



BULLETIN

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IMPORTANT NOTE: TO BE PLACED ON THE LDRC MAILING LIST FOR FUTURE BULLETINS AND SPECIAL REPORTS, TO ORDER BACK ISSUES OF THE BULLETIN, TO PROVIDE LDRC WITH INFORMATION REGARDING IMPORTANT DEVELOPMENTS, AND TO FOLLOWUP ON THE VARIOUS ARTICLES AND INQUIRIES CONTAINED IN THIS BULLETIN, PLEASE USE THE QUESTIONNAIRE/ ORDER FORM ATTACHED AT THE END OF THE BULLETIN.

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EDITOR'S NOTE

The reaction to LDRC Bulletin No. 1 was gratifying. Although its format is not slick, and its circulation is modest, the Bulletin seems to be reaching its intended audience and to be establishing itself as a useful forum for communication among attorneys and organizations active in the libel defense field.

Bulletin No. 2 reflects the decision to publish on a regular quarterly basis -- Summer (July 31 - August 15); Fall (October 31 - November 15); Winter (January 31 - February 15) and Spring (April 30 - May 15). The circulation of this and future Bulletins is also expected to increase markedly, from some 250 to as much as 500 or more. A key factor in this increased circulation has been the decision of a number of LDRC's leading association supporters to have the Bulletin circulated to their Legal Committees or lists of member counsel. We hope that other organizations will perceive the value of this additional circulation and will contact LDRC to make appropriate arrangements for such direct and inexpensive mailings. Of course, we continue to seek additional interested individual subscribers as well.

In an effort further to improve LDRC's responsiveness we have designed for this Bulletin, and expect to use on a continuing basis, a standardized Questionnaire/Order Form. On a single sheet readers will be able to respond to the various inquiries included in each Bulletin, to order briefs, reports and other materials available from LDRC, to alert LDRC to developments in the field and to suggest new LDRC activities and projects that would be of benefit to the libel defense community. We hope you will take the few moments necessary to complete this issue's Questionnaire/Order Form and we look forward to hearing from you in this manner.

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Henry R. Kaufman
General Counsel

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LDRC DAMAGES PROJECT
(INTERIM REPORT)

Bulletin No. 1 briefly noted (p.23) LDRC's intention to embark upon a substantial study of the issue of actual and punitive damages in libel and privacy actions. Over the past three months, with significant assistance from its law student extern Henry Beck, LDRC has already developed a significant body of background information and material on this important subject.

September 10 Preliminary Report

A Preliminary Report on the Damages Project was presented on September 10, 1981 to the LDRC Executive Committee and was later circulated to LDRC's full Steering Committee, comprised of one representative from each of LDRC's thirty-one supporting organizations. That Report focused on what were believed to be two of the most fruitful areas for action in the damages field -- namely (1) the problem of narrowing and specifying "actual injury" as defined by the Gertz Court; and (2) the possibility of establishing a clearer and more favorable rule with regard to "punitive damages," at least against "media" defendants.

With regard to the question of actual damages, the September 10 Report preliminarily concluded that, despite its new constitutional damage requirements of "competent" evidence and "limiting jury instructions," the Gertz decision appears to have failed to abolish "the reality of presumed damages, however much such awards may be camouflaged under the rubric of compensation for "actual injury," citing recent experience in Green v. Alton Telegraph (\$6.7 million in actual damages); Pring v. Penthouse (\$1.5 million in actual damages); and Burnett v. National Enquirer (\$100,000 in actual damages). The Preliminary Report concluded that "[m]ore specific jury instructions, some means for achieving a realistic valuation of psychological and reputational loss, and a reiteration of the serious harm done to First Amendment values by unbridled jury awards" will be required to fulfill the as yet unfulfilled promise of Gertz in this area.

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With regard to the question of punitive damages, the Preliminary Report again noted the failure to secure adequate limitations in the courts. Although a few state courts have banned punitive damages (Massachusetts, Oregon, Washington), the Federal Circuit Courts which have spoken on the issue have failed to close the door to punitive damages potentially left open in Gertz, adopting the position of one leading court that awards of punitive damages "advance a valid state goal" -- "to deter [those] who might engage in malicious false attacks on ... public figures." Appleyard v. Transamerican Press, Inc., 539 F. 2d 1026, 1030 (4th Cir. 1976). The Preliminary Report concluded that Gertz's constitutional actual malice protection in the area of punitive damages is inadequate: "[T]he most effective strategy would seem to be to win explicit recognition of a common law malice requirement as a constitutional prerequisite to punitive damages rather than to continue to permit the individual states to set their own standards, or to allow federal trial courts to circumvent state standards [that in practice may in fact be] more protective than 'actual malice.'"

The Preliminary Report concluded with the following recommendations for further LDRC study and analysis:

"Based upon the above analysis, we recommend to the Executive and Steering Committees that all or some of the following be approved for action by the LDRC Staff:

I. Actual Damages

(i) Study and analysis of all tried libel cases (e.g., over last 4-5 years as per Franklin study) to determine the nature of actual damages permitted and found;

(ii) 50 - state survey of actual damages in libel actions and elements of non-physical compensatory damages (e.g., mental and emotional distress) in non-libel, tort actions;

(iii) Develop model legal arguments for the purpose of limiting the definition of compensable elements of actual damages.

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II. Punitive Damages

(i) 50 - state survey on the availability of punitive damages (a) in libel actions; (b) in all tort actions;

(ii) Take further actions to advance constitutional challenges to punitive damages in general -- e.g., gather pertinent briefs for LDRC brief bank; possibly draft model brief;

(iii) Take further actions to seek constitutionalization of the common law malice and reasonable relation requirements -- e.g., brief bank materials and model briefs;

III. Other Actions

(i) Develop strategies for challenging or limiting damage claims at earlier stages of litigation where appropriate -- e.g., motions to dismiss certain damage claims; motion for partial summary judgment; motions in limine;

(ii) Provide support to legislative action or administrative rule-making in this field -- e.g., New York State Law Revision Commission;

(iii) Develop jury instructions bank by issue, including all damages issues; possible model jury instructions regarding damages."

Copies of the full text of the September 10, 1981 Preliminary Report: Damages Project (15 pages) are available from LDRC. Please use the order form which appears at the end of Bulletin No. 2.

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Franklin Damages Cases

One of the first recommendations of the September 10 Preliminary Report, supra, was that LDRC should undertake to study and analyze all tried libel cases over the last 4-5 years as per the Franklin stud[ies] to determine the nature of actual [and punitive] damages permitted [in the courts]. Working with the cooperation of Professor Marc Franklin, and with indispensable assistance from LDRC Extern Henry Beck and research assistance from Hugo Black III of the Stanford University Law School and Charles DeLaFuentes of the New York bar, a substantial portion of that first task has been accomplished. Thus, as part of its ongoing damages project, LDRC obtained and analyzed many of the recent cases relating to damages collected by Professor Franklin of the Stanford University Law School in connection with the preparation of his two recent articles, "Winners and Losers and Why: A Study of Defamation Litigation," 1980 ABF Research J. 455 and "Suing the Media for Libel: A Litigation Study," 1981 ABF Research J. 795. It will be recalled that Professor Franklin's sampling included a review of all defamation cases reported by the West Reporter System that were decided between January, 1976 and mid-June, 1979 and were indexed under West's "Libel and Slander" heading. This sample was then supplemented in Professor Franklin's follow-up study by a review of all media defamation cases reported in BNA's Media Law Reporter between January, 1977 and mid-December, 1980, ending with cases decided by September 30, 1980. Professor Franklin's first study uncovered 165 media, and 369 non-media defamation cases. The second study yielded 291 media cases, some of which overlapped the first sampling.

What follows, then, is a listing and brief description of all the cases collected by Professor Franklin in which punitive damages were initially awarded after trial by judge or jury or in which the nature and content of actual damages were discussed in connection with the Gertz privilege. Table I lists all such punitive damages cases involving media defendants; Table II consists of such non-media punitive damage cases. Table III list those cases relating to actual damages. For each case, we endeavored to determine the following: the history of the case; (a) the state under whose law it was decided; (b) whether it was decided by judge or jury; (c) the amount and nature of the damages; (d) whether the damages award was affirmed, modified or reversed; and (e) the specific holding on the question of actual and/or punitive damages. Please note that while we have listed all of the cases coded by Professor Franklin under the punitive or actual damage criteria noted above, not all of the cases provide a full discussion of all aspects of the damages issue and consequently, there are some gaps in the information provided.

