



BULLETIN

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INSIDE THIS ISSUE

Editor's Note	1
Franklin Follow-up Study	2
Jury Verdict Research Study	5
Authors Guild Libel Survey	6
U.S. Supreme Court Hears No Libel	10
N.J. Supreme Court to Consider Reporters Privilege in Libel Action	15
Inquiries	
-- Liability of a Mere Printer or Distributor	16
-- Use of Expert Witnesses	17
-- Briefs Sought on <u>Gertz</u> Standards	18
<u>Amici Curiae</u>	19
New Publications	20
At the LDRC	
. Current Services	
--Advance Opinions from BNA	21
--Case Files.	22
--Brief Bank	22
. Future Projects	
--Annual Statistical Survey	23
--LDRC Extern Will Research Damages Issues	23
. New Supporters	24
. Publicity	24
Attachments	
. Questionnaire -- Use of Experts (PLEASE COMPLETE AND RETURN)	
. Case Survey Form (PLEASE DUPLICATE AND USE TO ALERT LDRC TO PENDING CASES)	

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LDRC Bulletin No. 1

EDITOR'S NOTE

This is the inaugural Issue of the LDRC Bulletin. The Bulletin will be the primary means by which the Libel Defense Resource Center will communicate with its supporters and with others interested in the defense of libel and privacy claims. Special reports, special alerts and other materials will also be sent out by the Center from time to time.

We envision the Bulletin as a means of alerting LDRC's constituency to pertinent developments not reported elsewhere, to information that may be available from LDRC and to activities that are being undertaken by, or through the facilities of, LDRC. We also see the Bulletin as a forum for communication among LDRC supporters and others who share an interest in improving the law, law-related procedures and litigation strategies in the libel/privacy field. It is not our intention to duplicate other currently available services such as the Media Law Reporter, the Reporters Committee's News Media & The Law and the publications of individual supporting trade and professional associations.

LDRC's ability to make the Bulletin the most effective possible educational and communicative tool directly depends upon at least two factors: first, the quality and comprehensiveness of the information made available to the Center; and second, the widespread and effective dissemination of the Bulletin to attorneys and others with a need for the information it provides. Readers of the Bulletin will play a central role in this process. We urge you to respond to "inquiries" such as those found in this issue; to take advantage of the materials and publications to which the Bulletin will alert you; to advise LDRC of developments that should be reported in the Bulletin; to share the Bulletin with those who may have an interest in its contents; and to advise LDRC of the names and addresses of others interested in receiving future Bulletins.

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Henry R. Kaufman
General Counsel

FRANKLIN FOLLOW-UP STUDY WILL ASSESS IMPACT OF HUTCHINSON AND WOLSTON

A new study of recent media libel cases by Professor Marc A. Franklin of Stanford University, a follow-up to his seminal article "Winners and Losers and Why: A Study of Defamation Litigation," 1980 A.B.F. Res. J. 455, concludes that the Supreme Court's 1979 Wolston and Hutchinson decisions have thus far had only a limited impact and that the success rate for media defendants in libel cases continues to be very high. Of the 136 ultimate dispositions recorded by Professor Franklin, plaintiffs prevailed in only 10 cases, or 7%, with defense success at 93%. The results of Franklin's study of almost 300 reported media libel cases between 1977 and the end of 1980, clearly the most comprehensive study of its kind in the field, will be published in the American Bar Foundation Research Journal this fall. Requests for reprints of the Franklin follow-up article should be addressed to the Journal, at 1155 East 60th Street, Chicago, Illinois 60637. The price of reprints has not been set, but you can pre-order and be billed.

Advance galleys (still subject to minor revision) made available to LDRC reflect the following general findings and conclusions:

Effects of Hutchinson and Wolston

Hutchinson and Wolston appear thus far to have had little overall impact on the thinking of lower trial and appellate courts. Of the 123 post-1979 cases studied, 99 courts failed to mention the recent Supreme Court rulings, while 10 cited them only in passing, 7 distinguished them and 2 stated they did not affect the result of the case under consideration. Only 3 cases studied denied summary judgment expressly in reliance on footnote 10 of the Hutchinson case and only 2 courts expressly rejected public figure status based upon Wolston. According to Professor Franklin, the strongest impact of Hutchinson and Wolston may be in the availability of the New York Times privilege. Thus, defendants won in 35 out of 39 appeals before 1979 on contested issues of Times coverage; after the 1979 rulings, only 24 out of 34 favorable appellate rulings were secured. Professor Franklin concludes that it is too early to tell whether the recent Supreme Court cases will inspire additional litigation, but the study did not find any significant indication of additional litigation at this time.

Franklin Study (cont'd)

LDRC Bulletin No. 1

Damages

The Franklin follow-up study contains fascinating data on the amount of damages awarded by judges or juries, and the size of awards finally sustained on appeal, in recent libel actions. Professor Franklin documents the infrequency of plaintiff's judgments finally sustained as well as the relatively small size of the awards in those few cases where plaintiffs have prevailed. Thus, out of the nearly 300 media libel cases surveyed during the four-year period, only 10 damage awards were finally upheld, and only one of these awards was in the six figures (\$350,000 in the Alioto v. Cowles action*). There were six other reported jury awards of more than \$100,000, but five were reversed outright and the sixth was reduced on appeal to well below six-figures by entirely eliminating a \$100,000 punitive damage award. It should be noted, however, as Professor Franklin indicates, that this remarkable history of defense success in libel actions currently stands at a watershed. If not overturned, the unprecedented number of seven-figure libel verdicts recently entered, and currently on appeal, could radically reverse this favorable record and could embolden the plaintiffs bar to more aggressive action.

Other Findings

-- Juries find for plaintiffs more frequently than do judges. Thus, pro-plaintiff verdicts were entered in 20/24 cases tried to a jury (83%); but only 3/6 trials to the court (50%) resulted in judgment for plaintiffs.

-- On the other hand, success on appeal is greater regarding jury verdicts, with 12/20 pro-plaintiff jury verdicts reversed but only 1/3 court judgments. Moreover, in 5/8 pro-plaintiff affirmances the jury award was reduced by the appellate court.

