 1995) (No. 94-1001). Although the case involved a non-media defendant, the Colorado decision illustrates the difficulty and unpredictability of litigating "opinion" claims in the post-*Milkovich* era.

Perhaps more importantly, the Colorado Supreme Court held that a public official could maintain a slander claim based solely upon emotional distress injury, with no evidence of reputational harm.

The Claims

Keohane arose in the aftermath of a highly publicized bench trial of a physician charged with sexual assault, over which the defamation plaintiff, Judge Keohane, presided. A verdict of not guilty by reason of impaired mental condition was entered against the doctor resulting in widespread public outrage directed towards both the legal and medical professions in the Canon City, Colorado area. During the trial, a reporter for the Canon City Daily Record published a statement made by Canon City Councilman Stephen Stewart that Keohane was "the best judge money can buy." After the verdict was entered Stewart reportedly approached the reporter and asked him: "What do you think, was [Keohane] paid off in drugs or in money?" and "Do you think he was paid off in cash or cocaine?"

The reporter repeated the remarks to Keohane, who then filed a slander action against Stewart, but only for these post-trial comments. These comments were only repeated by the reporter to the plaintiff-Judge. Unlike defendant-Stewart's prior comment to the reporter about Keohane, these remarks were never otherwise published.

Judge Keohane also filed suit against the author of two letters to the

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Newsroom Search

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materials seized came within the Act's protection. However, the court rejected Citicasters' contention that the tape was also protected under analogous provision of the Act covering seizure of "work product" of a communicator, finding that the definition of "work product" did not encompass tapes not initially produced for the purpose of communicating to the public.

The defendants offered a number of arguments as to why the Act was inapplicable to them and this instance. They argued that the outtakes were not protected under the Act; that the Act only protected "as broadcast" materials. The court easily rejected that argument as inconsistent with the fundamental purpose behind enactment of the Act.

Defendants argued that their inability to obtain a subpoena duces tecum for the videotape in the course of their investigation, due to the vagaries of Missouri law, rendered the Act inapplicable to them. In effect, they were arguing, "we had no choice." The court rejected that as well while noting that the states were given sufficient time under the Act prior to its effective date to make procedural changes necessary to comply with the Privacy Protection Act. Missouri's failure to do so would not preclude a plaintiff from bringing a claim under the Act.

Equally unavailing were defendants efforts to come within one or more of the exceptions to the Act's requirements. Defendants could not show that immediate seizure was necessary to prevent death or serious injury to a human being, or to avoid destruction, alteration or concealment of the evidence – and neither of these reasons was cited in the affidavit in support of the search warrant.

The defendants claim that the Privacy Protection Act of 1980 violated the Tenth Amendment was denied by the court. The court refused to find any violation absent an egregious invasion of the state's police power.

Although the Privacy Protection Act applied to the facts of the case as a whole, the court found that the Act did not apply to every defendant. The court acknowledged that sovereign immunity if not waived by the state would prevent suit against state officials sued in their official capacity. Such a suit would be deemed a suit against the state itself. Under this analysis police officer Parker and the individual members of the Board of Police Commissioners, all of whom were officers of the State, were immune from suit in their official capacity. The Act did authorize suit against an individual officer or employee of the state if the state did not waive sovereign immunity. The court allowed plaintiff-broadcaster to amend its complaint to file a claim against the police officer in his individual capacity.

The prosecutor, as an official of the county, was subject to suit under the specific provisions of the Act authorizing suit against a governmental unit.

Remedies

The Act authorized damages. Finding that Citicasters had not alleged that it suffered any actual damage, the court found that the Act authorized liquidated damages of $1000 to Citicasters.

In authorizing an injunction directing defendants to return the original tape to plaintiff-Citicasters, the court rejected defendants argument that a suit for damages was the exclusive remedy provided by the Privacy Protection Act. However, the court found that Citicasters had not met its burden with respect to its request for an injunction against any future violations of the Act by defendants.

No Violation of Section 1983

The court agreed with defendants that plaintiff-Citicasters had failed to state a claim under section 1983. Relying on *Continental Cablevision* v. *Storer Broadcasting*, 583 F. Supp 427 (E.D.Mo. 1984), Citicasters claimed that the reporter's privilege guaranteed by the First Amendment required a hearing before news related materials could be seized. The court distinguished *Continental Cablevision* on the grounds that it dealt with civil litigation whereas this case dealt with a criminal prosecution and that *Continental Cablevision* involved the confidentiality of sources instead of outtake material.

The court found that the reporters' privilege was designed to prevent infringement of the media's ability to gather and disseminate news. Plaintiff's ability to gather and disseminate news was not hindered in this instance, according to the court, as it had already broadcast the news report.

The court refused to find a First Amendment reporter's right to a hearing prior to seizure of material pursuant to a criminal investigation.