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I. PUNITIVE DAMAGES -- MEDIA DEFENDANTS

1. Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363 (N.D. Cal. 1977); aff'd, 623 F.2d 216 (9th cir 1980); cert. denied, 101 S. Ct. 897, _____ U.S. _____ (1981); 2 Med. L. Rptr. 1801. (a) Decided under California law; (b) Non-jury trial; (c) Damages award of \$350,000; claim for punitive damages rejected; (d) Affirmed; (e) Damages holding: Because of their greater access to the mass media, public figures may, in the appropriate circumstances, have the damages awarded to them reduced.

2. Anderson v. Kammeier, 262 N.W. 2d 366 (Minn 1978; reh. denied 1978); (a) Decided under Minnesota law; (b) Non-jury trial; (c) Damages awarded \$1,000 punitive; (d) Affirmed; (e) Damages holding: In a case of slander per se, punitive damages may be awarded absent a finding of actual damages.

3. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), cert. denied, 429 U.S. 1041 (1977) (a) Decided under North Carolina law; (b) Jury Trial; (c) Damages award of:

\$10,000	compensatory
75,000	punitive
<u>\$85,000</u>	

Punitive damages reduced to \$5,000; (d) Affirmed; (e) Damages holding: punitive damages are permissible in libel cases involving public figures.

4. Bindrim v. Mitchell, 155 Cal. Rptr. 29 (App. 1979) cert. denied 444 U.S. 984; reh. denied 444 U.S. 1040 (1979). (a) Decided under California Law; (b) Jury trial; (c) Damages of:

\$38,000	actual
25,000	punitive
<u>\$63,000</u>	

Reduced by trial court to

\$25,000	actual
0	punitive
<u>\$25,000</u>	

(d) Judgment affirmed, original verdict and damages reinstated;
(e) No specific holding re: damages.

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5. Brown v. Briggs, 569 S.W. 2d 760 (Mo. App. 1978). (a) Decided under Missouri law; (b) Jury Trial; (c) Damages award of:

\$5,000	actual
0	punitive
<u>\$5,000</u>	

(d) Reversed; (e) No specific holding re: damages.

6. Buckley v. Littel, 539 F. 2d 882 (2d Cir. 1976) cert. denied, 429 U.S. 1062 (1977). (a) Decided under New York Law; (b) Non-jury trial; (c) Damages award of:

\$ 1	compensatory
7,500	punitive
<u>\$7,501</u>	

(d) Reversed in part, affirmed in part; (e) Damages holding: (i) Public figures may in appropriate circumstances, be awarded punitive damages for libel; (ii) In the absence of proof of special damages, the plaintiff, a public figure, was entitled to no more than \$1 in compensatory damages for libel.

7. E. W. Scripps Co. v. Cholomondeloy, 569 S.W. 2d 700 (Ky App. 1978). (a) Decided under Kentucky Law; (b) Jury trial; (c) Damages award of:

\$ 32,500	compensatory
100,000	punitive
<u>\$132,500</u>	

(d) Reversed as to punitive damages, affirmed as to compensatory; (e) Damages Holding: Punitive damages may not be awarded unless actual malice is shown.

8. Cape Publications, Inc. v. Adams, 336 So. 2d 1197 (Fla App. 1976; reh. denied 1976). (a) Decided under Florida Law; (b) Jury trial; (c) Amount of award not specified; (d) Affirmed; (e) No specific damages holdings.

9. Glover v. Herald Co., 549 S.W. 2d 858 (Mo. 1977); cert. denied 434 U.S. 965 (1977) (a) Decided under Missouri law; (b) Not clear from reported decision whether jury involved; (c) Damages award of:

\$4,000	actual
3,000	punitive
<u>\$7,000</u>	

(d) Reversed; failure to show actual malice; (e) No specific damages holding.

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10. Handelman v. Hustler Magazine, 460 F. Supp. 1053 (S.D.N.Y. 1979). (a) Decided under New York Law; (b) Non-jury trial; (c) ----; (d) ----; (e) Punitive damages may not be awarded to a public figure absent actual malice.

11. Hotchner v. Castillo-Puche, 551 F. 2d 910 (2d Cir 1977); cert denied sub nom. Hotchner v. Doubleday, 434 U.S. 834 (1977), 2 Med. L. Rptr. 1545. (a) Decided under New York law; (b) Jury trial; (c) Damages awarded of:

\$125,000	punitive
<u>2</u>	compensatory
\$125,002	

(d) Reversed for failure to find actual malice re: public figure; (e) No specific damages holding on appeal.

12. International Brotherhood of Electrical Workers, Local 1805, v. Mayo., 379 A. 2d 1223 (Md. App. 1977). (a) Decided under Maryland law; (b) Jury trial; (c) Damages awarded of:

\$5,000	punitive
<u>1</u>	compensatory
\$5,001	

(d) Affirmed; (e) Damages Holding: When actual malice is shown against a media defendant, plaintiff can recover both compensatory and punitive damages without proof of actual injury.

13. Jones v. Neighbor Newspapers, Inc., 236 S.E. 2d 23 (Ga. App. 1977; reh. denied 1977). (a) Decided under Georgia law; (b) Partial summary judgement for newspaper which had published story with minor inaccuracies; (c) No award; (d) Affirmed; (e) Damages Holding: No punitive damages may be awarded without proof of malice.

14. Martin v. Griffin Television, Inc., 549 P. 2d 85 (Okla. 1976; reh denied 1976). (a) Decided under Oklahoma law; (b) Jury trial; (c) Damages award of:

\$55,000	actual
<u>30,000</u>	punitive
\$85,000	

(d) Reversed and remanded for new trial; (e) Strict liability is a constitutionally impermissible standard for defamation. Furthermore, a requirement of a minimum award without a showing of actual harm is unconstitutional.

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15. Newspaper Publishing Corp. v. Burke, 224 S.E. 2d 132 (Va. 1976): (a) Decided under Virginia law; (b) Jury trial; (c) Damages award \$10,000 punitive; (d) Reversed; failure to instruct jury as to actual malice standard; (e) Actual malice, but not actual damages, required to support award of punitive damages.

16. Orr v. Argus - Press Co., 586 F. 2d (6th Cir 1978), cert. denied, 440 U.S. 960 (1979), 4 Med. L. Rptr. 1593. (a) Decided under Michigan law; (b) Jury trial; (c) Damages award of

\$15,000	punitive
5,000	compensatory
<u>\$20,000</u>	

(d) Reversed; failure to show actual malice; (e) No discussion of damages.

17. Palm Beach Newspaper, Inc., v. Early, 334 So. 2d 50 (Fla App. 1976) reh denied 1976) cert denied 439 U.S. 910 (1978). (a) Decided under Florida law; (b) Jury trial; (c) Damages award of: \$1,000,000 actual and punitive; (d) Reversed; application of Times malice standard required directed verdict for defendant; (e) No discussion of damages.

18. Pettengill v. Booth Newspapers, Inc., 278 N.W. 2d 682 (Mich. App. 1979; reh denied); 5 Med L. Rptr. 1326. (a) Decided under Michigan law; (b) Unclear from case; (c) Damages awarded; \$265 "out of pocket"; (d) Plaintiff appeals ruling denying him punitive damages, and this ruling is reversed so that plaintiff can make a showing of the extent of the actual damages for which he had originally claimed \$499,735; (e) Actual damages may include mental anguish.

19. Widener v. Pacific Gas & Electric Co., 142 Cal Rptr. (App. 1977; reh denied 1977) cert denied, 436 U.S. (1978) 3 Med. L. Rptr. 1260. (a) Decided under California law; (b) Jury trial; (c) Damages award of:

\$ 750,000	actual
7,000,000	punitive
<u>\$7,750,000</u>	

(d) Trial Court's JNOV reversed; jury had sufficient evidence from which to infer Times malice; (e) No specific damages holding.

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II. PUNITIVE DAMAGES -- NON-MEDIA CASES

20. Ardoyno v. Kyzar, 426 F. Supp. 78 (E.D. La. 1976).
(a) Decided under Mississippi law; (b) ; (c) ; (d) ;
(e) Defendant's 12(b)(6) motion denied.

21. Bayoud v. Sigler, 555 S.W. 2d 913 (Tex. Civ App. 1977). (a) Decided under Texas law; (b) Jury trial; (c) Damages awarded:

\$150,000	exemplary
<u>75,000</u>	actual
\$225,000	

(d) \$100,000 of exemplary damages remitted. Affirmed on condition of additional remittitur of \$50,000 actual damages and \$40,000 exemplary damages; (e) Damages holding: Amount of damages is peculiarly within the province of the jury and no fixed standard may be used. (2) This is especially true in defamation cases in which actual damages include mental anguish, etc.