* Alioto v. Cowles Communications, Inc., 623 F.2d 616 (9th Cir. 1980), cert. denied, 449 U.S. ____ (1981).

Franklin Study (cont'd)

LDRC Bulletin No. 1

-- Trial judges are far more reluctant than appellate courts to intrude on the province of the jury. Thus, of the 31 jury trials reported, only 7 cases were dismissed before being submitted to the jury. And, of the 20/24 pro-plaintiff jury verdicts that resulted, 17 were upheld on post-trial motions, with only 2 awards reduced and judgment n.o.v. entered in only 1 of the cases.

-- With regard to defendant's success on appeal, 15 trials resulted in judgments for defendants. The 8 pro-defendant jury verdicts were all affirmed on appeal. 5/7 cases not submitted to the jury were affirmed, with only 2 pro-defendant dismissals reversed and remanded.

-- State law defenses and privileges remain important and show success earlier in the litigation process on motions to dismiss. Federal defenses are successful later in the process, particularly on summary judgment.

-- Final dispositions, not surprisingly, are affected by the applicable legal standard, with Times cases successfully defended more often than Gertz cases (92% vs. 79%). On the other hand, significantly, defendants won 8/9 Gertz cases (89%) in states requiring proof of more than mere negligence.

-- The "group of nine" states considered by some insurance carriers to be "high risk" jurisdictions, are still well below average from the defendant's point of view. These states represented 19% of the appeals studied, but 50% of the plaintiffs' wins. Overall, in the nine states, plaintiffs "won" 14% of their cases, compared to a success rate of 3% based on the full 291 case sample. Defendants "won" only 47% of the cases in these states, compared to 71% nationally.

-- For those interested in avoiding libel actions through careful prepublication counselling, there is fascinating material in the Franklin study regarding the relation between content and libel litigation. At least statistically, the types of charges, the nature of the person charged and the manner in which the charges are aired by the media do have some potentially significant relationship to frequency and success rates of litigation.

-- Illinois, with its innocent construction rule, ranks high in defense success, at 93%.

-- For some reason, broadcasters did not lose a case during the period of the study.

LDRC Bulletin No. 1

JURY VERDICT RESEARCH REPORT ON LIBEL AND SLANDER

Jury Verdict Research, Inc. of Solon, Ohio publishes a service, updated monthly, entitled Personal Injury Valuation Handbooks. Intended primarily for attorneys, claims specialists and others involved in personal injury and related tort litigation, the Jury Verdict Research Handbooks record and evaluate verdicts in such cases. In addition to this basic publication, Jury Verdict Research will also provide, for a special fee, individual statistical case valuations based upon past experience with similar fact and damage patterns.

As a part of its basic Handbooks, Jury Verdict Research has recently published a "Special Research Report" on plaintiff recovery rates entitled "False Arrest, Libel and Slander." (Release No. 237, 1980). The section on libel and slander covers 80 cases in the period 1978-1980 and finds an overall plaintiff recovery rate of 71%. Unfortunately, when compared to the two recent studies by Professor Franklin for the American Bar Foundation Research Journal, the Jury Verdict Research report falls short of the comprehensiveness and pertinence that would make its findings of great value, particularly to media libel defendants. Thus, of the 80 cases included during the three-year period, only 15 involved "news media" defendants. Moreover, the Jury Verdict Research report does not provide detailed data even on this small number of verdicts. Instead, the report indicates only the number of cases and the overall recovery rates stated as a percentage. Thus, other than for the two cases which are provided as examples, the size of the verdicts in the remaining cases is not made known. This, of course, renders the report's overall percentage figures somewhat unilluminating and difficult to evaluate. Just under half of the 80 cases studied by Jury Verdict Research involved corporate defendants, such as investigative services and general businesses, where the plaintiffs recovery rate was the highest -- 77%. Another third of the cases involved suits between private individuals where the recovery rate was 65%. According to the report, in the 15 news media verdicts studied plaintiffs had a recovery rate of 76%. This, of course, is inconsistent with Professor Franklin's recent findings documenting a far smaller overall recovery rate in libel cases, although it is consistent with Franklin's data for cases that actually go to trial before a jury, where Franklin reports an 83% plaintiff recovery rate. However, this data standing alone is substantially misleading, particularly in a field where, as documented by the Franklin studies, so many cases are resolved on appeal and are either

Jury Verdict Research (cont'd)

LDRC Bulletin No. 1

reversed or modified after trial. A perfect example of this shortcoming is Burns v. McGraw-Hill, No. C-68115, April, 1978 (Denver, Colorado), one of the two media libel cases actually described in the report. The report states, accurately, that a plaintiffs' verdict of \$175,000 was entered in the McGraw-Hill case. Unfortunately, it fails to indicate that this award was later reduced to \$45,000 by the trial judge and that, subsequently, the Colorado Court of Appeals reversed the judgment altogether. The Colorado Supreme Court recently granted plaintiffs' petition for certiorari in the case.

In sum, we found the Jury Verdict Research report something of a disappointment. In light of the frequency of pre-trial dispositions in libel cases, jury verdicts may never reflect a great percentage of libel cases. Nonetheless, the recent spate of widely-reported seven-figure verdicts suggests that an ongoing, comprehensive evaluation of actual jury verdicts in all cases that go to verdict would represent an important service to the libel bar. This would be particularly true if the information included comprehensive coverage of unreported cases (which the Franklin study did not). Sadly, at the present time, this kind of comprehensive coverage does not appear to be provided in the Jury Verdict Research libel report. For those interested, the report on False Arrest, Libel and Slander (No. 237) can be purchased separately from Jury Verdict Research, Inc., 5325 Naiman Parkway - Suite B, Solon, Ohio 44139 for \$12.50.

AUTHORS GUILD SURVEY ON LIBEL AND INVASION OF
PRIVACY SUITS AND CLAIMS

(Excerpted from Authors Guild Bulletin, June - July 1981. Copyright 1981 The Authors Guild, Inc. Reprinted by permission.)

