



## **Bulletin No. 6, Winter 1983**

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# BULLETIN

No. 6, Winter, 1983  
(March 15, 1983)

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ATTACHED: LDRC Brief Bank Order Form

ENCLOSURES: (i) Corrected page 625, LDRC 50-State Survey 1982  
(ii) LDRC Flyer

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EDITOR'S NOTE

We welcome you as a subscriber to the quarterly LDRC Bulletin.

Most of you have been regular readers of the Bulletin for some time and are familiar with our format. In future issues we will be reporting on and updating the features that have been a regular part of the Bulletin over the past two years. And we will continue to keep you informed about new trends in the libel and privacy area. In addition, some changes in format are planned which will, we hope, make it easier for you to keep your quarterly Bulletins accessible for ready reference. Regardless of format, however, we know you will continue to find the Bulletin a source of useful and practical information relevant to your needs and the needs of your organization or clients.

SPECIAL NOTE:

We are enclosing with this Bulletin a flyer which can be used to order the LDRC 50-State Survey 1982 and other recent LDRC publications.

If you have purchased LDRC's publications or subscribed to the Bulletin in the past, you are eligible for these special discounts:

1. If you have already purchased the LDRC 50-State Survey 1982, one or more additional copies can be obtained for \$40.00 each -- a 20% discount below the regular first copy price. Perhaps you could use a desk copy of the survey for reference instead of trudging to the library when the need arises. Or perhaps other colleagues in the office have borrowed your copy once too often. Also, if you place an advance order for the LDRC 50-State Survey, 1983, you will be eligible for a 10% discount on next year's Survey.

2. Additional copies of the LDRC Bulletin also are available at a discount if a colleague in your office would like to have her or his own subscription. Multiple Bulletin subscriptions mailed in bulk to one person are available for \$20 each; individually mailed subscriptions to two or more individuals within one organization or firm are \$25 each.

Sales of materials are a vital part of LDRC's financial support. So, if you can use LDRC's publications, know that your payment will help to fund LDRC's on-going projects and activities in behalf of media defense counsel and their clients. With your support LDRC will continue to provide this vital service.

P.S. If you don't need the flyer, pass it along to a colleague who can use it.

## LDRC DAMAGES WATCH:

MORE RECENT UPS AND DOWNS

LDRC continues to monitor closely developments in libel and privacy cases that have gone to trial with the possibility, all too often realized, of the imposition of damage awards against the libel defendants. Since our last report we have become aware of verdicts, judgments, post-trial rulings or appellate decisions in 23 cases. It should be noted that while most of these decisions were handed down recently, and since our last report, some of them occurred prior to our previous reports but did not come to our attention until now. All took place in 1982 or 1983. Three of the items reflect new developments in cases previously reported. 21 of the 23 cases involve media defendants.

Basically, the 23 cases reflect a continuation of most of the trends recorded in the LDRC Trial and Damages Study published in LDRC Bulletin No. 4 (Part 1) (August 15, 1982). Defendants are continuing to lose most trials, although at slightly lesser rate -- 83% as opposed to 87%. And, despite two favorable defense verdicts by juries in the current sampling, the phenomenally bad 90% loss rate before juries continues, although if two directed verdicts are included, defendants lost at a somewhat lower 82% rate overall in cases tried before juries. Also, the favorable defense record on appeal previously documented has been eroded somewhat, with the defense winning 64% of the appeals recently decided as opposed to approximately 73% (affirmances vs. reversals or reductions on appeal) in the prior study. Of course, the current sampling is smaller and a small number of the cases overlap with the prior data or are still pending on appeal. Finally, the size of damage awards continues to be high, with 11 of the 18 new awards at \$100,000 or larger, 3 at a quarter-million or more, 2 above \$500,000 and 1 in the multi-million category. However, with one phenomenal aberration in a case currently on further appeal,\* the general trend that only the relatively small awards are affirmed on appeal continues.\*\*

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\* Rogers v. Doubleday -- \$2,500,000 award affirmed by Court of Appeals; currently on writ to Texas Supreme Court.

\*\* The other awards affirmed on appeal were: \$500,000 (non-media); \$175,000 (reduction to \$45,000 to be reconsidered on remand); \$75,000; \$35,000.