PLEASE PAY NOW FOR YOUR 50-STATE SURVEYS: 1994-95

For those of you who still have not paid for the *1994-95 LDRC 50-State Survey* shipped last October: **Please pay NOW.** LDRC needs to close out the 1994 financial records and you are holding us up! We would sincerely appreciate it if you could send us a check for your book(s). Thank you.

If you wish to order a copy of the *1994-95 LDRC 50-State Survey*, simply send a check for $135 (which also covers shipping and handling) to LDRC, 404 Park Avenue South, New York, New York, 10016.

UNIFORM CORRECTION ACT: A Status Report

The Uniform Correction or Clarification Act has been introduced in two state legislatures thus far this term: North Dakota and New Mexico. Dick Winfield of Rogers & Wells and Barbara Wall of Gannett are monitoring developments on the UCA in the states. The following is a report from Dick Winfield.

The North Dakota Senate unanimously passed the UCA in January. It will now pass to the House for consideration. Jack McDonald, of Wheeler Wolf in Bismarck, North Dakota, is coordinating efforts in the North Dakota state legislature.

In New Mexico the UCA bill has been introduced by State Senator Reagan, a Uniform Law Commissioner.

For more information about the UCA or about current developments, give LDRC a call, or contact Dick Winfield or Barbara Wall.

BEWARE FOOD DISPARAGEMENT STATUTES

BE AWARE! State legislatures may have disparagement statutes on their agendas for the 1995 session. In the State of Washington, an "agricultural commodity" disparagement bill has been resubmitted to its House.

Disparagement as defined by the bill is any false information regarding the application of any agricultural chemical or process to agricultural commodities that is not based on reliable scientific date, that the disseminator must know or should have known was false, and that causes the consuming public to doubt the safety of the commodity. Any producer of the commodity who is damaged is authorized to sue, and a successful plaintiff would be entitled to all litigation costs, including reasonable attorney fees, investigative costs and court costs.

None of the key provisions of the draft bill meets applicable First Amendment or state constitutional standards.

States such as Louisiana, Idaho, Georgia, Alabama, South Dakota, Mississippi, and Colorado have enacted perishable food disparagement statutes. The legislatures in Delaware, Texas, South Carolina, Minnesota, Pennsylvania, and Missouri have rejected such statutes in recent years.

The chances of the Washington State bill passing the second time around are not clear. However, look for other states to submit similar statutes.

LDRC reported on the interest in, and enactment of, various agricultural disparagement bills last year. (See Disparagement Statute Update, *LDRC LibelLetter* (April 1994 , at 2 col. 2) We have copies of enacted provisions at LDRC.

A REPORT ON PUNITIVE DAMAGES
by P. Cameron DeVore

H.R. 10

Punitive damages continue under heavy attack in the Congress. HR 10, presently under active consideration, is a part of the Republicans' "contract with America." Initially, it imposes a cap on punitive damages in product liability cases, but is expected to be amended to apply more broadly to all civil cases in federal courts.

U.S. SUPREME COURT

The U.S. Supreme Court continues its flirtation with possible enhanced due process requirements for imposition of punitive damages. On January 23, 1995, the Court granted certiorari in *BMW of North America, Inc.* v. *Gore*, No. 94-896, apparently to readdress the question of a standard that might identify unconstitutionally excessive awards, and also the extent to which a jury may punish a defendant for conduct occurring entirely in other states.

The thus far imprecise nature of guidance from the Court on punitive damages due process requirements was again illustrated by the decision of the Oregon Supreme Court on February 2, 1995, on remand, in *Oberg* v. *Honda Motor Company*. The Supreme Court held in 1994 that Oregon's lack of appellate review of punitive damages did not meet due process standards. On remand, the Oregon Supreme Court reviewed the case, but upheld the punitive damages on the simple basis that they were "within the range that a rational juror would be entitled to award in the light of the record as a whole."

UNIFORM LAW COMMISSIONER

The National Conference of Commissioners on Uniform State Laws has established a drafting committee to develop a model act on puntive damages. The ULC noted that punitive damage provisions in the various states held differing standards and, to their mind, called for a level of uniformity.

The drafting committee held its first meeting in Atlanta on January 13-15, 1995. The initial working draft proposed a cap on punitive damages, and would require proof of malicious or "despicable" behavior to a clear and convincing level, and limit respondeat superior liability.

The reporter for the committee is Roger Henderson, professor at the University of Arizona School of Law. The chair's goal for the committee is a presentation to the full body of National Law Commissioners in approximately two year.

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Colorado Opinion Case

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editor which strongly criticized the legal and medical professional. The letters suggested that corruption and conspiracy between the two prevented proper disciplining of lawyers and doctors. The plaintiff was not specifically named in the letters.

A jury awarded plaintiff damages against both the author and publisher of the letters to the editor and against Councilman Stewart.

The Supreme Court of Colorado

The Supreme Court of Colorado affirmed the Colorado Court of Appeals dismissal of Keohane's claim against the publisher and the author of the letters, holding the statements were not actionable. The Colorado Supreme Court also affirmed the appellate court's decision to uphold the jury verdict against Councilman-Stewart.