22. Borden v. Wallace, 570 S.W. 2d 445 (Tex. Civ App. 1978). (a) Decided under Texas law; (b) Jury trial; directed verdict; (c) Damages awarded:

\$ 500,000	actual
<u>500,000</u>	exemplary
\$1,000,000	

(d) Reversed; conditional privilege; (e) No damages holding.

23. British Overseas Airways v. Tours & Travel of Houston, 568 S.W. 2d 888 (Tex. App. 1978). (a) Decided under Texas law; (b) Jury trial; (c) Damages awarded:

\$25,000	actual
<u>7,500</u>	exemplary
\$32,500	

(d) Affirmed; (e) Damages holding: Exemplary damages may be awarded in libel action where libelled party establishes wilfull or wanton act sufficient to support finding of malice.

24. Brown v. Skagg's - Albertson's Properties, Inc., 563 F. 2d 983 (10th Cir 1977; reh denied 1977). (a) Decided under Oklahoma law; (b) Jury trial; (c) Damages awarded of:

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\$20,000	actual
<u>10,000</u>	punitive
\$30,000	

(d) Affirmed; (e) Malice may be inferred when libel defendant has had no reasonable basis for believing allegedly libelous statement to be true.

25. Bucher v. Roberts, 595 P. 2d 239 (Colo. 1979). (a) Decided under Colorado law; (b) Jury trial; (c) Damages awarded

\$5,000	compensatory
<u>500</u>	punitive
\$5,500	

(d) Judgement reinstated by Colorado Supreme Court; (e) No damages holding.

26. Cash v. Empire Gas Corp., 547 S.W. 2d 830 (Mo. App. 1976). (a) Decided under Missouri law; (b) jury Trial; (c) damages awarded: \$15,000 actual; against corporate defendant; 50,000 punitive; against corporate defendant; 500 punitive; against corporate treasurer defendant; \$65,500 total; (d) Reversed; conditional privilege; (e) No damages holding.

27. Cassat Avenue Mobile Homes, Inc. v. Bobenhausen, 363 So. 2d 1065 (Fla. 1978; reh denied 1978). (a) Decided under Florida law; (b) Jury trial; (c) Damages awarded:

\$30,000	actual
<u>50,000</u>	punitive
\$80,000	

(d) Reduced to total of \$40,000; (e) No damages discussion.

28. Codner v. Toone, 581 P. 2d 387 (Kan. 1978). (a) Decided under Kansas law; (b) Jury trial; (c) Damages awarded:

\$5,000	actual
<u>0</u>	punitive
\$5,000	

(d) Affirmed; (e) No discussion of damages.

29. Food Fair Stores, Inc. v. Lascola, 355 A. 2d 757 (Md. Ct. Spec. App. 1976). (a) Decided under Maryland law; (b) Jury trial; (c) Damages awarded:

\$ 7,000	compensatory
<u>10,000</u>	punitive
\$17,000	

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(d) Reversed in part and remanded; (e) (1) Negligence is the minimum requirement for liability since Gertz. (2) When there is more than one cause of action and a finding is made on each of the counts, punitive damages must not be awarded in a lump sum.

30. Ford Motor Credit Co. v. Holland, 367 A. 2d 1311 (D.C. 1977). (a) Decided under the law of the District of Columbia; (b) Jury trial; (c) Damages awarded:

\$100,000	punitive
50,000	compensatory
<u>\$150,000</u>	

(d) Reversed with instructions to enter verdict for defendant; privilege; (e) No damages discussion.

31. General Motors Corp. v. Piskor, 352 A. 2d 810 (Md. App. 1976). (a) Decided under Maryland law; (b) Jury trial; (c) damages awarded:

\$ 1,000	slander
300	assault
200	false imprisonment
25,000	punitive
<u>\$26,500</u>	

(d) Reversed as to punitive damages; remanded for findings as to malice; (e) Damages holding: It is improper to award one lump sum for punitive damages when compensatory damages have been awarded for each count.

32. Georgia Power v. Busbin, 250 S.E. 2d 442 (Ga. 1978 reh denied 1978). (a) Decided under Georgia law; (b) Jury trial; (c) Amount of damages not specified; (d) Reversed; corporate employee acting outside scope of authority does not subject the corporation to liability for slander; (e) No damages holding.

33. Gray v. Allison Division, General Motors, Corp., 370 N.E. 2d 747 (Ohio App. 1977). (a) Decided under Ohio law; (b) Jury trial; (c) Damages awarded:

\$40,000	punitive
100	actual
<u>\$40,100</u>	

(d) Reversed; (e) Even where malice has been shown, punitive damages may not be awarded in an amount grossly disproportionate to actual damages.

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34. Hames v. Anderson, 571 P.2d 831 (Okla., 1977; reh. den. 1977). (a) Decided under Oklahoma law; (b) ?; (c) Damages awarded:

\$1,000	actual
<u>7,500</u>	punitive
\$8,500	

(d) Affirmed; harmless error in jury instruction; (e) No damages issue.

35. Hardee v. North Carolina Allstate Services, 537 F.2d 1255 (4th Cir. 1976). (a) Decided under South Carolina law; (b) Jury trial; (c) Damages awarded:

\$20,000	compensatory
<u>50,000</u>	punitive
\$70,000	

(d) Reversed; (e) No holding on damages.

36. Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Or. 1977). (a) Decided under Oregon law; (b) Jury trial; (c) Damages awarded:

\$25,000	punitive
<u>500</u>	general
\$25,500	

(d) Affirmed; (e) Presumed damages are permissible against a non-media defendant.

37. Hirman v. Rogers, 257 N.W.2d 563 (Minn. 1977). (a) Decided under Minnesota law; (b) Jury trial; (c) Damages awarded:

\$1,500	actual
<u>\$1,500</u>	punitive
\$3,000	

(d) Reversed; (e)

38. Holdaway Drugs, Inc. v. Braden, 582 S.W.2d 646 (Ky. 1979). (a) Decided under Kentucky law; (b) Jury trial; (c) Damages awarded:

\$1,850	compensatory
2,100	loss of income
<u>0</u>	punitive
\$3,950	

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(d) Reversed; qualified privilege; (e) No discussion of damages.

39. Houston Belt & Terminal Railway Co. v. Wheery, 548 S.W.2d 743 (Tex. Civ. App. 1976; reh. denied 1977). (a) Decided under Texas law; (b) Jury trial; (c) Damages awarded:

\$150,000	compensatory
<u>50,000</u>	exemplary
\$200,000	

(d) Affirmed and reformed: recovery against non-corporate employee defendants deleted but case is unclear as to whether this resulted in any change in the amount of the recovery; (e) Texas post-Gertz standard for private figure is negligence plus actual injury.

40. King v. Masson, 251 S.E.2d 107 (Ga. App. 1978; reh. denied 1978). (a) Decided under Georgia law; (b) Jury trial; (c) Damages awarded:

\$15,000	actual
<u>20,000</u>	punitive
\$35,000	

(d) Affirmed; (e) No damages issue.

41. Kraisinger v. Liggett, 592 P.2d 477 (Kan. App. 1979; reh. denied 1979). (a) Decided under Kansas law; (b) Jury trial; (c) No damages awarded despite a finding for the plaintiff; (d) Affirmed; (e) Even though nominal damages should have been awarded as a matter of law, the decision will not be reversed; de minimis.

42. Luster v. Retail Credit Co., 575 F.2d 609 (8th Cir. 1978). (a) Decided under Arkansas law; (b) Jury trial; (c) Damages awarded:

\$ 50,000	compensatory
<u>100,000</u>	punitive
\$150,000	

(d) Affirmed and modified: compensatory award upheld on remittitur of punitive award; (e) Arkansas requires actual ill will or express malice for an award of punitive damages.

43. Marchesi v. Franchino, 387 A.2d 1129 (Md. App. 1978). (a) Decided under Maryland law; (b) Jury trial; (c) Damages awarded:

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\$20,000	punitive
500	compensatory
<u>\$20,500</u>	

(d) Reversed actual malice required to defeat conditional privilege; (e) No damages holding.

44. Matthews v. Deland State Bank, 334 So.2d 164 (Fla. App. 1976). (a) Decided under Florida law; (b) Jury trial; (c) Lower court found for defendant; (d) Reversed; jury may deduce malice from proof of publication; new trial ordered; (e) No damages discussion.

45. Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691 (8th Cir. 1978). (a) Decided under Kansas law; (b) Jury trial; (c) Damages awarded:

\$25,000	punitive
0	actual
<u>\$25,000</u>	

(d) Affirmed; (e) Under Kansas law, it is not plain error to award punitive damages when no actual damages are awarded. However, under Kansas law, no punitive damages may be awarded absent actual malice.

46. NAACP v. Moody, 350 So.2d 1365 (Miss. 1977; reh. denied 1977); 3 Med.L.Rep. 1711. (a) Decided under Mississippi law (b) Jury trial; (c) Damages awarded:

\$200,000	punitive
50,000	actual
<u>\$250,000</u>	

Actual damages reduced to \$10,000 by trial court.

(d) Reversed; failure to show Times malice; (e) No damages holding.

47. Nelson v. Cail, 583 P.2d 1384 (Ariz. App. 1978; reh. denied 1978 review denied 1978). (a) Decided under Arizona law; (b) Jury trial; (c) Damages awarded:

1.	Defamation count:
\$1,000	nominal
3,000	punitive
<u>\$4,000</u>	

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2.	Interference count
	\$40,000 general
	40,000 punitive
	<u>\$80,000</u>
Total	\$84,000

(d) Defamation award reduced to \$1 nominal damages \$0 punitive. Judgment for interference with contractual relations affirmed; (e) (1) Punitive damages may not be awarded absent a showing of Times malice. (2) Nominal damages are trivial in amount; \$1,000 is not trivial.

48. Patten v. Smith, 360 N.E.2d 233 (Ind. App. 1977; reh. denied 1977). (a) Decided under Indiana law; (b) Jury trial; (c) Damages awarded:

\$30,300	punitive
<u>12,350</u>	actual
\$42,650	

(d) Reversed; jury instructions must make clear difference between common law and Times malice and explain "reckless disregard."; (e) No damages holding.

49. Pirre v. Printing Developments, Inc. 468 F. Supp. 1028 (S.D.N.Y. 1979); aff'd 614 F.2d 1290 (2d Cir. 1979). (a) Decided under Connecticut law; (b) Jury trial; (c) Damages awarded:

\$400,000	actual
<u>45,000</u>	punitive
\$445,000	

(d) Actual damages reduced to \$45,000; punitive damages upheld; (e) No damages discussion.

50. Porterfield v. Burger King Corp., 540 F.2d 398 (8th Cir. 1976). (a) Decided under Missouri law; (b) Jury trial; (c) Damages award:

1. Employment statute:	\$10,000 actual
	<u>0</u> punitive
	\$10,000
2. Libel	\$ 0 actual
	<u>\$50,000</u> punitive
	\$50,000
Total	\$60,000

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Reduced by trial court to: 1. \$1 nominal; 0 punitive; 2. 0; no damage shown; (d) Affirmed; (e) Under Missouri law, punitive damages can be recovered only when there is a basis for the recovery of compensatory damages.

51. Ramaciotti v. Zinn, 550 S.W.2d 217 (Mo. App. 1977).
(a) Decided under Missouri law; (b) Jury trial; (c) Damages awarded:

\$10,000 actual and punitive

(d) Affirmed in part; reversed in part; remanded; (e) No discussion of damages.

52. Riggs National Bank v. Price, 359 A.2d 25 (D.C. 1979). (a) Decided under District of Columbia law; (b) Jury trial; (c) Damages awarded:

1.	False Imprisonment	
a.	Defendant bank	\$1,000 compensatory <u>5,000</u> punitive
b.	Defendant employee	\$1,000 compensatory <u>500</u> punitive \$1,000

Total \$7,500

2.	Slander	
a.	Defendant bank	\$1,250 compensatory <u>5,000</u> punitive \$6,250
b.	Defendant employee	\$1,250 compensatory <u>500</u> punitive \$1,750

Total \$8,000

(d) Judgment for false imprisonment reversed; judgment for slander affirmed and compensatory but not punitive damages awarded; (e) Punitive damages are awarded to punish persons for outrageous conduct such as maliciousness, etc., but such awards are not favored.

53. Roberts v. Bucher, 584 P.2d 97 (Colo. App. 1978; reh. denied 1978); reversed 595 P.2d 239 (Colo. 1979) (See Bucher v. Roberts supra.): (a) Decided under Colorado law.; (b) Jury trial; (c) Damages awarded:

\$5,000	compensatory
<u>500</u>	punitive
\$5,500	

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(d) Reversed; (e) No damages discussion.

54. Rogelein Provision Co. v. Mayen, 566 S.W.2d 1 (Tex. Civ. App. 1978). (a) Decided under Texas law; (b) Jury trial; (c) No discussion of damages awarded; (d) ; (e).

55. Rowe v. Metz, 579 P.2d 83 (Colo. 1978). (a) Decided under Colorado law; (b) Jury trial; (c) Damages awarded:

\$1,000	compensatory
<u>2,500</u>	punitive
\$3,500	

(d) Affirmed; (e) Where the reputation of a private plaintiff has been injured by a non-media defendant in a purely private context, and the remarks are defamatory per se, the common law rule permitting the presumption of damages is applicable.

56. Royer v. Steinberg, 153 Cal. Rptr. 499 (App. 1979)

(a) Decided under California law.; (b) ?; (c) Damages awarded:

\$200,000	actual
<u>4,300</u>	punitive
\$204,300	

(d) Reversed; privilege; (e) No discussion of damages.

57. Sears, Roebuck & Co. v. Moten, 558 P.2d 954 (Ariz. App. 1976; reh. denied; petition for review denied 1977). (a) Decided under Arizona law; (b) Jury trial; (c) Damages awarded:

\$1	compensatory
<u>\$1</u>	punitive
\$2	

Increased by additur:	\$25,000	compensatory
	<u>\$ 5,000</u>	punitive
	\$30,000	

(d) Judgment vacated; additur improper; (e) No discussion.

58. Southwestern Bell Telephone Co. v. Dixon, 575 S.W.2d 596 (Tex. Civ. App. 1978; reh. denied 1979). (a) Decided under Texas law; (b) Jury trial; (c) Damages awarded:

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Plaintiff 1.

\$ 500,000 actual (slander)
500,000 wrongful death (caused
by slander)
500,000 exemplary
\$1,500,000

Plaintiff 2.

\$1,000,000 actual
500,000 exemplary

(d) Reversed; conditional privilege; no malice shown; (e) No discussion of damages.

59. Stearns v. McManis, 543 S.W.2d 659 (Tex. Civ. App. 1976; reh. denied 1976). (a) Decided under Texas law; (b) Jury trial; (c) Damages awarded:

\$1,000 exemplary
200 actual
\$1,200

(d) Affirmed; (e) No holding on damages.

60. Thomas v. Kaufmann's, 436 F. Supp. 293 (W.D. Pa. 1977)
(a) Decided under Ohio law. (b) Jury trial; (c) Damages awarded:

\$12,000 actual
20,000 punitive
\$32,000

(d) No damages holding; (e) Reversed; new trial ordered; verdict against weight of evidence.

61. Thornton v. Equifax Inc., 467 F. Supp. 1008 (E.D. Ark. 1979) reversed 619 F.2d 700 (8th Cir. 1980); cert. denied 101 S. Ct. 108 (1980). (a) Decided under Arkansas law; (b) ?; (c) Damages awarded:

\$250,000 punitive
5,000 actual
\$255,000

(d); (e) Jury may consider defendant's wealth in assessing punitive damages.

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62. Troutman v. Erlandson, 593 P.2d 793 (Or. 1978). (a) Decided under Oregon law (b) ? (c) ?; (d) Affirmed; (e) Damages not at issue.

63. Turner v. Gateway Transportation, Inc. 569 S.W.2d 358 (Mo. App. 1978). (a) Decided under Missouri law; (b) Jury trial; (c) Damages awarded:

\$50,001	punitive
<u>5,000</u>	compensatory
\$55,001	

Jury verdict vacated; qualified privilege etc.; directed verdict for defendant.

(d) Affirmed; (e) No damages holding.

64. Ward Telecommunications & Computer Services, Inc. v. State, 366 N.E.2d 840 (N.Y. 1977). (a) Decided under New York law; (b) ?; (c) ?; (d) Reversed; absolute privilege; (e) No damages holding.

65. Wenig v. Wood, 349 N.E.2d 235 (Ind. App. 1976; reh. denied 1976). (a) Decided under Indiana law; (b) Jury trial; (c) Damages awarded:

\$150,000	actual
<u>50,000</u>	punitive
\$200,000	

Reduced to	\$25,000	actual
	<u>5,000</u>	punitive
	\$30,000	

(d) Affirmed in part; reversed in part; (e) Malice need not be shown for private plaintiffs to recover damages (actual or punitive).