The 22 cases can be summarized empirically as follows:

<u>JURY</u>	<u>NON-JURY</u>
22	1

Plaintiff Wins at Trial:

<u>JURY</u>	<u>JUDGE</u>
18/22 (82%) (1)	(3) 1/1 (100%)

Defendant Wins at Trial:

<u>JURY</u>	<u>JUDGE</u>
4/22 (18%) (2)	0/1 (0%)

1. Includes one directed verdict in favor of plaintiff.
2. Includes two directed verdicts and two actual jury verdicts of non-liability in favor of defendants.
3. Invasion of privacy (misappropriation) case --  
Cher v. Forum.

VERDICTS AND JUDGMENTS  
POST-TRIAL AND ON APPEAL

Post-Trial Rulings:

Number decided :	3
Plaintiff wins:	0
Defendant wins	3*

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\* 1 damage award; 2 judgments n.o.v.

Appeals from judgments adverse to defendant:

Number decided :	14
Plaintiff wins:	5 (36%)
Defendant wins**:	9 (64%)

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\*\* Includes 1 case remanded for new trial; the remaining defendant wins reflect outright dismissal of claims and judgment for defendant. Note that these figures also include the Cher case in which the judgment was reversed as to some defendants on key claims, but not as to others.

SIZE OF DAMAGE AWARDS  
(Combined Compensatory and Punitive)

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AWARDS	JURY	JUDGE
0                      9,999	0	0
10,000    -    24,999	2	0
25,000    -    99,000	6	0
100,000   -   249,000	5	0
250,000   -   499,000	3	0
500,000   -   999,999	1	1
1,000,000 --    up	1	0

DAMAGES WATCH CASE LIST

I. TRIALS

A. Defendant Wins:

1. Fred Frederick Chrysler-Plymouth v. WJLA, Inc.,  
Unreported, (D. Md., Civil Action No. 481-3151)

Award: -0-

Status: Jury verdict for defendant -- (8/31/82)

2. Marchiando v. Brown, See 8 Med. L. Rptr. 2233  
(N. Mex. 1982)

Award: -0-

Status: Jury verdict for defendant, 10 to 2  
(3/11/83)

B. Plaintiff Wins:

1. Fleming v. Moore, See 7 Med. L. Rptr 1313  
(Va. 1981)

Award (Jury): \$100,000 compensatory  
250,000 punitive

Status: Post-trial motions are pending challenging  
this award on retrial, in a private-plaintiff/  
non-media defendant libel action.

2. Harris, et al. v. The Gazette, Inc.  
Unreported, (Vir. Cir. Ct. Goochland Co., Law Nos.  
82-16, -17 and -18)

Award (Jury): \$50,000 compensatory (total among three  
plaintiffs)

Status: Appeal will be pursued to Virginia Supreme  
Court in this private figure libel action  
involving alleged misidentification from  
public records of the libel plaintiffs as  
defendants, rather than plaintiffs, in a  
sexual assault case.



3. Lewis v. Port Packet Corporation, unreported  
(Vir. Cir. Ct. Alexandria, At-Law 6692, 12/2/82)  
  
Award (Jury):      \$ 50,000 compensatory  
                         100,000 punitive  
  
Status:              Notice of appeal filed; petition for writ  
                         of appeal to Virginia Supreme Court to be  
                         filed by April 26 in this private figure  
                         libel action arising out of two-part news-  
                         paper series on child abuse.
4. Marion v. Hall, unreported (Alabama  
SC80-867)  
  
Award (Jury):      \$250,000  
  
Status:              Appeal argued before Alabama Supreme Court  
                         on March 22, 1982.
5. Matthews v. Charlottesville Newspapers, Inc.,  
unreported (Charlottesville City Cir. Ct.)  
  
Award (Jury):      \$25,000 compensatory  
  
Status:              Petition for writ of appeal to Virginia  
                         Supreme Court in this private figure  
                         libel action involving the misidentification  
                         of the pregnant victim of a sexual assault as  
                         "Miss" instead of "Mrs."

## II. POST-TRIAL MOTIONS AND APPEALS

### A. Defendant Wins:

1. Benjamin v. Cowles Publishing Co., unreported (Spokane  
Washington, Super. Ct., 8/13/82)  
  
Award (Jury):      \$219,493  
  
Holding:              Trial judge vacated the jury award,  
                         entered judgment n.o.v. for the defendants  
                         and dismissed the complaint on the ground  
                         that "the column was a combination of sub-  
                         stantially true statements of fact and con-  
                         stitutionally protected expression of opinion."  
  