The Court analyzed the statements in the letters and those said by the Councilman as to whether (1) a sued upon statement is "sufficiently factual to be susceptible of being proved true or false," (derived from *Milkovich*) and (2) whether reasonable people would conclude that the assertion is one of fact by considering factors such as how the statement is phrased, the context of the statement, and the circumstances surrounding the assertion which includes the medium in which it is contained and the intended audience (derived from *Burns v. McGraw-Hill Broadcasting Co.*, 659 P.2d 1351 (Colo. 1983)).

As to the letters to the editor, while recognizing that certain statements in them standing alone could be read to state verifiable facts, the Court found that such a conclusion must be rejected when those statements were read in the context of the entirety of the letters. The use of hyperbole, gross overgeneralization, speculation and capital letters for emphasis -- as well as the letter's placement on the opinion page of the newspaper -- were signals that the statements were not to be taken literally.

The Councilman's statements, however, taken in context could be understood to state that the judge took a bribe, the only question being how he was paid off. The Councilman's statements, the Court found, were not made in hyperbolic terms or as seemingly rhetorical questions. They were made in the backdrop of a public debate about corruption in the city and Stewart's prior published statement that Keohane was "the best judge money could buy". Reasonable people could have concluded that the Councilman was basing his assertions on facts to which he was privy about the Judge, but which were undisclosed. Moreover, they implied a criminal action, which the Court found, even if coached as an opinion, is not protected.

The Dissent

Chief Judge Rovira who wrote an opinion last year on the issue of "opinion" that set out a sound analysis *NBC Subsidiary v. The Living Will Center*, 882 P.2d 1293, 22 Media L. Rep. 2545 (Colo. 1994), dissented from that part of the Court's decision that affirmed the judgment against Councilman Stewart.

Joined by two other Justices in a strongly worded opinion, he pointed out that the majority had paid little heed to the fact that the reporter, the only person who heard the defendant's comment, testified that he did not have "the slightest clue" as to what Stewart meant by his remarks and that the reporter never took the remarks seriously because he "never knew" when Stewart was being serious or just saying something for effect. The dissent analogizes the statement, in the context of the plaintiff's controversial ruling, as akin to the charge of "blackmail" in *Greenbelt Cooperative v. Bresler*, 389 U.S. 6 (1970) and "scab" in *Letter Carriers v. Austin*, 418 U.S. 264 (1974) -- as no more than epithet and rhetorical hyperbole. In this instance, with the backdrop of a highly controversial decision by Judge Keohane, the dissent found that listeners would understand Stewart's statements as "figurative expression of Stewart's dissatisfaction with the verdict [and a] . . .hyperbolic and figurative expression of Stewart's discontent and low regard for Keohane as a judge." (*Keohane*, 882 P.2d at 1307).

No Reputational Harm
Only Emotional Injury

Equally significant, the Colorado Supreme Court upheld the damage award granted to Keohane based solely on the judge's evidence of emotional distress upon having Stewart's statements repeated to him by the reporter. The statement having been made by the defendant only to the one person, who in turn testified that he did not understand the remarks to be defamatory, left no evidence of reputational harm. Evidence of the emotional distress was shown only by Keohane's testimony that he felt "worse" because the statements were made.

On this issue, Chief Justice Rovira states in his dissent that "permitting public officials to recover damages solely for emotional distress in a defamation action will result in a chilling of speech and discouragement of public debate. Knowing that they can be sued for nothing more than hurting the feelings of public officials, citizens will be more likely to remain silent on issue of public interest." (*Keohane*, 882 P.2d at 1311).

Punitive Damages

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Consistent with ULC procedures, upon establishing the committee, it informed the ABA. The ULC allows interested ABA committees to send a representative to the drafting committee meetings as advisors. I serve as an ABA advisor to the committee from the Forum on Communications Law. There are also representatives from the ABA TIPS and the Litigation Section. I will keep you posted on the process.

Philip Morris/ABC

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sources. ABC's Motion to Quash, and the *amicus* support that motion received, were reported upon in the November, December and January issues of the *LDRC LibelLetter*.

The court's order granting Philip Morris's Motion to Compel has been stayed, however, pending argument before the court on ABC's motion for reconsideration. That argument is currently scheduled for March 1. The court's order denying ABC's Motion to Quash has been stayed pending further order from the court.

The Privilege

The court found clear precedent from the Virginia Supreme Court, and federal cases, for the existence of a constitutionally based qualified reporters' privilege. In so doing, the court rejected an argument made by Philip Morris that the Supreme Court decision in *Herbert v. Lando*, 441 U.S. 153 (1979), held broadly that there was no constitutional protection for a defendant reporter who refuses to identify sources used in a public figure libel case. The editorial process that was at issue in *Herbert*, the court stated, is wholly different from the privilege against disclosure of confidential sources.

The required balancing test for the qualified reporter's privilege it took from *LaRouche v. National Broadcasting Company, Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986): (1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is compelling interest in the information.