66. Wheeler v. Green, 593 P.2d 777, 5 Med. L. Rptr. 1132 (Or. 1979). (a) Decided under Oregon law; (b) Jury trial; (c) Damages awarded:

	\$150,000	general
against various	<u>260,000</u>	punitive
defendants	\$410,000	

(d) Punitive damages eliminated; various other changes re: defendants other than Green; (e) Damages holding: The Oregon Constitution, Art. I, §§8, 10, prohibits awarding punitive damages in defamation cases. However,

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compensatory damages may include an award for mental anguish.

II. ACTUAL DAMAGES -- MEDIA AND NON-MEDIA CASES

67. Dixson v. Newsweek, 562 F.2d 626 (10th Cir. 1977).
(a) Decided under Colorado law; (b) Jury trial; (c) Damages awarded: \$75,000; reduced by court to 45,000; (d) Affirmed; (e) The Colorado standard re: private figure plaintiffs is "reckless disregard" as defined by state law; that is "wanton indifference to consequences" rather than serious doubt as to falsity.

Plaintiff's argument that because of the general verdict it cannot be ascertained for which of his claims for actual damages the jury allowed compensation, is rejected because of his failure to request a special verdict.

68. E.W. Scripps v. Cholomondelay, 569 S.W. 2d 700 (Ky. 1978). See discussion supra., case # 7.

69. Martin v. Griffin Television, Inc., 549 P. 2d 85 (1976). See discussion supra. case # 14.

70. Mid-America Food Service, Inc. v. ARA Services, Inc., 578 F. 2d 691 (8th Cir. 1978). See discussion supra., case # 47.

71. Nelson v. Cail, 583 P.2d 1384 (Ariz. App. 1978). See discussion supra., case # 47.

72. Nieves v. Army Times, 440 F. supp. 677 (D.P.R. 1976).
(a) A media case decided under Puerto Rico law; (b) Non-jury question; (c) ; (d) ; (e) Malice is presumed under the law of Puerto Rico when the charge made in the allegedly libelous material is a punishable offense.

"Actual damages" include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

73. Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P. 2d 1216 (1977). (a) A media case decided under Arizona law; (b) Directed verdict for defendant appealed; affirmed by the Arizona Court of Appeals; (c) ; (d) Affirmed; (e) Mere negligence is sufficient to establish fault in a suit for defamation brought by a private plaintiff under Gertz.

"Actual damages" were sufficiently alleged to meet the Gertz requirement forbidding presumption of damages.

74. Pettengill v. Booth Newspapers, Inc., 278 N.W. 2d 682 (Mich. App. 1979). See discussion supra., case # 18.

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75. Sriberg v. Raymond, 544 F. 2d 15 (1st Cir. 1976). (a) Decided under Massachusetts law; (b) ; (c) ; (d) ; (e) Summary judgment for attorney on issue of privilege affirmed.

76. Time, Inc. v. Firestone, 424 U.S. 448 1 Med. L. Rptr. 1665 (1976). (a) Media case decided under Florida law; (b) Jury trial; (c) \$100,000; (d) Reversed for failure to submit jury instructions as to fault, or, in the alternative, a finding as to fault by the Court; (e) Supreme Court's comment on actual damages.

"Petitioner's theory seems to be that the only compensable injury in a defamation action is that which may be done to one's reputation, and that claims not predicated upon such injury are by definition not actions for defamation. But Florida has obviously decided to permit recovery for other injuries without regard to measuring the effect the falsehood may have had upon a plaintiff's reputation. This does not transform the action into something other than an action for defamation as that term is meant in Gertz. In that opinion we made it clear that states could base awards on elements other than injury to reputation, specifically listing 'personal humiliation, and mental anguish and suffering' as examples of injuries which might be compensated consistently with the constitution upon a showing of fault. Because respondent has decided to forego recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her." (424 U.S. 448, 460 (1976).)

77. Trahan v. Ritterman, 368 So. 2d 181 (La. App 1979). (a) Decided under Louisiana law; (b) Non jury trail; (c) Damages awarded: \$1,000 in general damages; (d) Affirmed; (e) Damages holding:

(1) When alleged defamatory words are found to be defamatory per se, falsity and malice are presumed and defendant bears burden of rebutting presumption.

(2) Mere assertion of criminal conduct is injurious to reputation of defamed party and entitles him to damages without proof thereof.

(3) Damages for humiliation, embarrassment and mental anguish and suffering, although requiring competent evidence, need not be established in terms of pecuniary value.

(4) Trier of fact has great discretion in setting amount of damages; the exercise of this discretion will not be disturbed absent a showing of manifest error.

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**GUCCIONE V. HUSTLER MAGAZINE:
FIRST OF THE MEGA-DAMAGE
AWARDS REVERSED ON APPEAL**

Much has been written over the past several months concerning the new and disturbing trend toward huge, seven-figure damage awards in libel cases. Many of those jury awards are now pending on appeal. One such case, Guccione v. Hustler Magazine, while the least publicized (perhaps because it pits a media plaintiff against an unpopular if not notorious media defendant), has become the first to test the current attitude of the appellate bench to such huge awards. If the Ohio Court of Appeals view is representative, there is some cause for optimism that other huge awards will be reversed or substantially reduced on appeal.

In Guccione, plaintiff, the publisher of Penthouse Magazine, complained of the publication, in the June, 1979 issue of Hustler Magazine, of a doctored photograph in which plaintiff's head (photo courtesy of U.P.I.) was superimposed on the photograph (source unstated) of another man performing "buggery." The fake photo appeared under the caption, "Bob Guccione Discovers Vaseline." The jury recorded its displeasure with the Hustler brand of humor by rendering a massive verdict in plaintiff's favor on libel and on invasion of privacy counts. The verdict against the Magazine was for \$1,150,000 in compensatory damages (including attorneys fees) and \$11,000,000 in punitive damages and against Larry Flynt, the Magazine's publisher, for \$2,150,000 in compensatory damages (including attorneys fees) and \$26,000,000 in punitive damages. On remittitur, the trial judge substantially reduced the damage judgment to approximately 1/13th of the jury's original award, but still a multi-million dollar sum -- \$1,150,000 in compensatory damages (and attorneys fees) against each defendant and punitive damages of \$2,000,001 against defendant Flynt and \$850,001 against the Magazine.

On appeal, the Franklin County Court of Appeals reversed and remanded for a new trial on the damage issue only. The Court sustained a number of assignments of error regarding improper, inadmissible and inflammatory testimony. It also found error in a confusing verdict form and in jury instructions which it found to have resulted in improper awards of punitive damages on those counts where the jury made no award for actual or compensatory damages. Further -- and most centrally -- the Court of Appeals held that the huge punitive awards, both before and after remittitur, were clearly the result of "passion or prejudice" and must be set aside. The trial court's remittitur of punitive damages, the Court of Appeals found, itself establishes that the jury award was some

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13 times greater than reasonably could be awarded. Moreover, the punitive damage award sought was clearly intended, according to the Court of Appeals, "to put [Flynt] out of business ... [and] this is exactly what the jury attempted to do ... Where a jury awards punitive damages with the intent of destroying a person or corporation, rather than merely punishing them ... the jury has operated under passion and prejudice." (Memorandum opinion at pp. 38-39) Finally, and significantly, the Court also found that the compensatory damage award was also "grossly excessive." As noted by the Court, "There is no conceivable basis upon which the jury could properly return a verdict of \$1,000,000 in compensatory damages for invasion of privacy or \$2,000,000 in compensatory damages for the libel, unless they were influenced by the appeals for passion and prejudice..."

SUPREME COURT TO HEAR
TWO CASES; REFUSES
TO TAKE SEVEN OTHERS

The Supreme Court has kicked off its new Term in dramatic fashion by accepting two libel cases on petitions for certiorari, the first libel cases to be heard in three Terms. The cases accepted, Street v. NBC and Wilson v. Scripps - Howard Broadcasting Co. had both been decided favorably to media defendants in the lower courts. Each case therefore once again threatens an unfavorable ruling for libel defendants. In Street, yet another narrowing of the "public figure" category is a possibility. In Wilson, a major ruling on burden of proof of falsity in libel actions is in the offing. The Court has also denied petitions in seven other cases. The cases and dispositions (through November 9, 1981) are as follows:

I. Review Denied

1. Arsenault v. Allegheny Airlines, Inc., unpublished, (1st Cir., 12/24/80), cert. denied, 50 U.S.L.W. 3245 (10/5/81), (non-media action -- summary judgment had been granted in favor of defendant).
2. Kadans v. O'Brien, unpublished, (9th Cir., 11/26/80), cert. denied, 50 U.S.L.W. 3245 (10/5/81), (non-media action -- Ninth Circuit had held that testimony given by witness in a fact-gathering hearing related to appointment of personnel conducted by a non-decision making agency was absolutely privileged).
3. Medico v. Time, Inc., 643 F.2d 134, 6 Med. L. Rptr. 2529 (3d Cir. 1981), cert. denied, 50 U.S.L.W. 3246

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(10/5/81) (Third Circuit had ruled that magazine article was protected by common law privilege for fair reporting of official action).