Status:              It is not known whether an appeal is being  
                         pursued.

2. Bloch v. Compton, unreported, cert. denied, 51 U.S.L.W. 3419 (11/29/82) (See also this issue, Supreme Court Report)

Award(Jury): \$150,000 compensatory (joint liability of all defendants).

Holding: The Virginia Supreme Court denied plaintiff's petition to appeal the trial court's entry of j.n.o.v. for the media defendants.

Status: Judgments n.o.v. for defendants affirmed.

3. Cape Publications v. Bridges, 8 Med. L. Rptr. 2535 (Fla. DCA 5, 1982)

Award(Jury): \$1,000 compensatory  
9,000 punitive

Holding: Reverses verdict and judgment based on claims of invasion of privacy, intentional infliction of emotional distress and trespass holding that privacy claim must fail due to newsworthiness of the subject photograph (of plaintiff partially naked at a crime scene) and that the emotional distress claim must fail due to absence of sufficient "outrageousness."

Status: Damage award reversed and judgment for defendant.

- \*4. Cher v. Forum International, Ltd., 8 Med. L. Rptr. 2484 (9th Cir. 1982), affirming in part, reversing in part, 7 Med. L. Rptr. 2593 (C.D. Cal. 1982) (See LDRC Bulletin No. 4 (Part I) at page 9)

Award(Judge): \$663,234

Holding: Reverses judgment for misappropriation and publication of interview with Cher by Star and Forum magazines on ground that such publication is protected by First Amendment; however, upholds finding of a liability against Forum (and Penthouse) for use of Cher name in false advertising promoting the publication; affirms only as to

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\* Indicates case previously reported by LDRC.

Forum and Penthouse in the amount of \$169,117 and \$100,000 punitive

Status: Damage awards reversed and judgment for all defendants except Forum and Penthouse.

- \*5. Diaz v. Oakland Tribune, Inc., 9 Med. L. Rptr. 1121 (Cal. Ct. App. 1st Dist., 1/19/83) (See LDRC Bulletin No. 4 (Part I) at page 9)

Award (Jury): \$250,000 compensatory (both defendants); \$500,000 punitive - publisher - \$25,000 punitive - journalist.

Holding: Disclosure of intimate facts invasion of privacy verdict reversed and remanded for new trial because of instructional errors -- (i) judge should not have instructed that only "compelling public need" could justify publication; (ii) judge failed to instruct on burden of proof regarding newsworthiness: burden is on plaintiff to prove article was not newsworthy. However, the court also refused to rule that the publication was newsworthy as a matter of law; it held newsworthiness to be a question for the jury on retrial. As to damages, it held that a compensatory award of \$250,000 was not excessive as a matter of law and that there was sufficient evidence of malice for the punitive damage issue to be submitted to the jury. But it noted that the trial judge must closely scrutinize any punitive award to "ensure that it is not used to silence unpopular...speech."

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\* Indicates case previously reported by LDRC.

6. Goodrich v. Waterbury Republican-American, 108 Conn. 107, 448A.2d 1317, 8 Med. L. Rptr. 2329 (Conn. 1982)
- Award: - 0 -
- Holding: Affirms directed verdict for defendant on ground that the publication represented fair comment on matters of public interest and was constitutionally protected expression of opinion. As to plaintiff's invasion of privacy claims, the false light claim must fail since the publication was substantially true; the private facts claim cannot prevail because the publication was newsworthy.
- Status: Judgment for defendant.
7. Graves v. Lexington Herald Leader, 9 Med. L. Rptr. \_\_\_\_\_ (Ky., 12/28/82)
- Award: \$100,000
- Holding: Kentucky Supreme Court finds "insufficient evidence" of actual malice or reckless disregard to support jury verdict.
- Status: Reversed and judgment for defendant.
8. Lawrence v. Bauer Publishing & Printing Ltd., 9 Med. L. Rptr. 1536 (N.J.), cert. denied, 51 U.S.L.W. 3360 (1982)
- Award(Jury): \$22,500 (Plaintiff Simpson)
- Holding: Reverses verdict and judgment for plaintiff Simpson on the ground that he should have been held to be a public figure and that he failed to establish actual malice.
- Status: Damages award overturned and judgment for defendant.