A key first issue, however, was whether the privilege would apply to the non-party subpoenas; what Philip Morris argued was its effort simply to exhaust the alternative sources for the information. Philip Morris argued that the privilege did not protect information in the hands of neutral third parties "to whom [the parties to a 'confidential' relationship] have knowingly imparted their secret." (Slip op. at 4-5).

The court soundly rejected Philip Morris's position. It recognized the need for reporters to travel and use telephones freely. To require reporters to avoid all manner of modern technology which results in a paper trail would be, in the words of the court, "unreasonable and would unduly burden and infringe upon First Amendment freedoms." (*Id.* at 7)

The court dismissed Philip Morris' reliance on *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), which held that plaintiff-journalists had no right to be notified in advance by the government when it chooses to subpoena their toll-billing records during an investigation of a possible felony. Distinguishing *Reporters Committee* on the grounds that the historically rare occurrence of subpoenaed toll-billing records in furtherance of criminal investigations is different from ordinary civil discovery, the court asserted that it refused to open a "Pandora's Box" that would "invariably lead to this type of discovery becoming common practice at least in the realm of libel law." (Slip op. at 6). This type of discovery, the court noted, has the potential to render a reporter's promise of confidentiality meaningless.

Moreover, the court expressed its fear that granting such access to third-party records could make other entrenched privileges, such as the attorney client privilege, vulnerable to similar rear-guard attack.

To avoid the "affront to the right to gather news, which is protected by the First Amendment" that Philip Morris' third-party subpoenas represented, the court concluded that "the reporter's qualified privilege against disclosure of confidential sources is held to extend to any and all documentary or electronically compiled evidence that is the product of the reporter's news gathering activities." (Slip op. at 8).

The court did not rule out the possible testimony of a third-party witness of whom the plaintiff became aware and who knew of the identity of a confidential source, such as a taxi driver who drove the reporter and his source to a restaurant. But the wholesale rummaging through telephone, hotel, car rental and like records of reporters was to be subject to the reporter's privilege.

Overcoming the Privilege

After a very persuasive and emphatic presentation of the importance of the reporter's privilege to non-party subpoenas as well as to reporter inquiries, the Virginia court applied the three-part balancing test in a manner that resulted in a favorable outcome for plaintiff-Philip Morris.

First, the information regarding the confidential sources was, the court held, "clearly relevant to the issue of 'actual malice'." (Slip op. at 8). According to the court, one such source, "Deep Cough", was "the centerpiece of the broadcast." (Slip op. at 9). Not only did she appear in the broadcast, she was "the only source with alleged first hand knowledge" of one of the matters now at issue in this libel suit. *Id.* Similarly, with respect to a confidential Philip Morris source who did not appear in the telecast and certain confidential government sources, the court found that their identities and the information that they provided ABC would surely be relevant to ABC's state of mind in preparing the news report.

Second, the court agreed that the information was not available by alternate means. The totality of what the reporters knew and not simply what was broadcast by ABC is relevant to ABC's state of mind, the court concluded. Thus, Philip Morris must be entitled to learn the totality of what ABC knew and its sources. Simply finding supporting materials for the as-broadcast statements is not sufficient. It would not, according to the court's analysis, prove that ABC did not know that what it put in the report was false.

Third, the court accepted that there was a compelling interest in the information. ABC had argued that the need was not compelling because the confidential sources were not the only sources for the allegedly defamatory statements, that they were not needed to prove falsity, and that even if the issue of actual malice was ultimately a critical

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Philip Morris/ABC

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one in the case, the present record was insufficient to show whether the case would require the source information. The court was unconvinced. First, the judge re-states his view that "Deep Cough" was a critical source for ABC in its decision to report the story. Second, the court reasoned that the plaintiff cannot hope to prove actual malice without a full record of what the reporters knew.

Then, in reasoning that seems to undercut its prior strong statements on the reporter's privilege, the court states that a public-figure plaintiff required to prove actual malice must be given access to all of the evidence. The court rejected ABC's argument that the court should wait to determine this issue until a further record from discovery was developed. The court states that it is in agreement with the "reasoning of those jurisdictions which have refused to apply a reporter's privilege in public figure/official cases. While the court here was not prepared to go that far, it felt it necessary in such cases to provide a "balanced playing field". (Slip op. at 12)

Finally, the court also notes that the issues in the litigation are ones of substantial public interest which lends support to its decision that a compelling interest in the source information exists. The court does not elaborate on why this should be the case or, indeed, why this factor should not weigh against disclosure.

As noted above, the order compelling ABC to disclose its confidential sources and the information received from them has been stayed until further order from the court. Furthermore, the order that would allow discovery of the third-party telephone, airline, charge card, etc. companies to go forward has been stayed until after argument on ABC's Motion for Reconsideration. In the interim, Philip Morris has only begun the depositions of two of twenty ABC on-air nonconfidential sources.

IS IT INTENTIONAL INFLICTION ?