4. Porter v. Guam Publications, Inc., 7 Med. L. Rptr. 1368 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3300 (10/13/81) (Ninth Circuit had ruled, on remand from Supreme Court to reconsider in light of Gertz, that defendant's newspaper article regarding the contents of a "daily police bulletin" was privileged as a fair report of judicial proceedings).

5. Valley News v. McCusker, 428 A.2d 493, 7 Med.L.Rptr. 1343 (N.H. 1981), cert. denied, 50 U.S.L.W. 3452 (11/2/81) (New Hampshire Supreme Court had affirmed denial of defendant's motion for summary judgment, holding as a matter of law that plaintiff, an appointed deputy sheriff and former elected county sheriff, was not a public official or public figure).

6. Washington Post Co. v. Rebozo, 637 F.2d 375, 6 Med.L.Rptr. 2505 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3351 (11/2/81) (Fifth Circuit had ruled that plaintiff was a public figure, but denied defendant's motion for summary judgment, holding that genuine issues of material fact existed regarding actual malice).

7. Cahalan v. Walker, 411 Mich. 857 (1981), cert. filed, 9/11/81, No. 81-494 (non-media action -- Michigan Supreme Court had refused to grant a defendant's motion for summary judgment based upon defendant's affidavit regarding his state of mind in public figure libel action).

II. Review Granted

1. Street v. NBC, 645 F.2d 1227, 7 Med.L.Rptr. 1001 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3245 (10/5/81) (Justice Marshall taking no part in the consideration of the petition) (Sixth Circuit had affirmed the district court's directed verdict for defendant on the ground that plaintiff was, and continued for 40 years to be, a public figure and that there was no evidence of actual malice). SEE STORY BELOW

2. Wilson v. Scripps-Howard Broadcasting Co., 7 Med.L.Rptr. 1169 (6th Cir. 1981), cert. granted, 50 U.S.L.W. 3351 (11/2/81) (Sixth Circuit had ruled that plaintiff was a private figure but reversed a jury verdict for plaintiff, holding, as a matter of federal, constitutional law, that the jury was erroneously instructed that defendant had the burden of proving truth. Cert. petition presented only burden of proof issue). SEE STORY BELOW

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III. Cases Filed

Since LDRC Bulletin No. 1, the following additional libel petitions have been filed, but had not been acted upon by the Supreme Court, as of November 9, 1981.

1. Anderson v. Low Rent Housing Commission of Muscatine, Iowa, 304 N.W.2d 239, 7 Med.L.Rptr. 1726 (Iowa 1981), cert. filed, 7/14/81, No. 81-714 (non-media action -- Iowa Supreme Court had reversed libel verdict in favor of plaintiff holding that public figure must prove all elements of Sullivan standard against a non-media defendants).

2. Maple Properties v. Superior Court of Los Angeles County (Harris, real party in interest), unpublished, California Sup. Ct., cert. filed, 10/13/81, No. 81-719.

Public Figure in Street v. NBC

In granting certiorari in Street v. NBC, supra, the Supreme Court agreed to hear a case which involves, among other issues, one of the most difficult questions in the "public figure-private figure" dichotomy. Can a person once embroiled in a public event of historic proportions reacquire her status as a "private figure" with the passage of time?

Mrs. Street brought her original suit on the basis of a nationally-televised program which depicted her role in the historic Scottsboro Boys case of the mid-1930's. Street's petition for certiorari concedes (and the Federal District Court found) that by virtue of her role in the Scottsboro trial she had been a "public figure", albeit an unwilling one. But the District Court found that because of her disappearance from public view for the forty or so years since the conclusion of that trial she was no longer a "public figure" within the meaning of that term. The Sixth Circuit, in a 2-1 decision as to Street's status, found her to be a "public figure," expressly noting that "The Supreme Court has explicitly reserved the question of 'whether or when an individual who was once a public figure may lose that status by the passage of time' [citing Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 156, 166 n. 7], 7 Med. L. Rptr. 1001, 1006.

In its papers opposing the petition for certiorari, NBC argued that there is a profound and continuing historic interest in the trial. It also cited a number of Circuit Court cases which seemed to hold that the passage of time did not restore public figure status.

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Copies of Street's petition for certiorari and of NBC's papers in opposition are available from LDRC. Use the Order Form at the end of this Bulletin.

Burden of Proof and Wilson v. Scripps-Howard

The recent grant of certiorari by the Supreme court in Wilson v. Scripps-Howard, supra, presents a seemingly technical legal issue. Yet burden of proof is an issue that could readily be used, if the Court were so disposed, as the occasion either to reaffirm and strengthen constitutional doctrine, or else to retreat (at least to some extent) from constitutional rulemaking in favor of state discretion in the libel field.

The central question presented in Wilson, according to the petition for certiorari, is whether the Sixth Circuit "err[ed] in holding that the First and Fourteenth Amendments ... require that private-figure libel plaintiffs bear the burden of proving the falsity of a defamatory communication in contravention to state law?" Since "falsity" is an essential element of the cause of action for defamation, how this question is answered may have profound implications. (Note that the petitioner appeared to concede that a public figure may bear the burden of proof, but that a private figure should not; Scripps-Howard argued that the burden "rests squarely on the plaintiff, whether he is classified as a 'public' or a 'private' figure.)

In its opposition to the Wilson petition, Scripps-Howard argued in favor of the Sixth Circuit's holding, relying upon what it viewed as the clear implication of prior Supreme Court rulings, including most prominently New York Times v. Sullivan; Gertz v. Robert Welch and Herbert v. Lando, 441 U.S. 153, 175-76 (1979). It also cited what was asserted to be an unbroken line of precedent in the prior decisions of "all other federal appellate courts and state courts of last resort that have directly ruled upon the issue," citing the following cases: See Simonson v. United Press International, No. 80-2708, slip op. at 6 (7th Cir. July 16, 1981); Jenoff v. Hearst Corp., 644 F.2d 1004, 1008 (4th Cir. 1981); Meiners v. Moriarity, 563 F.2d 343, 351 (7th Cir. 1977); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), cert. denied, 434 U.S. 834 (1977); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 690 (Md. 1976); Troman v. Wood, 340 N.E. 2d 292, 299 (Ill. 1975); Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 174 (Mass. 1975); Brown v. Boney, 41 N.C. App. 636, 647-48 (1979); Newell v. Field Enterprises, Inc., 415 N.E.2d 434, 451 (Ill. App. 1980); Farnsworth v. Tribune Co., 43 Ill.2d 286, 253 N.E.2d 408, 412 (1969); Field Research Corp. v. Patrick, 30 Cal. App. 3d 603, 611, 106 Cal. Rptr. 473, 478, cert. denied,

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414 U.S. 922 (1973). In support of this "consensus" of the lower courts, Scripps-Howard also adverted to the Restatement (Second) of Torts, §580 B, Comment j (1977) which states that "in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will or necessarily find that he must show the falsity of the defamatory communication." Scripps-Howard distinguished five cases seemingly to the contrary cited in the Petition, primarily on the ground that four of them involved non-media defendants.

Copies of the petition and brief in opposition are on file with the LDRC and may be ordered using the form which appears at the end of this Bulletin. LDRC also has an interesting set of trial briefs on the burden of proof issue, focusing on the distinction between the initial burden of producing evidence and the risk of non-persuasion, in Lewis v. Time Incorporated, Civ. No. 5-79-369-LKK, earlier opinion reported at 83 F.R.D. 463, 5 Med. L. Rptr. 1790 (E.D. Cal. 1979). These may also be ordered from LDRC.

LDRC PLANS TO MONITOR ACTIVITIES
OF LITIGIOUS GROUPS,
CORPORATIONS AND INDIVIDUALS

It is a common perception in the libel defense and libel counselling field that certain groups, corporations or individuals may be more prone to commence libel litigation than others. Infrequently, such plaintiffs publicly and expressly announce their intention to commence a libel litigation campaign. More frequently, a similar intent vigorously to pursue libel claims becomes apparent only after multiple litigations are actually commenced. For want of a better label, libel plaintiffs of either kind would seem justifiably to be classifiable as "litigious" groups.