9. Sibley v. Holyoke Transcript-Telegram, 8 Med. L. Rptr. 2497 (Mass. Super. 1982)\*

Award: \$30,000 (Special verdict on damage issue only)

Holding: Private figure libel plaintiff had sufficiently proved newspaper's negligence in failing to confirm information; however, the article was nonetheless privileged as a fair report of a judicial proceeding (issuance of a search warrant); trial court therefore rejects jury special verdict.

Status: Judgment for Defendant.

10. Silberman v. Georges, 8 Med L. Rptr. 2647 (N.Y. App. Div. 1st Dept. 1982).

Award(Jury): \$10,000 compensatory  
50,000 punitive  
(divided equally between two plaintiffs)

Holding: Jury verdict based upon allegorical oil painting unanimously reversed; the publication was non-defamatory opinion and fair comment; there was also no proof of malice or damage.

Status: Jury verdict reversed; judgment for defendant.

11. Stack. v. Capital-Gazette Newspapers, Inc., 8 Med. L. Rptr. 1704 (Md. Ct. App. 1982), reversing 7 Med. L. Rptr. 1265 (Md. Ct. Sp. App.)

Award: - 0 -

Holding: Directed verdict for defendant should be reinstated and decision of the Court of Special Appeals reversed. The editorial regarding state senatorial candidate was opinion or rhetorical hyperbole and not published with actual malice.

Status: Judgment for defendant.

B. Plaintiff Wins:

1. Beamer v. Nishiki, no reported decision (Hawaii Cir. Ct. No. \_\_\_\_\_)

Award(Jury): \$35,000 general damages

Status: It is not known whether this jury award, on a second trial after the first trial produced a hung jury, will be appealed. Plaintiff was an unsuccessful candidate for Lt. Governor of Hawaii whose suit challenged political ads published by her opponent in a local newspaper (The Valley Isle), alleging plaintiff was associated with organized crime figures. It is not known whether the award is against newspaper, which was a defendant in the action, or the defendant candidate, or both.

- \*2. Burns v. McGraw-Hill, 9 Med. L. Rptr. \_\_\_\_\_ (Colo., 2/22/83), reversing, 6 Med. L. Rptr. 2415 (Colo. Ct. App. 1980) [See LDRC Bulletin No. 4 (Part I) at page 8].

Award(Jury): \$175,000 (total to 5 plaintiffs reduced by trial judge to \$45,000).

Holding: Court of Appeals erred in holding that publication was protected opinion; publication implied false and defamatory facts and was published with reckless disregard thus defeating defendant's privilege under Colorado law to report on matters of public or general concern about private persons. As to damages, the trial court erred in reducing the award without a finding that it was excessive and unjust; if the verdict was found to be influenced by bias, passion or prejudice, a new trial should have been ordered.

Status: Reversed, judgment for plaintiff reinstated and case remanded for consideration of damage award.

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\* Indicates case previously reported by LDRC.

3. Kohn v. West Hawaii Today, Inc., 9 Med. L. Rptr.  
1238 (Haw. 1982)

Award(Jury):               \$35,000 special damages  
                              40,000 general damages

Holding:                   Jury verdict and judgment affirmed  
                              on ground that plaintiff adduced  
                              sufficient proof of the publisher's  
                              negligence, without expert testimony,  
                              in failing to check story on drug  
                              indictment against police blotter  
                              and that it was for the jury to  
                              decide whether article was sub-  
                              stantially true.

Status:                   Verdict and judgment for plaintiff  
                              affirmed.

4. Rogers v. Doubleday, not reported in Media Law Reporter  
(Tex. Ct. App. 9th Dist., 10/21/82, No. 09-81-073-CV),  
Application for writ of error pending in Texas Supreme  
Court, No. C-1793.

Award(Jury):               \$ - 0 - compensatory  
                              \$2,500,000 punitive

Holding:                   Court of Appeals reversed the trial  
                              court's entry of judgment n.o.v.  
                              holding that the book publisher  
                              had published in reckless disregard  
                              of the truth. As to damages, the  
                              Court held that compensatory damages  
                              could be presumed in a libel action  
                              and therefore that punitive damages  
                              could be awarded. It did not con-  
                              sider the size of the punitive award,  
                              stating (erroneously) that defendant  
                              had failed to object to the award.