The facts according to the court: Television crew visits home. Ascertains that three children, ages 11, 7 and 5, are present, but no adults are at home. After opening the door to the home himself, learning from the three children that they played regularly with the kids next door, the reporter tells the children that the mom next door has killed her children and herself. Do they want to comment. All of this with cameras rolling.

The tape was never broadcast.

Is it intentional infliction of emotional distress?

A California appellate court has recently upheld a trial court's determination that the defendants were not entitled to summary judgment in connection with a claim, brought by the parents of the three children, for intentional infliction of emotional distress. *KOVR-TV, Inc. v. The Superior Court of Sacramento County*, Respondent and *Whittle, et al.* Real Parties in Interest, CO 18015 (Super. Ct. No. 536332) (Third App. Dist. Jan. 23, 1995)

The court determined that the videotaped encounter with the children was susceptible to the inference that the defendant-reporter was attempting to make news, not gather it, that he was trying to elicit an emotional response from the children. A deliberate attempt to manipulate the emotions of young children, the court notes, could support a determination by a jury that such conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency...." -- the standard requirement for the claim. It was not lost upon the court that this encounter was uninvited and took place in the childrens' home. The defendant-reporter's affidavit to the effect that he didn't mean to provoke an emotional response from the children would not suffice to negate the existence of a triable issue of fact.

The court noted that such an inference was not compelled; one could determine that the reporter was innocently gathering news, and gave little or no thought to the consequences of providing children with information that would have far less of an impact on adults. But, the court states, citing *Miller v National Broadcasting Co.*, (187 Cal. App. 1463 (1986), that the trier of fact need not find that the defendant acted with a malicious or evil purpose to support the claim. The factfinder need only find that the defendant "'devoted little or no thought' to the probable consequences of his conduct...In dealing with children under the age of 12, the trier of fact reasonably could find that '[l]ittle or no thought constitutes...'reckless disregard' of the rights and sensitivities of others.'" (Slip op. at 12)

The court states a fundamental of this body of law that will not surprise media lawyers: that the standard for judging outrageous conduct does not offer a "bright line", and that the analysis of conduct is "filtered through the prism of the appraiser's values, sensitivity threshold, and standards of civility. The process evoked by the test appears to be more intuitive than analytical..." (Slip op. at 6)

Dismissed from the litigation were claims of intentional infliction of emotional distress brought by the parents themselves, an invasion of privacy claim and a negligent infliction of emotional distress claim brought by the children.

Fines for Op-ed in Singapore

On January 17, a Singapore court held the *International Herald-Tribune* in contempt of court for publishing an op-ed piece by an American academic. The court ordered *The Tribune*, the freelance author, the paper's publisher, and editor, and the local printer and distributor to pay some $15,000 in fines. A separate libel action based on the article has been filed by former Prime Minister Lee Kuan Yew.

The underlying opinion piece is notable only for its blandness. It did not name Singapore and said only that "intolerant regimes" in Asia use "a compliant judiciary to bankrupt opposition politicians." The authorities in Singapore understood this to refer to them, in part because they do not dispute that a number of opposition politicians have been driven to financial ruin by defamation suits brought by Singapore politicians.

The Herald-Tribune apologized to Lee Kuan Yew and "to the Singapore judiciary" on December 10, noting that it had neither intended to refer to Singapore nor believed that the Singapore judiciary was "compliant" in the sense of deciding cases on any basis but the merits. The newspaper had also apologized to Mr. Lee and his son in August, this time for an article referring to several Asian nations' "dynastic politics." Here again, the article made no direct reference to the individuals in question and there is no dispute that Singapore politics is dynastic at least in the sense that Singapore politics is dynastic at least in the sense that Mr. Lee's son is Deputy Prime Minister. Neither apology managed to head off further legal action.

Singapore has a long history of official intimidation of the press. In the past decade, it has limited the circulations of the *Asian Wall Street Journal*, *The Economist* and the *Far Eastern Economic Review*. The idea of holding a newspaper in contempt of court, much less for the passage at issue in the most recent *Herald-Tribune* article, is a new and potent reminder that not all the world plays by American rules.

The Singapore judgment is unenforceable in the United States under the *Matusevitch* (see article on *Matusevitch* at page one of this *LibelLetter)* and *India Abroad* cases. The statement in question is not libel as understood by American law for any number of reasons -- truth, opinion, "of and concerning," group libel, lack of fault. The prosecution in Singapore was, however, fundamentally different from even a libel suit brought by a local politician to punish the press; it was a government prosecution for criticism of the government. That is, it was a prosecution for seditious libel, which, as Professor Harry Kalven noted, "is the hallmark of closed societies throughout the world." No United States court would consider enforcing the judgment.

This is small comfort to *The Herald-Tribune* and most of the other defendants, as they live or work or have assets in Singapore. The author of the piece, who received the largest fine, is happily beyond the jurisdiction of the courts of Singapore.

British Law

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This scenario has occurred with increasing frequency in this age of global publishing where a publication emanating from the U.S. is likely to find its way into jurisdictions with libel laws that do not protect a free press with the vigor of the First Amendment.