In the Fall of 1980 the Contract Committee of the Authors Guild (sister organization of the Authors League, one of LDRC's supporters) conducted a survey on libel and invasion-of-privacy suits and claims involving books. A questionnaire distributed to Guild members sought information on various topics, including: the frequency of suits and claims, how they were resolved, financial burdens borne by authors, and the enforcement of publishers' indemnity clauses.

Authors Guild Survey (cont'd)

LDRC Bulletin No. 1

Summary of Findings

The survey indicates that only a few of the authors responding had been sued for libel or invasion of privacy (2%) or had claims asserted against them that were disposed of before suit (1.5%). The number of books involved were a very small proportion of all titles published by the authors who responded. It should, however, be noted that several major suits for libel or invasion of privacy against authors of books are not included in the survey. Those who are not Guild members did not receive the questionnaire; some Guild members probably did not respond because of a reluctance to report suits of this nature.

Most of the lawsuits were not tried: 9 were withdrawn, and 12 were settled by some payment to the plaintiff. None of the 6 cases that were decided in court ended in a judgment against the author and publisher.

According to the Authors Guild, the survey confirms the general view that authors and publishers usually prevail - although, in some of the survey-instances (as in other reported cases), success comes on appeal-reversing a judgment rendered at the trial for the plaintiffs.

Some authors reported that claims of libel or invasion of privacy were settled by withdrawing the book or objectionable portions, or by commitments to revise the material in subsequent printings and editions. According to the survey, publishers do enforce indemnity clauses. Several authors reported demands for payment or withholding of royalties; a few publishers sought to enforce indemnities but desisted in the face of the authors' refusals.

Number of Responses, Suits and Claims

Responses: Questionnaires were sent to the 5,840 members of the Guild (as of November, 1980). The Committee received 1,264 completed questionnaires (21%).

Suits: 27 authors, 2% of those responding, reported 29 suits for libel, invasion of privacy or both - involving 28 books. There were 19 libel suits, 4 privacy suits, and 6 suits for libel and invasion of privacy. Novels were involved in 5 cases; non-fiction books in 24.

Authors Guild Survey (cont'd)

LDRC Bulletin No. 1

The 28 books represented .22% of the 12,466 titles published by all responding authors. Numbers of titles published by the 27 writers sued range from 1 book (three authors) to more than 10 books (ten authors); in all, they had published 319 books.

Most of the suits occurred after 1969 (9 in 1978-1981; 9 in 1974-1977; and 3 in 1970-1973). In six instances, only the publisher was sued; the remaining suits were brought against the author and publisher.

Claims: 19 authors, 1.5% of those responding, reported that one of their books had been the subject of a claim of libel or invasion of privacy that was disposed of without litigation. The 19 books represented .15% of the 12,466 published titles.

Insurance

None of the 46 authors had insurance protecting them against liability or expenses for libel or privacy suits and claims.

Results of Law Suits and Claims

Suits: 8 of 29 law-suits were withdrawn without any payment to plaintiffs, and 12 suits were settled before trial or a motion to dismiss the complaint. 1 case was settled after the plaintiff defeated the publisher's motion for summary judgment. Another case was settled, pending appeal, after the plaintiff had prevailed. In 6 cases, defendant authors and publishers prevailed either on trial or appeal. One author did not report the result of her suit.

Claims: 10 of the 19 claims were withdrawn without payment or concessions to the persons who made the claims of libel or invasion of privacy. 3 claims were settled by payments from the author to the claimants. The remaining 6 claims were disposed of by withdrawing or changing the book (4), or promising to make changes in future editions (2).

Enforcement of Indemnity Clauses

Suits: Contracts for 26 books contained indemnity clauses; 2 authors did not report whether their contracts contained the clause; and 1 pre-1950 contract provided that the author would pay all costs.

Authors Guild Survey (cont'd)

LDRC Bulletin No. 1

12 authors responded that their publishers enforced the indemnity clause; 4 reported withholding of royalties; 2 reported demands for repayment; 1 reported the institution of proceedings; 5 did not disclose how the indemnity clause was enforced. 3 more authors said they had successfully resisted their publishers' attempts to enforce the clause. In 11 cases, publishers did not seek to enforce the indemnity provision. 2 authors did not report whether their publisher had enforced the clause, and 1 answered "not yet."

Claims: 14 authors had indemnity clauses in their contracts; 3 said they did not; and 2 did not answer the question. None of the 19 authors reported that their publishers sought to enforce the indemnity clause.

Representation by Publisher's Attorney

Suits: 9 authors were represented by their publisher's attorneys and 15 authors were not; the others did not answer this question.

Claims: 6 authors were represented by their publisher's attorneys and 8 were not; 1 retained his agent's attorney; and 4 authors did not answer the question.

The Costs of Settlements

Suits: 12 suits were settled before trial or a motion to dismiss. In 2 suits, the settlement payment was made by the publisher, and in 3 cases the payment was made by the author. In 7 suits, the payment was shared by authors and publishers: 6 authors paid 50% of the settlement and 1 author paid 25%. The amounts paid by authors range from \$200 (2) to "between \$10,000 and \$50,000" (1). Other amounts paid were: \$10,000(2); "less than \$10,000" (1); \$5,000(1); \$2,500(1); \$1,500 (1).

Claims: In the 3 instances where payments were made to dispose of claims, the author contributed the entire amount. 1 author paid between \$5,000 and \$10,000, the other did not report the amount of their payments.

Payments of Publishers' Attorneys Fees

Suits: 5 authors paid one-half of their publishers' attorneys fees and 2 paid an unspecified share. The amounts paid (to date) were: between \$10,000 and \$50,000 -- 1; "less than \$10,000" -- 2; between \$1,000 and \$2,000 -- 3; "less than \$1,000 -- 1. (Another author paid the entire fee of his attorney who also represented the publisher.)