Status:                   Jury award reinstated; further ap-  
                              peal pending.

5. Selby v. Savard, non-media case not reported in Media Law Reporter, (Arizona Supreme Court, 11/18/82)

Award (Jury):                \$150,000 compensatory  
                                     350,000 punitive

Holding:                      Affirms trial court's directed verdict for plaintiff in non-media action involving repeated allegations of wrongdoing by private businessman against public official; held there was ample evidence of actual malice or reckless disregard of probable falsity.

Status:                        Judgment for plaintiff.



SUPREME COURT REPORT --  
NEW HAMPSHIRE JURISDICTION CASE TO BE HEARD;  
OTHER CASES REFUSED OR PENDING

The most significant news from the Supreme Court -- which makes its own news via the grants or denials of certiorari -- is that the hot libel issue of the moment, by dint of the grant of certiorari in Keeton v. Hustler, (see below), is jurisdiction. While it is not at all clear that the Supreme Court views the due process jurisdictional issue in Keeton as peculiar to the libel context, it does seem quite certain that the implications of an adverse decision in the case are unavoidably far-reaching for nationally-distributed communications media and their authors and journalists. If Keeton, a New York resident, is permitted to pursue her libel claim against an Ohio publication (and related individuals) in New Hampshire, where less than 1% of the publication is circulated, then it would seem that almost any libel plaintiff can attempt to circumvent unfavorable procedural and substantive rules simply by shopping for a hospitable forum. Most obviously, it would greatly undermine the network of especially short statutes of limitations enacted to protect the media from stale libel claims by enabling libel plaintiffs to benefit from the longest state statutes available anywhere the publication may have been distributed, however tangential to the locus of the publication or the alleged harm.

Such forum-shopping would be inherently improper and unfair in almost any context; in the libel context it also arguably takes on significant First Amendment overtones which some courts have previously recognized. Keeton was not decided -- and cert. was not granted -- on the First Amendment issue. But it is difficult to imagine how a decision by the Court to permit the New Hampshire action could not severely undermine such First Amendment arguments in the future. These implications for the communications media will be spelled out for the Supreme Court in at least two amicus curiae briefs currently in preparation -- one by Robert D. Sack of Patterson, Belknap Webb & Tyler, for The Wall Street Journal, the New York Times and possibly others; the second by R. Bruce Rich of Weil, Gotshal & Manges, for the Association of American Publishers and possibly others. Only time will tell what the outcome of this latest threat to established libel law will be.

Apart from Keeton, The Supreme Court has continued to stay away from decisions in the libel field. Since November it has denied cert. in another eight cases, bringing the total of denials to twenty-one for the term thus far; four petitions are still awaiting decision.

The Supreme Court's actions from November 8, 1982 through March 15, 1983, as reflected in volume 51 United States Law Week Issue No. 19 (11/16/82) through Issue No. 35 (March 15, 1983), are as follows:

I. Certiorari granted -- Favorable Decision Below

Keeton v. Hustler Magazine, Inc., 682 F.2d 33, 8 Med. L. Rptr 1748 (1st Cir. 1982), cert. granted, 51 U.S.L.W. 3662 (1/24/83) (The First Circuit had unanimously affirmed dismissal of defamation action filed in New Hampshire after statute of limitations in New York and Ohio had expired on the ground that assertion of person jurisdiction by courts in New Hampshire, where Ohio defendants' only contacts were distribution of less than 1% of its total magazine circulation, and where the New York resident plaintiff had no contacts, would violate the due process clause of the 14th Amendment).

II. Media Defendants -- Unfavorable Decisions Left Standing (3)\*

Robert Welch, Inc., v. Gertz, 680 F. 2d 527, 8 Med. L. Rptr. 1769 (7th Cir. 1982); cert. denied, 51 U.S.L.W. 3613 (Justice Stevens taking no part in the decision) (Seventh Circuit had affirmed \$400,000 jury verdict against media defendant finding adequate proof of "reckless disregard" to support defeasance of common law privilege and \$300,000 award of punitive damages -- see LDRC Bulletin No. 4 (Part 1) at 3n\*\* and at 10).