Church of Scientology

At least one such well-known group, the Church of Scientology, has had the dubious distinction of having expressly been dubbed as "litigious" by no less than a federal district court judge in the Southern District of New York. In Church of Scientology v. Siegelman, 475 F. Supp. 950, 5 Med. L. Rptr. 2021 (S.D.N.Y. 1979), Judge Goettel noted, in support of his reference to "the litigious Church of Scientology," 475 F. Supp. at 951, 5 Med. L. Rptr. at 2022, that the libel litigation against J.B. Lippincott and two book authors over which he was presiding was only one of thirty other reported cases (presumably not all libel litigations) in which a "lexis"

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scan, provided as an Exhibit to a motion by one of the defendants, showed that the Church of Scientology (presumably in one corporate form or another) was involved as a party.

Since Judge Goettel's decision, despite public indications that the Church of Scientology would turn away from some of the more extreme activities of certain of its branches or representatives, it would appear from information reviewed by LDRC that the Church of Scientology has not foregone libel litigation, or the threat of litigation, as an organizational response to publications critical of the Church. Reasons to expect that the Church's litigation activities might diminish had stemmed from the widely-publicized prosecution and subsequent conviction of several high Church officials in connection with a federal indictment for conspiracy, burglary, and theft. These convictions were very recently upheld by a panel of the District of Columbia Circuit Court of Appeals. Church documents seized in connection with preparation of the federal government's case, it has been widely reported, revealed a far-flung counter-espionage type operation under the guidance the Church of Scientology's internal security wing known as the "World-Wide Guardian Office."

One Church document, given publicity after the indictments, although it had apparently been previously publicly available, is particularly revealing regarding the Church's view -- at least at the time the document was prepared -- regarding litigation against the press. That document, "Magazine Articles on Level O., Checksheet" by L. Ron Hubbard, founder of the Church, in discussing "Dissemination of Material" to the general public, states:

"...we do not want Scientology to be reported in the press, anywhere else than on the religious page of newspapers. It is destructive of word of mouth to permit the public presses to express their biased and badly reported sensationalism. Therefore we should be very alert to sue for slander at the slightest chance so as to discourage the public presses from mentioning Scientology."

In a statement publicly issued after the federal convictions, in August of this year, Bill Franks, the Church's newly-appointed "Executive Director International," announced a reorganization of the Guardian Office. He also disavowed the "criminal actions" by a "handful" of individuals in that Office who, he claimed, were not following Church policy, but had gone "adrift." The Franks statement announced a return to "tried and true Church policy." While this seems to suggest that the

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Church might abandon questionable libel suits, or related activities, brought for the seeming purpose of chilling freedom of the press, in fact it is now clear that the Church has not abandoned libel litigation, or the threat of such litigation, against its critics.

For example, in May, 1980, Reader's Digest published an article by Eugene H. Methvin a Senior Editor at the Digest's Washington Bureau, entitled "Scientology: Anatomy of a Frightening Cult." The Digest now reports, in a followup article, "Scientology: The Sickness Spreads," published in its September 1981 issue, that in the past eighteen months "the U.S.-based Church of Scientology launched a global -- and unsuccessful -- campaign to prevent publication ... Digest offices were picketed or bombarded with nuisance phone calls. In Denmark, South Africa and Australia, the Church sued unsuccessfully to prevent publication." Digest lawyers have reported to LDRC that in fact a total of five suits were filed abroad against the Digest by various branches of the Church of Scientology. Three cases sought prior restraints which were all denied. The other two cases were based on claims for defamation. Interestingly, no litigation has been commenced against the Digest in the United States. However, in what has all the trappings of an orchestrated campaign, hundreds of demands for retraction, regarding the second article, have been received by the Digest. Also, two subpoenas were served by the Church on employees of the the Digest in Washington, D.C. seeking to secure information about the Digest articles in connection with one of the Church's numerous litigations against or involving author Paulette Cooper. The seventeenth such case involving Cooper, stating claims for defamation and "interference with prospective advantage," was filed by the Church of Scientology "Celebrity Center" in California as recently as August of this year, at or about the time the Franks statement, suggesting a change of policy, was publicly released.

Ex-CIA Officials Form "Legal Action Fund"

In addition to established organizations like the Church of Scientology, other more ad hoc groups arise from time to time for the purpose of pursuing or threatening to pursue libel litigation. One recent development of this kind involves a group of CIA intelligence officers who last year announced the creation of "Challenge -- An Intelligence Officers' Legal Action Fund." The group, lead by David Atlee Phillips, who also founded the Association of Former Intelligence Officers, has as its announced goal the funding of litigation by ex-intelligence officers, challenging allegedly defamatory publications regarding their activities -- presumably

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activities that were undertaken when such officers were public officials still in public employ. Challenge's Advisory Board is comprised of current and former high-ranking public officials including William Colby, James Buckley, Lyman Kirkpatrick and two retired Generals, Robert E. Cushman, Jr. and Richard G. Stilwell. Challenge's initial fund-raising letter complains of defamatory matter in both works of non-fiction and fiction. Phillips even urges that "a test case should be mounted against writers who defame ex-intelligence officers, dead and alive, by using their names in egregious novels." (emphasis added)

It is not known how successful Phillips' fund-raising effort has been, or precisely how vigorous Challenge will be in pursuit of its goals through libel litigation. It is known, however, that David Atlee Phillips has himself commenced three libel actions since the effort to develop a legal action fund was undertaken. He has sued author Donald Freed, several researchers and a research committee, for libel, slander and invasion of privacy in connection with statements made and published at a press conference alleging that Phillips was connected with the 1976 assassination of Orlando Letelier in Washington, D.C. Although these charges were also published in author Freed's book, Death in Washington (Lawrence E. Hill & Co. 1980), Phillips initially chose not to name the publisher as a defendant and to base his suit only on the press-conference related publications. Phillips is also reported to have filed a libel and invasion of privacy action against The Washingtonian magazine and Gaeton Fonzi for an article by Fonzi discussing possible connections between Phillips and the assassination of President Kennedy. (See Eve Pell, "Spooks' Lib: Taking C.I.A. Critics to Court," The Nation, October 17, 1981, p. 371.) Finally, according to Publishers Weekly (November 13, 1981, p. 11), the other shoe did fall and Phillips, on October 23, brought a second action against Freed and his publisher Lawrence Hill & Co., for libel and invasion of privacy arising out of publication of Death in Washington. LDRC will continue to monitor and report on the activities of such litigious groups or individuals.

INQUIRY # 2-1: Bulletin readers who are aware of significant developments regarding additional libel litigation by the groups covered in Bulletin No. 2, or others, are urged to report them to LDRC. A reporting form is annexed at the end of this Bulletin.

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JURY VERDICT RESEARCH
FOLLOWUP STUDY ON VERDICT
EXPECTANCY VALUES IN LIBEL ACTIONS

LDRC Bulletin No. 1 (July 31, 1981) reported on a 1980 "Special Research Report" on plaintiff recovery rates in "False Arrest, Libel and Slander" cases published by Jury Verdict Research, Inc. of Solon, Ohio (JVR). That LDRC item noted the absence of information concerning the size of verdicts in those cases that were included in the 1980 JVR report.

Since July 31 LDRC has had further discussions with JVR which indicate that additional data is in fact available from JVR on the size of verdicts in libel and slander cases. Thus, a report published by JVR in 1976 (Injury Valuation Reports, "Tables of Verdict Expectancy Values for Libel and Slander," No. 196), found that in the five-year period prior to 1976, where verdicts were granted against media libel defendants, the "average" verdict was \$35,619, with the "mid-point" verdict \$24,000, the "probability range" \$11,650 - \$60,000 and the actual verdict range \$1000 - \$750,000. (The JVR report does not appear to indicate how many verdicts were included in computing these data.) According to JVR, the 1976 figures were actually lower than similar data reported in a similar study prepared by JVR in 1970, when the mid-point verdict against media defendants was \$50,000 and the average verdict was \$115,481. Interestingly, in contrast, the overall figures in the 1976 report for all libel and slander cases including non-media actions showed an increase since the 1970 report, with the mid-point verdict at \$27,000 (up from \$19,750), and the average at \$61,003 (up from \$56,493). Also, according to the JVR report, no million dollar verdicts were reported in their 1976 data, in contrast to four such verdicts in the 1970 sampling. Of course, as is well-known, this trend away from huge jury awards has reversed itself dramatically in the past year or two.