Authors Guild Survey (cont'd)

LDRC Bulletin No. 1

Of the 7 authors who paid a portion of their publishers' attorneys fees, 5 also paid fees to their own attorneys: "less than \$2,000" -- 2; "less than \$10,000" -- 2; between \$2,000 and \$5,000 -- 1. Three of the suits were settled; one was withdrawn and three were decided for the author and publisher, at trial or on appeal. (Three other publishers demanded a portion of their attorneys fees from authors who refused to pay.)

Claims: None of the authors reported that they had paid a portion of their publishers' attorneys fees.

For further information about the Authors Guild survey contact Irwin Karp, General Counsel, Authors League of America, 234 West 44th Street, New York, N.Y. 10036.

SUPREME COURT ENDS 1981 TERM - HEARS NO LIBEL CASES

For the second straight term, the U.S. Supreme Court has declined to accept any libel actions for review on certiorari or appeal. The Supreme Court's unexplained disinterest might be seen as a blessing to media defendants, particularly in light of its three most recent libel decisions adverse to media defendants -- Hutchinson v. Proxmire, 443 U.S. 111 (1979); Wolston v. Reader's Digest Assn. Inc., 443 U.S. 157 (1979); and Herbert v. Lando, 441 U.S. 153 (1979). And the Court's non-action has at least been neutral, with favorable as well as unfavorable decisions (from the media's point of view) left standing by the Court. Nonetheless, the Supreme Court has foregone a number of opportunities to clarify or shape libel law in ways that would appear consonant with the First Amendment interests recognized and defined by New York Times v. Sullivan and its progeny. For example, it has declined to take cases in situations where clarification and expansion of public figure (or public official) status could have been achieved. It has also continued to decline to accept cases involving reporters privilege claims, including a number of such claims asserted in the libel context.

Summary of Supreme Court Actions

The list that follows summarizes Supreme Court actions on libel or slander cases during its 1980-81 Term. The cases are divided into three categories -- 1) cases involving media defendants where basically "unfavorable" decisions below were left standing by the Supreme Court; 2) cases involving media defendants where "favorable" decisions below were left standing; and 3) non-media cases, which are listed but not

1981 Supreme Court Term (cont'd)

LDRC Bulletin No. 1

described at length. LDRC has obtained, or is currently in the process of obtaining, petitions for certiorari and oppositions to certiorari, plus any amicus briefs, in each of the "media" actions listed below.

I. MEDIA DEFENDANTS -- UNFAVORABLE DECISIONS LEFT STANDING

1. ABC v. Vegod, 5 Med. L.Rptr. 2043 (Cal. 1979), cert. denied, 49 U.S.L.W. 3250 (10/6/80) (California Supreme Court had ruled that corporate plaintiff was not a public figure).

2. Advertiser Co. v. Fulton; Bronner v. Fulton, (Ala. Sup. Ct. 9/19/80), cert. denied, 49 U.S.L.W. 3931 (1/26/81) (Alabama Supreme Court had reversed the trial court's grant of defendant newspaper's motion for summary judgment).

3. Altus Newspapers, Inc. v. Akins, 3 Med. L.Rptr. 1449 (Okla. 1977), cert. denied, 49 U.S.L.W. 3409 (12/1/80) (Oklahoma Supreme Court had upheld jury finding of "reckless disregard" in public official's libel action).

4. Cowles Communications, Inc. v. Alioto, 6 Med. L.Rptr. 616 (9th Cir. 1980), cert. denied, 49 U.S.L.W. 3494 (1/12/81) (Ninth Circuit had upheld judgment for plaintiff).

5. Lake Charles American Press v. McHale, 6 Med. L.Rptr. 2478 (La. Ct. App. 3d Cir. 1980), cert. denied, 49 U.S.L.W. 3931 (6/15/81) (Louisiana Court of Appeal had upheld judgment of \$150,000 in compensatory damages in favor of public official libel plaintiff and ruled that newspaper's editorial that "no bond buyer would buy a nickel's worth of securities on [plaintiff-attorney's] opinion" was a statement of fact and not opinion).

6. Lorain Journal v. Milkovich, 6 Med. L.Rptr. 2185 (Ohio Ct. App. 11th Dist. 1979), cert. denied, 49 U.S.L.W. 3329 (11/3/80) (Ohio Court of Appeals had reversed directed verdict in favor of defendants in public figure libel action; Justice Brennan dissents from denial of cert.: Knowledge of falsity or reckless disregard cannot be inferred from conflict between published matter and ancillary judicial fact-finding; Justice Stewart would deny the petition for want of a final judgment).

7. Loudoun Times-Mirror v. Arctic Co., Ltd, 6 Med. L.Rptr. 1433 (4th Cir. 1980), cert. denied, 49 U.S.L.W. 3494 (1/12/81) (Fourth Circuit had held research corporation acting as consultant for local government agency was not a public figure).

1981 Supreme Court Term (cont'd)

LDRC Bulletin No. 1

8. Moss v. Lawrence, 6 Med. L.Rptr. 2377 (10th Cir. 1981), cert. denied, 49 U.S.L.W. 3883 (5/26/81) (Tenth Circuit had ruled that senatorial candidate's paid political consultant was not a public figure).

9. Penthouse International Ltd. v. Rancho LaCosta, Inc., 6 Med. L.Rptr. 1351 (Cal. Ct. App. 1980), app. dis. and cert. denied, 49 U.S.L.W. 3616 (2/23/81) (California Court of Appeal had overturned trial court finding that plaintiff corporation and corporate officials were public figures and that defendants' publication was conditionally privileged under California Civil Code section 47(3)).

*10. Transamerican Press v. Miller, 6 Med. L.Rptr. 1598 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 3743 (4/6/81) (Fifth Circuit had ordered disclosure of confidential source for allegedly libelous statement).

II. MEDIA DEFENDANTS -- FAVORABLE DECISIONS LEFT STANDING

1. Brewer v. Memphis Publishing Co., Inc., 6 Med. L.Rptr. 2025 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 3949 (6/22/81) (Fifth Circuit had ruled that plaintiffs were public figures, despite passage of time since public notoriety, reversed jury verdict for plaintiffs and entered judgment for defendants).