Rothballer v. Wanless, unreported, Illinois App. Ct. 3d Dist., No. 57107, cert. denied, 51 U.S.L.W. 3611 (2/22/83) (Ill. Third District Court of Appeals had reversed the grant of defendant's motion for summary judgment holding that, in a public figure city attorney's libel action: (i) as to the defense of truth, the determination whether undisputed facts constituted a conflict of interest was a jury question, and (ii) as to the existence of actual malice, the failure to pursue other "avenues of investigation" may constitute reckless disregard and therefore preclude summary judgment.)

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\* This increases the total of unfavorable decisions, left standing to six since the beginning of the 1982-83 Term -- see also LDRC Bulletin No. 5 at 7.

Tribune Publishing Co., v. Hyde, 647 S.W. 2d 251 (Mo. Ct. App. 1982), cert. filed, 51 U.S.L.W. 3613 (2/22/83, No. 82-982) (The Missouri Court of Appeal had reversed a trial court order dismissing the complaint, as against both media and non-media defendants, holding that unauthorized "negligent" disclosure and publication of the name and address of a crime victim may state a cause of action in favor of the victim and is not barred by the First Amendment).

### III. Media Defendants -- Favorable Decisions Left Standing (4)\*\*

Arrington v. New York Times Co., 55 N.Y. 2d 433, 434 N.E. 2d 1319, 8 Med. L. Rptr. 1351, cert. denied, 51 U.S.L.W. 3533 (1/17/83) (N.Y. Court of Appeals had dismissed various invasion of privacy claims against the Times on the grounds that the law recognizes no constitutional privacy claim against private parties, that New York does not recognize a false light privacy claim and that New York's misappropriation statute does not apply to the use of a picture for legitimate editorial purposes; note, however, that the Court had permitted the statutory claim to proceed against the original photographers, but cert. was not sought on this aspect of the case).

Bloch v. Compton, (Unreported), cert. denied, 51 U.S.L.W. 3419 (11/29/82) (Virginia Supreme Court had denied plaintiff's petition to appeal from the trial court's entry of judgment for the media defendant (a small weekly newspaper) notwithstanding the jury's \$150,000 verdict in a defamation action arising out of a newspaper report concerning a criminal sentencing procedure).

Cole v. Westinghouse Broadcasting Co., 8 Med. L. Rptr. 1828 (Mass. 1982), cert. denied, 51 U.S.L.W. 3419 (11/29/82) (Massachusetts Supreme Judicial Court had reversed a \$100,000 plaintiff's verdict and entered judgment for the defendants on the ground that the libel claim involved constitutionally-protected statements of opinion).

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\*\* This increases the total of favorable decisions left standing to eleven since the beginning of the 1982-83 Term -- see also LDRC Bulletin No. 5 at 7-8.

Rood v. Finney, 418 So. 2d 1, 8 Med. L. Rptr. 2047 (La. Ct. App. 4th Cir. 1982), cert. denied, 51 U.S.L.W. 3633 (2/28/83) (The Fourth Circuit Court of Appeals of Louisiana had unanimously affirmed the trial court's grant of summary judgment in favor of UPI and its staff reporter on the ground that plaintiff, a professional golfer held to be a public figure, could not establish actual malice with convincing clarity).

IV Non-media Defendants\*\*\* -- Decision Left Standing

Pomeroy v. South Bell Telephone and Telegraph Co., 410 So. 2d 647 (Fla. Ct. App. 3d Dist. 1982), cert. denied, 51 U.S.L.W. 3334 (12/6/82) (Florida District Court of Appeals had affirmed dismissal of non-media action on ground that allegedly defamatory statements were no more than expressions of opinion under Florida case law).

V. Cases Filed But Not Yet Acted Upon.

American Broadcasting Companies, Inc., v. Clark., 684 F. 2d 1208, 8 Med. L. Rptr. 2049 (6th Cir. 1982), cert. filed, 51 U.S.L.W. 3583 (1/31/83, No. 82-1288) -- unfavorable -- media -- (Sixth Circuit had reversed grant of defendant's motion for summary judgment holding that the broadcast in question was "reasonably capable of a defamatory meaning;" that it was not within the scope of Michigan's common law public interest privilege and that plaintiff was not a public figure.