JVR will publish an updated verdict value report in 1982 covering the five-year period from 1976 to 1981. LDRC's Executive Committee has approved efforts to cooperate with JVR in order to help make its 1982 and subsequent reports as valuable as possible for LDRC's supporters and constituency. To this end, LDRC has agreed to provide JVR with jury verdict information that comes to LDRC's attention. In the interim, anyone interested in obtaining the 1976 JVR Report (No. 196), should contact JVR at 5325 Naiman Parkway - Suite B, Solon, Ohio 44139. The cost of the 1976 Report is \$12.50 and this will be the cost of the 1982 study as well.

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EXPERT TESTIMONY--
INTERIM REPORT

In Bulletin No. 1 we inquired regarding the use of "expert" witnesses in defending libel actions. We theorized that, particularly in private-figure actions where a negligence or some similar standard of fault applies, there might be opportunities to introduce expert testimony as to the custom and practice of the press that would tend to support a defense based upon absence of the requisite degree of fault. A formal printed questionnaire on the subject was included as a part of the Bulletin. Initially, respondents were asked to indicate whether they had ever used, or considered the possible use of, expert witnesses in libel actions. Where experts had been used, a series of questions followed concerning the nature of the case and the content of the expert's testimony. Respondents were asked to record their general views concerning use of expert witnesses and to indicate whether they felt LDRC could be of assistance in this field -- for example, by developing lists of qualified expert witnesses or by developing information concerning satisfactory uses of such testimony in libel litigation.

Only twelve replies to this inquiry have been received to date, certainly not enough to be considered a statistically significant sampling of opinion and practice on the issue. We urge readers of Bulletin No. 2 to respond to this questionnaire or otherwise provide LDRC with information on this topic. Nonetheless, despite the small number of replies and the necessarily interim nature of this report, some interesting and useful commentary, insights and materials were received in response to our inquiry. We feel these should be made available to readers of the Bulletin.

A useful memorandum of law on the subject, inter alia, of the admissibility of expert testimony in a private figure libel action was received from the Princeton, New Jersey firm of Brenner, Wallack & Hill. New Jersey courts have apparently not decided the issue. The memorandum notes the explicit sanction for expert testimony in the Restatement (Second) of Torts §580B, comment g (1977), regarding defamation of a private person, and recognition of the use of experts in Sack, Libel Slander and Related Problems 255 and Tribe, American Constitutional Law 646-47. It also cites Seegmiller v. KSL, 7 Med. L. Rptr. 1012, 1018 (Utah 1981) and Greenberg v. CBS, Inc., 69 A.D. 2d 693, 419 N.Y.S. 2d 988, 998, 5 Med. L. Rptr. 1470, 1476 (2d Dept. 1979) as also approving the use of expert testimony in the context of private figure libel actions. (The full text of the Brenner, Wallack Memorandum can be ordered from LDRC -- please use the Order Form at the end of this Bulletin).

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Six of the twelve respondents indicated that they had participated in at least one libel action where consideration was given to use of an expert witness. However, none of the reported cases was an expert ultimately used by the defendant. In Oklahoma one libel plaintiff offered the expert, but the Court refused to allow the testimony in a public figure case. In another case, the plaintiff offered expert testimony by the Dean of a leading School of Journalism, but defense counsel felt it would be a mistake for a book publishing defendant "to take the bait" and get into a no-win contest of experts, choosing instead to rely upon the editor's testimony regarding general practice and the specific work done on the subject book. In contrast to this view, a total of seven respondents indicated that they would use, or consider using, expert testimony in future cases. Three of these respondents seemed to feel that such testimony would be appropriate only or primarily as rebuttal to such testimony if offered by the plaintiff. One representative comment from an attorney in Texas:

"Texas applies the negligence standard in private figure libel actions. No Texas court has considered whether a plaintiff is required to produce some expert testimony in order to avoid a directed verdict as in medical malpractice cases. If a plaintiff puts on expert testimony defendant may want to counter with its own expert."

An attorney from Georgia noted both the risks and benefits of expert testimony:

"Where the erroneous fact has been published despite adherence to a visible set of procedural safeguards (e.g., use of annotated scripts, researchers, checkers, etc.) an expert might be helpful to validate that the system is reasonable. If, however, the mistake occurs while following an ad hoc fact gathering process, an expert might be more harm than help. On cross examination, plaintiff could elicit all of the thousands of things which could have been done and which were not done to get the facts right."

An attorney from Michigan stressed the need to take into consideration which fault standard is to be applied:

"Michigan post-Gertz law is presently to the effect that a libel plaintiff must prove 'actual malice' if the statements complained of concern a matter of 'public interest.' The approach seems indistinguishable from Rosenbloom. As long as this

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remains the state of the law, it would appear that the use of experts would not be called for. I would note, however, that although the "public interest" test has been well received by our intermediate appellate courts, the post-Gertz question has not been addressed by the Supreme Court of the state."

NEW PUBLICATION OF INTEREST

Guide to libel laws for editors, writers introduced by ABP. "Libel: An ABP Practical Guide" has been released by the American Business Press Inc. Written by Faustin F. Jehle, former counsel to McGraw-Hill Inc., the report is designed to assist investigative reporters, editors, publishers and authors in making day-to-day decisions about copy that may be libelous. The 22-page report includes a working definition of libel, explanations of various types of libel, statutes of limitations, and an explanation of the distinction between federal and state libel laws as they apply to publications. Also examined are defamation of public and private figures, and the corresponding principles of reckless disregard as laid out in the Sullivan Rule. Defenses against libel, retractions and corrections, a list of "dangerous" words, and a set of guidelines for editors to follow to avoid potentially libelous copy complete the guide's contents. Actual case histories are used as examples. Case and subject indexes are included. The report may be obtained for \$15 from the American Business Press Inc., 205 East 42nd Street, New York, New York 10017.

AT THE LDRC

LDRC Supporting Organizations
(As of November 15, 1981)

Alabama Press Association**
American Association for the Advancement of Science**
American Newspaper Publishers Association*
American Society of Newspaper Editors*
American Society of Journalists and Authors**
Association of American University Presses*
Association of American Publishers*
Authors League of America*
Bantam Books, Inc.**
CNA Insurance*
Doubleday & Company, Inc.*
Dow Jones & Company*
Dun & Bradstreet, Inc.**

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Employers Reinsurance Corporation*
Gannett Co., Inc.***
Magazine Publishers Association*
Media/Professional Insurance, Inc.*
Mutual Insurance Company Limited of Hamilton,
Burmuda*
National Association of Broadcasters*
National Newspaper Association*
P.E.N. American Center**
Playboy Enterprises, Inc.*
Radio-Television News Directors Association*
Reporters Committee for Freedom of the Press*
Society of Professional Journalists, Sigma Delta Chi**
Student Press Law Center**
Time Incorporated*
The Times Mirror Company*
The Washington Post Company*
Writers Guild of America, East***
Writers Guild of America, West**

LDRC Meeting Schedule

The following are dates of upcoming meetings of the LDRC Steering and Executive Committees. Steering Committee members are invited to attend all Executive Committee meetings if they so desire. Other interested guests are welcome at Steering Committee meetings, but should notify LDRC staff in advance.

Thursday, November 19, 1981	Semi-Annual Steering Committee 7:30 - Cocktails 8:15 - Dinner (New York Statler Hotel)
Thursday, January 14, 1982	Executive Committee 3:00 P.M. (place to be announced)

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- * Original supporters reflected on LDRC Brochure
 - ** Confirmed by LDRC Executive Committee as of September 10, 1981
 - *** New since September 10, 1981

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Thursday, March 4, 1982

Executive Committee
3:00 P.M.
(place to be announced)

Thursday, April 22, 1982

Executive Committee
3:00 P.M.
(place to be announced)

May or June

Semi-Annual Steering Committee
Date and place of dinner
meeting to be announced (to
be held in conjunction with
PLI or ABA workshop)

ERRATA

The following errors in Bulletin No. 1 have been brought to our attention. Page 2: the reference to the landmark footnote regarding summary judgment in the 1979 Hutchinson case should be to footnote 9, not 10. Page 19: the citation for Pring v. Penthouse, should be to 7 Med.L.Rptr. 1101 (D. Wyo. 1981), not 6 Med.L.Rptr. at the same page. Page 20: similarly, the citation for Burnett v. National Enquirer, should be to 7 Med.L.Rptr. 1321 (Cal. Super. L.A. Co. 1981), not 6 Med.L.Rptr. at the same page.