2. Catalano v. Pechous, 6 Med. L.Rptr. 2511 (Ill. 1980), cert. denied, 49 U.S.L.W. 3788 (4/20/81) (Affirmed grant of summary judgment for newspaper defendants in public officials' libel action).

3. Cohn v. NBC, 6 Med. L.Rptr. 1398 (N.Y. 1980), cert. denied, 49 U.S.L.W. 3410 (12/1/80) (New York Court of Appeals had affirmed dismissal of plaintiff's libel and privacy action for failure to demonstrate defamatory meaning).

* This decision involved cross-petitions for cert. and is listed in both favorable and unfavorable categories.

1981 Supreme Court Term (cont'd)

LDRC Bulletin No. 1

4. Dupler v. Mansfield Journal Co., 6 Med. L.Rptr. 2362 (Ohio 1980), cert. denied, 49 U.S.L.W. 3954 (6/22/81) (Ohio Supreme Court had upheld lower appellate court ruling that summary judgment should have been entered for defendant on the issue of actual malice and reversing verdict of \$149,000 against defendant).

5. Ihle v. Florida Publishing Co., 6 Med. L.Rptr. 2081 (Fla. Dist. Ct. App. 1980), cert. denied, 49 U.S.L.W. 3726 (3/30/81) (Florida District Court of Appeal had upheld grant of summary judgment (5 Med. L.Rptr. 2005) in action involving newspaper's restaurant review).

6. Long v. Arcell, 6 Med. L.Rptr. 1430 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 3493 (1/12/81) (Fifth Circuit had affirmed entry of judgment n.o.v. in favor of defendant newspaper reporters for failure to prove actual malice, by clear and convincing evidence; had also refused to relieve plaintiffs from stipulation that they were public figures).

7. Raymer v. Doubleday & Co. Inc., 6 Med. L.Rptr. 1245 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 3247 (10/6/80) (Fifth Circuit had affirmed grant of summary judgment in favor of book publisher and partial summary judgment in favor of the author and also affirmed jury's special verdict finding failure to prove defamatory meaning).

8. Sparks v. Western Shore Publishing Corp., 615 F.2d 1369 (D.C. Cir. 1980), cert. denied, 49 U.S.L.W. 3249 (10/6/80) (D.C. Circuit had affirmed without opinion district court's grant of summary judgment in the pro se libel action).

*9. Transamerican Press v. Miller, 6 Med. L.Rptr. 1598 (5th Cir. 1980), cert. denied, 49 U.S.L.W. 3743 (4/6/81) (Fifth Circuit had held plaintiff union official to be a public figure).

* This decision involved cross-petitions for cert. and is listed in both favorable and unfavorable both categories.

1981 Supreme Court Term (cont'd)

LDRC Bulletin No. 1

10. Waldbaum v. Fairchild Publications, Inc., 5 Med. L.Rptr. 2629 (D.C. Cir. 1980), cert. denied, 49 U.S.L.W. 3270 (10/14/80) (D.C. Circuit had affirmed grant of defendant's motion for summary judgment based upon a finding that plaintiff, an officer of a consumer cooperative, was a limited-purpose public figure).

11. Weingarten v. Block, 5 Med. L.Rptr. 2585 (Cal. Ct. App. 1980), cert. denied, 49 U.S.L.W. 3270 (10/14/80) (California Court of Appeal had affirmed trial court's judgment of nonsuit against public official/public figure libel plaintiff for failure to show, by clear and convincing evidence, that defendant newspaper had published allegedly libelous materials with actual malice).

12. Yiamouyiannis v. Consumers Union of U.S., 6 Med. L.Rptr. 1065 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3247 (10/6/80) (Second Circuit had affirmed grant of defendant's motion for summary judgment in public figure libel action where plaintiff had failed to show, with convincing clarity, actual malice).

III. NON-MEDIA DEFENDANTS

1. Avins v. White, F.2d (3d Cir. 1980), cert. denied, 49 U.S.L.W. 3350 (11/10/80).

2. Berndt v. Prudential Insurance Co. of America, F.2d (7th Cir. 1980), cert. denied, 49 U.S.L.W. 3788 (4/20/81).

3. Dacey v. Cotter, F.2d (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3350 (11/10/80).

4. George v. Kay, 49 U.S.L.W. 2212 (4th Cir. 1980), cert. denied, 49 U.S.L.W. 3725 (3/30/81).

5. Sellers v. Rupert, 50 N.Y.2d 881 (N.Y. 1980), cert. denied, 49 U.S.L.W. 3270 (10/14/80).

6. Thornton v. Equifax, Inc., 619 F.2d 700 (8th Cir. 1980), cert. denied, 49 U.S.L.W. 3246 (10/6/80).

NEW JERSEY SUPREME COURT TO HEAR SPECIAL APPEAL ON
REPORTERS PRIVILEGE IN A LIBEL ACTION

Sometime after returning from its summer recess this fall, the New Jersey Supreme Court will hear a special appeal concerning the assertion of the reporters "shield" privilege in the context of a libel action. Since reporters privilege in the libel context is currently one of LDRC's four "priority" issues (the others being summary judgment, public figure and damages), LDRC hopes to play an active role in providing support for the New Jersey libel defendants in the case, Maressa v. New Jersey Monthly, Supreme Court of New Jersey, Docket No. 18553.

The libel defendants, a regional magazine, its publisher, two editors and three free lance writers, have invoked the broad New Jersey newsmen's privilege (N.J.S.A. 2A: 84a - 21) as well as constitutional protections in an effort to resist wide-ranging discovery into their confidential sources and unpublished information by plaintiff Maressa. Maressa is a State Senator who claims to have been defamed by an article characterizing him as one of New Jersey's "worst" legislators. The trial court overruled defendants' opposition to the requested discovery and an interlocutory appeal was taken to the Appellate Division of the Superior Court of New Jersey. Before defendants' appeal had been heard, plaintiff's application for a special appeal to the New Jersey Supreme Court was made and granted. A hearing is expected to be scheduled for sometime early in the fall.