Bose Corporation v. Consumers Union of the United States, Inc., 692 F. 2d 189, 8 Med. L. Rptr. 2391 (1st Cir. 1982), cert. filed, 51 U.S.L.W. 3567 (1/20/83, No. 82-1246) -- favorable -- media -- (First Circuit had reversed \$115,000 defamation/product disparagement judgment and dismissed claim on grounds that, even assuming the publication was neither substantially true nor a statement of opinion, plaintiff had failed to meet its burden of proof of actual malice with convincing clarity -- see LDRC Bulletin No. 4 (Part 1) at 8).

Calder v. Jones, 138 Cal. App. 128, 187 Cal. Rptr. 825 (Ct. App. 2d Dist., Div. 1), cert. filed, 51 U.S.L.W. 3651 (2/22/83, No. 82-1401) -- media -- unfavorable (California Court of Appeal had reversed an order of the Superior Court which quashed service on personal jurisdiction grounds in this California libel action against an editor and reporter of the National Enquirer who were both residents of Florida. The Court of Appeal held that the individual defendant's lack of substantial contacts with California was irrelevant because the complaint sufficiently alleged acts outside the State intended to cause tortious injury within the state; it also rejected adoption of a special First Amendment jurisdictional rule in libel cases).

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\*\*\* The total of non-media cases not taken now stands at four since the beginning of the Term -- see also LDRC Bulletin No. 5 at 9.

Queen v. Tennessee Valley Authority, 689 F. 2d 80 (6th Cir. 1982), cert. filed, 51 U.S.L.W. 3535 (12/23/82, No. 82-1148 -- favorable -- non-media -- (Sixth Circuit had affirmed grants of summary judgment for non-media defendants (the TVA and certain TVA employees) on the ground that the employees enjoyed an absolute immunity from suit under Barr v. Mateo, 360 U.S. 564(1959) and that the TVA was immune from suit for statements made when it acts solely as a governmental entity).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS:  
NEW STUDY SHOWS ONLY MODEST INCREASE IN CLAIMS;  
FEW RECOVERIES AGAINST MEDIA DEFENDANTS.

Fears have been expressed from time to time that intentional infliction of emotional distress\* claims against the media could proliferate and could circumvent hard-won

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\* Intentional infliction of emotional distress is recognized and defined by the Restatement (Second) Torts, §46(1):

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

This tort is also sometimes referred to under the rubric "outrage" because outrageous conduct is required. See Restatement §46, comment(d) at 72: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

Intentional infliction of emotional distress should also be contrasted with, and distinguished from, negligent infliction of emotional distress and prima facie tort. According to Sack, Libel, Slander and Related Problems 472 n. 428 (PLI 1980) "causes of action for negligent infliction of emotional distress normally require physical impact for recovery. See Tumminello v. Bergen Evening Record, 3 Med. L. Rptr.2547 [2549] (D.N.J. 1978)." But see Hyde v. City of Columbia, 637 S. W. 2d 251 (Mo. Ct. App. W. Dist. 1982), cert. denied 51 U.S.L.W. 3613 (1983). A prima facie tort is "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful." ATI, Inc. v. Ruder & Finn, Inc., 42 N.Y. 2d 454, 458, 368 N.E. 2d 1230,1232 (1977). Although this definition would appear to place prima facie tort in close proximity to the tort of intentional infliction of emotional distress, it is generally held that prima facie tort "is a separate cause of action; it is not a 'catchall' alternative for every cause of action that cannot stand on its [own] legs." Belsky v. Lowenthal, 62 A.D. 2d 319, 323 ... (1st Dep't. 1978), aff'd, 47 N.Y. 2d 820... (1979)." Ann-Margret v. High Society, 6 Med. L. Rptr. 1774, 1779 (S.D.N.Y. 1980).

constitutional privileges in the areas of defamation and privacy.\* However, a new empirical study of the results of recent emotional distress tort claims against the media finds these fears to be unfounded. Emotional distress claims against the media have increased modestly but their use is still "startlingly low" in relation to defamation and privacy pleadings, according to the new study.