One answer to this problem has come from a growing number of courts in the U.S. on both the state and federal level which have refused to use their judicial authority to enforce libel judgments obtained after a trial in Britain on the grounds that British libel law is repugnant to United States public policy, as embodied in the First Amendment. At first blush, this result would seem unlikely since comity concerns usually favor enforcement of a foreign judgment, particularly from a jurisdiction such as Britain which is the source of so much of our legal process and common law traditions. In fact, however, the comity concerns (both at common law and as enacted in the Uniform Foreign Money-Judgment Recognition Act adopted in many states) have always contemplated that a U.S. court will refuse to enforce a foreign judgment when it is repugnant to U.S. public policy. Similarly, British courts have consistently refused to enforce American judgments which they consider contrary to British public policy, particularly in the area of damages. And despite the many similarities, the First Amendment protection for the press marks a deliberate departure from the British system which has no written constitution or bill of rights and, consequently, imposes many more restrictions on its press.

The latest decision on this issue has come from the federal district court for the District of Columbia (Urbina, J.) in the case of *Matusevitch* v. *Telnikoff*, decided January 27, 1995. Vladimir Ivanovich Telnikoff, a fairly well-known Soviet dissident living in London, published an op-ed column in London's *The Daily Telegraph* in 1984 in which he was critical of the BBC's Russian Service for not hiring more people "who associate themselves ethnically, spiritually, or religiously with Russian people" and for, instead, recruiting "Russian-speaking national minorities" for its Soviet news broadcasts. Vladimir Matusevitch, a Soviet Jewish emigre turned U.S. citizen, living in London and employed by Radio Free Europe/Radio Liberty, wrote a letter to the editor, criticizing what he called Telnikoff's "racialist" views, namely Telnikoff's demand that the BBC "switch from professional testing to a blood test" and dismiss the "'ethnically alien'" from the Service.

Telnikoff brought a libel suit in London claiming that he did not say in his letter what Matusevitch had ascribed

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to him and that he was not anti-Semitic. Matusevitch was successful at the trial and intermediate appellate level at getting Telnikoff's libel suit dismissed on the defense of fair comment. Over vigorous dissent, the House of Lords sent the case back for trial, directing that the jury could only consider the text of Matusevitch's letter to the editor and not the column upon which it was commenting. After a jury trial where Matusevitch was not permitted to prove justification (i.e., truth) since he had not pleaded it and where the plaintiff was not required to prove fault, a jury rejected the defense of fair comment and awarded Telnikoff $416,000. Under the British system, the prevailing party also gets attorney's fees.

Telnikoff subsequently sought to enforce the English judgment in a Maryland court where Matusevitch was now living. Matusevitch, represented by Davis, Polk, Wardwell, then brought a declaratory judgment action in federal district court contending, *inter alia*, that Telnikoff's attempt to enforce the British libel judgment violates the U.S. Constitution and the public policy of Maryland and the United States.

With amicus support from The New York Times, the Associated Press, NBC, CNN, News America, the Copley Press and the Magazine Publishers of America, Matusevitch's summary judgment motion was granted. The court agreed that comity dictates that enforcement of a foreign judgment be declined when it is repugnant to U.S. public policy. Because of the key differences between the two systems – namely that the British system imposes on a defendant the burden of proving truth and the plaintiff is not required to prove fault – the court concluded that "recognition and enforcement of the foreign judgment in this case would deprive the plaintiff of his constitutional rights."

The fact that the British jury was instructed to ignore the context of Matusevitch's comments was contrary to the principles by which U.S. courts determine whether speech constitutes an actionable statement of fact or non-actionable opinion. Relying on the recent decision of the D.C. Circuit in *Moldea* v. *New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994), the court noted the importance placed on context for that determination. Here, the context was a letter to the editor – a traditional forum for opinion – which merely took to a hyperbolic extreme the views offered in Telnikoff's op-ed column about a controversial political subject. The court held that, had Matusevitch's statements been "read in context to the original article or statement and in reference to the location of the statements in the newspaper, a reader would reasonably be alerted to the statements' function as opinion and not as an assertion of fact."

In addition, the court found that Telnikoff was a limited purpose public figure who, under the First Amendment, was required to prove actual malice. Although the British court found Matusevitch's use of inverted commas around certain words may have mislead a reader into believing these were actual quotes from Telnikoff's column, this was insufficient to establish knowledge of falsity under the holding of *Masson* v. *Malcolm*, 501 U.S. 496, 517 (1991).

The *Matusevitch* judge joins a growing list of courts who have reached the same damning conclusion about British libel law in a variety of contexts. The most direct precedent is the decision by a trial level court in New York to refuse to enforce a British libel judgment because of the differences regarding falsity and fault between the two systems. In *Bachchan* v. *India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992), the British judgment had been rendered against a U.S. based publication which merely reported that the leading Swedish daily had reported a new development about an international scandal involving the Prime Minister of India and a Swedish arms manufacturer. When the Swedish paper, upon being sued, retracted the story, *India Abroad* was found strictly liable for the alleged error – with no showing of fault. The New York court found that, because British libel law was "antithetical" to the First Amendment, refusal to enforce the British judgment was "constitutionally mandatory."