On appeal, plaintiff contends that there is no constitutional privilege, that Herbert v. Lando rejects such limitations on discovery and that the New Jersey newsmen's privilege does not apply in the context of a libel action. The defendants are seeking the broadest possible protection, either under the New Jersey statute, or based on constitutional principles. They have also urged, in the alternative, that "procedural safeguards," such as the separate consideration or trial of potentially dispositive issues before discovery of confidential sources and material, citing Bruno & Stillman, Inc. v. Globe Newspaper Co., 6 Med. L.Rptr. 2057 (1st Cir. 1980). According to the defendants, only if plaintiff prevails on such potentially dispositive issues should the so-called "three-part" test of relevancy, need, and the absence of alternative sources be invoked, citing Miller v. Transamerican Press, 621 F.2d 721 (5th Cir. 1980) and Senear v. Daily Journal American, 6 Med. L.Rptr. 2070 (Wash. 1980). The New Jersey Supreme Court does not appear to have ruled on the application of the privilege in a libel context, although the Court is well-versed on other aspects of the state's shield law. See In re Myron Farber, 78 N.J. 259, 4 Med. L.Rptr. 1360 (N.J. 1978) and State v. Boiardo, 82 N.J. 446, 6 Med. L.Rptr. 1195, 1337 (N.J. 1980).

New Jersey Supreme Court (cont'd)

LDRC Bulletin No. 1

Any reader of the LDRC Bulletin who has briefs or other materials that may be of assistance to counsel for the defendants in the Maressa action is urged to send them to the LDRC as soon as possible. Also, any organization that would be interested in preparing or joining an amicus curiae brief in support of the assertion of privilege in the action, or which would like more information about the case before making a decision on amicus curiae intervention, should contact Henry Kaufman at LDRC and/or Joseph C. Mahon at Brenner, Wallack & Hill, 15 Chambers Street, Princeton, New Jersey 08540, (609) 924-0808, attorneys for the defendants. It should be noted that the Brenner, Wallack firm is also representing the same client asserting similar privilege claims in another action currently pending on motion for leave to proceed with an interlocutory appeal before the New Jersey Superior Court Appellate Division, in Resorts International v. New Jersey Monthly, Civil Action No. L-43602-79 (Atlantic County). Further information regarding this second appeal can be obtained from Gerard H. Hanson at Brenner, Wallack.

INQUIRIES

Liability of a Mere
Printer Or Distributor

The Center has received inquiries regarding the liability of a mere printer or distributor in a defamation action. It would appear clear that in the normal situation a printer who has commercially contracted physically to print a manuscript, newspaper, magazine, book or other publication but who, unlike a publisher, does not exercise -- and indeed by contract may well be precluded from exercising -- editorial control over the matter to be printed, should not be held liable, at least absent proof that the printer knew or had reason to know of the allegedly defamatory content. Indeed, this rule appears to be reflected in the Restatement (2d) of Torts, §581. (Compare §612). The same would be true of a mere distributor exercising no editorial control.

Unfortunately, although other sections of the commentary to §581 expressly and specifically recognize the non-liability of "news dealers," "bookstores" and "librarians," among others, comment (c) to §581 confuses the issue regarding a mere printer by referring to the "author, printer or publishing house" as if they were all in the same position and subject to similar standards of liability. And the Restatement does not expressly deal with the liability of a mere

Inquiries (cont'd)

LDRC Bulletin No. 1

distributor. Similarly, for one reason or another, the leading commentators also fail separately and definitively to address the status of the mere printer or distributor, although they of course suggest arguments that could be made in behalf of the distributor's or printer's non-liability. See R. Sack, Libel, Slander and Related Problems 86-88 (PLI 1980); L. Eldridge, The Law of Defamation, §82 (Bobbs-Merrill 1978). See also Lewis v. Time, Inc., 83 F.R.D. 463, 5 Med. L.Rptr. 1790 (E.D. Cal. 1979) (treating the liability of a mere distributor); Maynard v. Port Publications, 6 Med. L.Rptr. 2239 (Wisc. 1980) (rejecting liability for a mere contract printer).

LDRC would like to receive any opinions, briefs, memoranda or other materials that may be available which treat the issue of the mere printer's or distributor's liability. We are particularly interested in any cases that expressly hold that a commercial printer or distributor fits within §581 of the Restatement, or any case or statutory law that recognizes an even broader privilege or other defenses for printers or distributors. Please send any pertinent materials to Henry Kaufman at LDRC. Any useful findings will be published in a future LDRC Bulletin.

Use of Expert Witnesses

LDRC has received an inquiry regarding the use of "expert" witnesses in defending libel actions, particularly in private-figure cases where some standard of care less than actual malice is at issue. The applicable standard may often be mere negligence, or it may be some more demanding standard such as New York's "gross irresponsibility" test measured by the "standards of information gathering and dissemination ordinarily followed by responsible parties". But whatever the standard, there would appear to be opportunities in appropriate cases, either on pretrial motions, or at trial, live or in affidavits, to introduce testimony as to the custom and practice of the press, or of the particular medium in question, that might support a defense based upon absence of the requisite degree of fault.

LDRC is interested in learning more about the actual experience of attorneys in the field regarding the use of expert witnesses. How frequently are they used? In what types of cases? For what purposes? At what stage or stages of the case? And have they been of assistance? What are the qualifications of an appropriate expert and will courts accept their testimony? Do their qualifications vary depending upon the type of case and the medium involved? And finally, would it be useful for LDRC to disseminate additional information on

Inquiries (cont'd)

LDRC Bulletin No. 1

the use of expert witnesses? To prepare a kit or guidelines for their use? To develop a list or lists of qualified experts with experience in providing such testimony?

A brief questionnaire reflecting these and related questions is attached to this Bulletin. We urge each of our readers to take a few moments to complete the questionnaire and to return it to LDRC.

Briefs Sought on Gertz Standards

One of the most notable developments in libel law over the past several years, of course, is the state by state redefinition of the appropriate fault standard to be applied pursuant to the constitutional guidelines defined in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For better or worse a substantial number of jurisdictions have already definitively ruled on the matter, with the majority of those jurisdictions adopting the minimal standard of mere negligence. Nevertheless, at last count some twenty-five states had still not yet definitively adopted a Gertz standard. Therefore, in many states the issue is still a very live one and the LDRC wishes to be actively involved in assisting local defendants in making the most effective possible argument for the most favorable possible legal standard in private-figure actions.

Since the Gertz issue has already been decided in some twenty-five states, it is a reasonable assumption that there exist numerous briefs of parties, and possibly of amici curiae as well, framing the arguments for standards more protective than mere negligence. LDRC would like to develop a collection of such briefs that could then be made available to assist defendants involved in cases in undecided jurisdictions. If appropriate, LDRC might also attempt, working from such briefs, to develop a "model" brief on the issue that could be widely disseminated.

Please send your Gertz-standard briefs to Henry Kaufman at the LDRC, or take a few moments to contact the attorneys who may have prepared such briefs in your state or jurisdiction to ask them to send their briefs along to LDRC.

LDRC Bulletin No. 1

AMICUS CURIAE ASSISTANCE

Over this summer LDRC became involved in alerting its supporters to requests for amicus curiae assistance in three important pending cases, all involving appeals from huge damage and punitive damage awards.

(i) Green v. Alton Telegraph

In May and early June LDRC alerted its supporting organizations to the Alton Telegraph's pending appeal from a massive \$9.2 million judgment (\$6.7 million "compensatory"; \$2.5 million punitive) based not upon a published story, but upon an allegedly libelous memorandum to government officials prepared by two of the Alton, Illinois newspaper's reporters in the course of an investigation into alleged local corruption. An amicus brief has now been filed by a group led by the Chicago Sun-Times and represented by A. Daniel Feldman of Isham, Lincoln & Beale. The Sun-Times amicus argues that the reporters' memorandum is protected by an absolute privilege to report alleged criminal conduct to federal prosecutors citing (*inter alia*) Restatement (Second) of Torts §598, and by a qualified privilege to provide information to the government that can be overcome only by a showing that the memorandum was motivated "solely to harm." The amici also argue that punitive damage awards of this kind are unconstitutional and ought to be eliminated in Illinois and that, in any event, punitive damages cannot be imposed on a newspaper for a publication never seen by its editors.

Co-amici on The Sun-Times' brief were the Danville Commercial News, The New York Times Company, the Peoria Journal-Star, the Rockford Register Star, the St. Louis Post Dispatch, the Waukegan News-Sun, the American Society of Newspaper Editors and the Society of Professional Journalists, Sigma Delta Chi. The Sun-Times amicus is on file at the LDRC.

LDRC understands that the Reporters Committee was also planning to file an amicus in the Alton Telegraph case, but at press time their brief had yet been received by LDRC.

(ii) Pring v. Penthouse, 6 Med. L.Rptr. 1101 (D. Wyo. 1981)

A letter from counsel for Penthouse requesting amicus curiae assistance and describing this case and the issues presented on appeal was circulated to LDRC's supporting organizations. It is understood that three organizations -- the Association of American Publishers (AAP), the Authors

Amici Curiae (cont'd)

LDRC Bulletin No. 1

League of America and the Reporters Committee for Freedom of the Press were planning separately to file amicus briefs which were due on July 27, 1981.

It is expected that the AAP brief will argue two major points. First, that the First Amendment does not permit liability for defamation in a fictional context unless a reasonable reader would understand that the passages complained of referred to actual facts and events concerning the plaintiff. Second, that the punitive damage award was unconstitutional because a private defamation plaintiff can obtain punitive damages regarding a work of fiction (a) only where it is shown that the defendant acted with reckless disregard as to whether the passages would be understood as referring to actual events concerning the plaintiff; (b) only where there is a finding of ill-will or other consciously-motivated reprehensible conduct and (c) only where the award of punitive damages bears a reasonable relationship to the amount of compensatory damages to the plaintiff.

Copies of the various amicus briefs in Pring will be on file with LDRC.

(iii) Burnett v. National Enquirer, 6 Med. L.Rptr. 1321 (Cal. Super. L.A. Co. 1981)

Counsel for the National Enquirer have indicated that they would welcome amicus curiae assistance when their appeal is perfected sometime early this fall. It is understood that the American Civil Liberties Union is considering the filing of an amicus focusing on the punitive damages issue. The Reporters Committee is also considering the filing of a separate amicus. Finally, LDRC has now been informed that James C. Goodale of Debevoise, Plimpton, Lyons & Gates will be coordinating the efforts of the various amici. Any organization interested in preparing or joining an amicus should contact Jim at 299 Park Avenue, New York, N.Y. 10022, (212) 752-6400 or Irving Younger, counsel for the Enquirer, at Williams & Connolly, Hill Building, 839 Seventeenth Street, N.W., Washington, D.C. 20006, (202) 331-5000.

NEW PUBLICATIONS OF INTEREST

NNA Legal Guide for Newspapers

The National Newspaper Association, an LDRC supporter, has recently published a book called Federal Laws Affecting

LDRC Bulletin No. 1

Newspapers. The book brings together in one volume most of the federal statutes and regulations which bear upon newspapers. Newspapers, journalists and communications attorneys should find NNA's new book to be a valuable resource tool. Copies of the book may be purchased from NNA, Suite 400, 1627 K Street, N.W., Washington, D.C. 20006 at a price of \$20.00 for NNA members and \$30.00 for non-members.