Beyond the enforcement context, courts have on several occasions either refused to consider claims under British law, *Abdullah* v. *Sheridan Square Press, Inc.*, 1994 WL 419847 (S.D.N.Y. May 4, 1994) (dismissing cause of action under British law as "antithetical to the First Amendment protections") or engrafted an actual malice requirement on claims brought in federal court but which arise under British-based libel law. E.g., *Desai* v. *Hersh*, 719 F. Supp. 670, 677 (N.D. Ill. 1989) (Indian law); *DeRoburt* v. *Gannett Co., Inc.*, 83 F.R.D. 574, 579-80 (D. Hawaii 1979) (Nauru law).

These decisions are becoming an effective roadblock against the use of U.S. courts to apply or enforce British or British-based law. They can be extended to the libel law of other jurisdictions that also lack the basic constitutional safeguards. While *Matusevitch* and *India Abroad* involved arguably public figures and non-enforcement is at its most compelling when public officials, public figures or matters of significant public concern are at stake, the logic still holds where the absence of key First Amendment protections materially affects the outcome in a foreign court. *Matusevitch* and *India Abroad* were based solely on the conflict between the laws of the two jurisdictions and did not turn on forum-shopping. Where obvious forum-shopping is afoot, the argument against enforcement is even stronger.

One practical limitation on the impact of these decisions: where a multi-national publisher has assets in the foreign jurisdiction that can satisfy the judgment, there will be no occasion to seek enforcement from a U.S. court. And a cautionary note: to date, there has been no appellate consideration of this issue.

Laura R. Handman and Robert D. Balin of Lankenau Kovner & Kurtz, represented amici in Matusevitch v. Telnikoff and the defendant newspaper in Bachchan v. India Abroad Publications, Inc.

Australian and Indian Libel Law: Away From Strict Liability

By Brian MacLeod Rogers

The High Court of Australia moved away from the traditional common law of libel in a recent decision; *Theophanous v. Herald & Weekly Times Ltd.* ((1994), 124 ALR 1). A recent Supreme Court of India decision also points to a relaxing of the strict liability rule and adoption of a U.S. approach to libel.

Relying on an implied "freedom of communication" under Australia's constitution, the country's top court found that false, defamatory statements about candidates for public office, or holders of such positions, may be defended on a modified *New York Times* v. *Sullivan* basis. A publication concerning the performance or suitability of political office holders or candidates, is not actionable for libel if the defendant establishes that:

(1) it was unaware of the publication's falsity;

(2) it did not publish the material recklessly, not caring whether the material was true or false; and

(3) the publication was reasonable in the circumstances (ie. it acted reasonably, either by taking steps to check accuracy or by establishing that publication was otherwise justified.)

Unlike the *New York Times* v. *Sullivan* rule, the Australian approach puts the onus on a defendant to show that it met these requirements. The court held that this was more consistent with traditional defences for justification of a publication under the common law of libel and that these matters were within the knowledge of the defendant, rather than the plaintiff.

Some critics have already pointed out that the test of reasonableness leaves a dangerous wild card in the hands of juries. It also adds to a publisher's uncertainty as to whether the defence will apply to any particular publication. Accordingly, the law of libel will continue to have its chilling effect even on such a core area for expression as criticism of those elected to, or seeking, public office.

The facts of the case are revealing. The plaintiff was a member of Australia's House of Representatives and was chair of a parliamentary committee on immigration, playing a prominent role in public discussion of immigration issues. A newspaper published a letter to the editor critical of the plaintiff's stance. The plaintiff sued both the letter writer and the newspaper. The case came to the High Court on a preliminary issue concerning the validity of the newspaper defendant's plea of qualified privilege in the circumstances. The plea was based upon the implied freedom of speech and the fact that the letter concerned an elected politician and a matter of public concern

The court afforded the same defence in another libel case decided at the same time: *Stephens* v. *West Australian Newspapers Ltd.* ((1994), 124 ALR 80). That case involved three newspaper articles concerning a trip to New Zealand, Canada and the U.S. by members of a legislature committee for the State of Western Australia. The defamatory statements, made by another legislature member, criticized the trip as wasteful and costly.

Unlike the United States or Canada, Australia has no constitutional bill of rights. However, over the past few years the High Court has developed an implied freedom of communication in relation to public affairs and political discussion; this is based on the need for public discussion for the existence of the country's democratic representative government, as enshrined in Australia's constitution. In *Theophanous*, three of the seven judges dissented on the basis that whatever implied freedom of communication might exist, did not apply to the law of defamation. (Intriguingly, one of the dissenters was Brennan J., no relation to the architect of *New York Times* v. *Sullivan*.) Chief Justice Mason and two others were joined in the result by the seventh justice, although that justice actually favoured an absolute immunity from libel law for publication of statements about the official conduct or suitability of holders of high political office.