Synopsis of the Law of Libel and The Right of Privacy
(World Almanac Publications, 1981)

A revised edition of Bruce Sanford's excellent handbook detailing the current libel laws in layman's language has recently been published by World Almanac Publications, a Division of Scripps Howard Corporation. This is an up-to-date, easy to read guide to libel and privacy problems and "red flag" words to be avoided. Especially recommended for writers, journalists, publishers and other non-lawyers. The publication is being made available at cost with discounts for quantity orders. (Single copies and quantities up to 10 are \$1.50 plus \$.70 postage and handling each; 10 to 99 copies are \$1.50 each, plus a flat postage rate of \$2.00 regardless of quantity; 100 to 499 copies are \$1.35 each, shipping included; 500 to 999 copies are \$1.20 each, shipping included; 1,000 to 2,499 copies are \$1.10 each, shipping included; and quantities of 2,500 or more are \$1.05 each, shipping included.) Orders should be addressed to Jane D. Flatt, Publisher and Vice President, The World Almanac, 200 Park Avenue, New York, N.Y. 10166, or call (212) 567-2333. Please refer to LDRC in your order.

AT THE LDRC

CURRENT SERVICES

LDRC is currently developing a number of systems for comprehensively monitoring pending libel and privacy actions, in both state and federal jurisdictions, and for developing a library of significant briefs, pleadings and other materials to be made available to libel defendants requesting assistance from LDRC.

-- Advance Opinions from BNA's Media Law Reporter

Special arrangements have been made for LDRC to obtain advance copies of libel and privacy opinions as they are received by BNA, that will later be published in the Media Law Reporter. This arrangement enables LDRC to be aware of recent

At the LDRC (cont'd)

LDRC Bulletin No. 1

opinions as much as four to six weeks in advance of their publication. As a result, LDRC can take any necessary action to secure pertinent briefs or related information in significant cases so that a full set of materials can be on file at LDRC by the time the opinions are published. It also permits LDRC to take timely action, such as alerting organizations to the need for amicus curiae assistance on appeals or alerting attorneys in other pending cases that may be affected by the decision(s) received. LDRC supporters should be aware of this available service and take advantage of it to the maximum possible extent.

-- Case Files

LDRC is attempting to develop, to the extent possible, a file of information and materials on all significant cases commenced, or currently pending, in 1981 and thereafter. An effort is being made to arrange for communication of information on pending cases either directly through major cooperating libel insurance carriers, or indirectly through the attorneys for those carriers' insureds. In the interim, and to supplement these arrangements, LDRC is opening files on all cases brought to LDRC's attention in any manner, including decided opinions, news clippings or direct communications from parties or attorneys involved in such cases. LDRC publicity materials also invite attorneys and libel defendants to provide such information to LDRC.

Each case covered is indexed and categorized according to state jurisdiction and legal issues presented; significant briefs, pleadings and related materials are solicited and a follow-up system is initiated in order to keep LDRC generally advised of further developments in the case. A central feature of this reporting and monitoring system is LDRC's "Case Survey Form", a copy of which is attached at the end of this Bulletin. READERS ARE URGED TO DUPLICATE THIS FORM (OR WRITE TO LDRC FOR AN ADDITIONAL SUPPLY) AND TO COMPLETE, OR HAVE THEIR COUNSEL COMPLETE, SUCH A FORM FOR EACH LIBEL CASE IN WHICH THEY ARE CURRENTLY INVOLVED.

-- LDRC Brief Bank

In addition to the systematic gathering of significant briefs in currently pending cases, LDRC has taken a number of actions to develop a bank of briefs in important cases concluded prior to LDRC's formation. Form letters have been sent to more than a dozen leading law firms requesting the provision of such briefs and arrangements are currently being made to transfer copies of useful briefs from these firms, or

At the LDRC (cont'd)

LDRC Bulletin No. 1

their clients, to LDRC. In addition, LDRC publicity materials request other attorneys or parties to provide pertinent briefs, particularly those that bear upon the four LDRC priority issues -- damages, public figure, summary judgment and reporters privilege. Finally, efforts are pending to solicit briefs and other materials on specific topics or issues, such as those discussed in the "Inquiries" section of this Bulletin. Notices of available briefs, indexed by key topics or legal issues, will be published in forthcoming issues of this Bulletin.

FUTURE PROJECTS

-- Annual Statistical Survey

The surveys summarized earlier in this Bulletin, particularly the ground-breaking Franklin Study and follow-up, suggest the value of, and need for, reliable data on the incidence, costs, and outcomes of libel litigation against the media. A proposal will be presented to the LDRC Executive Committee at its next meeting in September that LDRC undertake to prepare a statistical survey and report covering these key issues on some comprehensive and regular basis. This would be a major undertaking, but one that would, we believe, represent a significant service to the media, not only as a historical record but also as the basis for creative action to reduce the incidence, costs and attendant burdens of libel litigation. Progress on development of the annual survey will be reported in future Bulletins.

-- LDRC Extern

Arrangements have been made with the UCLA Law School, in cooperation with the Education Office of the Association of American Publishers, to have a legal "extern" work with LDRC for a two-month period beginning at the end of August. It is expected that the extern will devote a substantial block of time to research on issues relating to actual and punitive damages in libel and privacy actions. The extern's findings will be published in future Bulletins or in special reports issued by LDRC.

At the LDRC (cont'd)

LDRC Bulletin No. 1

NEW SUPPORTING ORGANIZATIONS

Since publication of LDRC's initial brochure in early May, three organizations have been added to the list of LDRC supporters.

Bantam Books, Inc.
Dun & Bradstreet, Inc.
Society of Professional Journalists,
Sigma Delta Chi

We welcome these new supporters to our growing ranks and expect to be able to report on the addition of still other new supporters in future issues of this Bulletin. Since LDRC depends upon voluntary support and contributions from media and other organizations, we urge those who might be interested in supporting the Center to contact Henry Kaufman, LDRC's General Counsel or Harry Johnston at Time Incorporated, LDRC's Chairman.

PUBLICITY

LDRC's initial press release in early May was directed only to the trade press. As of this date, LDRC is aware of coverage or mention in the following publications.

AAP Newsletter
Authors League Bulletin
Media Law Reporter
New York Law Journal
NNA Legal & Legislative News Media Update
Publishers Weekly

We are informed that at least the following additional publications are planning to cover LDRC's formation.

Folio
Columbia Journalism Review
Magazine Publishers Association Update

If you are aware that news of LDRC's formation has been covered elsewhere, please clip the article and send it to Henry Kaufman at LDRC.