The court's plurality relied heavily on U.S. case law, accepting that the traditional approach to libel liability chilled public debate and thereby unduly limited free communication, as protected by implication under the constitution. A recent English House of Lords case (*Derbyshire County Council* v. *Times Newspapers* [1993] 1 All E.R. 1011) was also cited; that case prohibits central and local governmental bodies in England from suing for defamation.

In another recent case (*Rajagopal* v. *State of Tamil Nadu*, October 7, 1994), the Supreme Court of India adopted a *New York Times* v. *Sullivan* rule, requiring public officials suing for libel to prove that defamatory statements were false and were published with reckless disregard for truth. The media should be successful if it is shown that it undertook a reasonable verification of the facts, provided it was not actuated by personal animosity or malice and the publication related to conduct relevant to the plaintiff's official duties. The Indian court also ruled that governmental authorities and institutions cannot maintain a suit for defamation nor impose prior restraint upon the media. With only two of its members deciding the case on a preliminary motion, the court acknowledged that it was annunciating only broad principles that are still in the process of evolution and again relied heavily on U.S. caselaw.

The *Rajagopal* case stemmed from a magazine's publication of an apparently autobiographical account of a man convicted of six murders; in it, the convict claims close ties to various government agencies and their involvement in the crimes. The state government and prison officials sought to prevent publication, and in a proactive strike, the magazine launched court proceedings to restrain their activities and obtain rulings on a number of key legal points. The court specifically invoked the Pentagon Papers decision to strike against the governmental interference perceived in the case.

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Supreme Court of Canada: Libel Test Case

On February 20, the Supreme Court of Canada will hear arguments in a libel case that could determine whether the Canadian Charter of Rights and Freedoms applies to the common law of libel and whether the *New York Times* v. *Sullivan* rule should be applied in Canada. The case is captioned *Church of Scientology* v. *Hill*, and the Court of Appeals decision can be found at (1994), 180.R.(3d) 385.

In the thirteen years since the Charter became part of Canada's constitution, this is the first case where the Supreme Court may deal with whether the traditional common law of libel should be altered in light of constitutional protection for freedom of expression. The plaintiff is a former crown attorney employed by the Attorney General of Ontario, and the defendants are the Church of Scientology of Toronto and one of its lawyers. The case stems from a press conference on the courthouse steps arranged by Scientology at which the lawyer read from documents subsequently filed with court alleging that the crown attorney had committed contempt because of an apparent breach of a court order. The order sealed documents seized from Scientology under a disputed search warrant. The contempt motion was later thrown out for insufficient evidence.

At trial, the jury awarded a total of $1.6 million. $300,000.00 was awarded in general damages against both Scientology and its lawyer although the plaintiff was promoted several times and his income was never affected; he was also elected by his peers as president of the Crown Attorney's Association and as a member of the Ontario legal profession's governing body. He is now a senior level judge. Further awards of $500,000.00 in aggravated damages (for conduct before and after publication, including at trial) and $800,000.00 in punitive damages were made against Scientology alone. The media was not involved at trial since the only media defendants (The Globe and Mail, The Canadian Broadcasting Corp. and CFTO-TV) settled for a collective sum of $50,000 toward costs just prior to trial. In May 1994, the Ontario Court of Appeal upheld the award and rendered a decision very restrictive of any application of the Charter to libel law, ruling against the defendants on every legal issue.

Joining the parties in the appeal in the Supreme Court of Canada are three groups of intervenors: one representing the media (Canadian Daily Newspaper Association, Canadian Community Newspapers Association, The Canadian Association of Broadcasters, Radio and Television News Directors Association of Canada, Canadian Magazine Publishers Association and Canadian Book Publishers Council) represented by Peter W. Hogg, Q.C., and Brian MacLeod Rogers of Blake, Cassels & Graydon; another representing writers groups (The Writers' Union of Canada, PEN Canada, Canadian Association of Journalists, Periodical Writers Association of Canada and Book and Periodical Council) represented by Edward Morgan of Davies, Ward & Beck; and the Canadian Civil Liberties Association represented by Robert J. Sharpe, Dean of Law at the University of Toronto.

The appellants and intervenors advocated adoption of the *New York Times* v. *Sullivan* rule, or some variation of it, for Canada, based on the Charter's protection for freedom of expression. The case could also determine whether a common law qualified privilege is available for reports of court documents, such as pleadings, that haven't been subject to any judicial action. In addition, the issue of damages in libel cases, including a possible cap on presumed general damages, was argued.

LDRC would urge LDRC members to notify the LDRC Executive Director of any new cases, opinions, legislative and other developments in the libel, privacy and related claims fields. LDRC welcomes submissions from LDRC members for the *LDRC LibelLetter*.

LDRC members are encouraged to make copies of the *LDRC LibelLetter* for distribution to colleagues within their organization.