These are the findings of an unpublished Masters Thesis submitted at the University of Wisconsin School of Journalism by attorney Terrance C. Mead, now an associate with the firm of Gust, Rosenfeld, Divelbess & Henderson in Phoenix, Arizona. Mead studied 484 actions filed against media defendants between 1977 and 1981. All cases studied appeared in the Media Law Reporter, Volumes 2 through 7. He found only eighteen cases in which emotional distress tort claims were pleaded against media defendants, alone or in combination with defamation and/or privacy claims. In two cases the emotional distress claim was pleaded alone, two were combined with defamation claims, seven were combined with privacy claims, and in six cases emotional distress was pleaded in combination with both defamation and invasion of privacy.

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\* See Wade, "Defamation and the Right of Privacy," 15 Vand. L. Rev. 1093, 1124(1962). It may be, however, that Wade's theory of privacy law engulfing defamation law only to be itself swallowed by the law of intentional infliction of "mental suffering" (as Wade put it) was meant to reflect a more general theory of tort liability not necessarily reflecting the special factual context of potential media liability and its attendant constitutional privileges. Sack, writing more recently, was perhaps more specific, and therefore accurate, in concluding that "[t]he stringent requirements for stating a cause of action [for intentional infliction] usually render this approach useless to the prospective plaintiff in a situation involving the mere publication of words." Sack, Libel, Slander and Related Problems 474-75 (PLI 1980). Certainly Sack's view would appear to be borne out by the study summarized herein.



In a related finding, Mead noted a far more significant incidence, and increase in privacy claims over the five-year period studied. Of the eighteen emotional distress claims, only two, or less than 15% resulted in judgments for the plaintiff. While Mead notes this plaintiff success rate is relatively high compared with defamation actions, the sampling is probably too small to be of great significance. Also noteworthy is the relatively small size of damage awards imposed -- \$10,000 (Clifford v. Hollander) and \$15,000 (Marley v. IRE). Two other cases in which juries entered verdicts for emotional distress plaintiffs, but which were later reversed on appeal, also involved very modest damage awards relative to defamation -- \$8,500 (Ross v. Burns) and \$10,000 (Cape Publications v. Bridges).<sup>\*</sup> Finally, Mead notes some slight difference in success rate between single and multi-theory complaints that include emotional distress claims. But the numbers are small and the multi-theory complaints are also significantly correlated to other factors such as states with generally higher success rates, federal vs. state pleadings and (presumably) more sophisticated plaintiffs' attorneys.

In sum, Mead's data confirm that it continues to be the exceptionally rare case in which intentional infliction of emotional distress is plead and even a rarer case where it prevails against a media defendant. The high "outrage" hurdles built into the tort in general, combined with a high recognition of the additional requirement of non-newsworthiness in the media context;<sup>\*\*</sup> suggest that the intentional infliction tort remains of only marginal current concern to the media. Nonetheless, because the issue does arise from time to time and because the Mead study represents such a useful summary of current trends, this summary, and the materials that follow, are provided for Bulletin readers.

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\* The verdict and reversal in Cape both post-date the end of Mead's study.

\*\* But see Ross v. Burns, 612 F.2d 271, 5 Med. L. Rptr. 2278 (6th Cir. 1980) suggesting that a truly outrageous publication might not have to meet a newsworthiness standard.



MEAD CASE LIST:  
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The following represents a list of the eighteen cases identified by Mead as having pled, singly or in combination with other claims, intentional infliction of emotional distress claims against media defendants, as reflected in Volumes 2 through 7 of the Media Law Reporter:

1. Florida Publishing v. Fletcher, 2 Med. L. Rptr. 1088 (Fla. Dist. Ct. of App. 1976)

Jury Verdict: - 0 -

Holding: Affirms trial court's grant of Summary Judgment on claim for punitive damages; no separate discussion of emotional distress tort.

2. Jeppson v. United Television, 3 Med. L. Rptr. 2513 (Utah, 1978)

Jury Verdict: - 0 -

Holding: Claim for "intentional and malicious infliction of emotional and mental harm" pleaded, and dismissed by trial court; on a-peal action re-instated with regard to unrelated statutory claim without discussion of emotional distress count.

3. Timminello v. Bergen Evening Record, 3 Med. L. Rptr. 2547 (DNJ 1978)

Jury Verdict: - 0 -

Holding: Grants defendant's motion to dismiss as to both intentional and negligent infliction theories.

4. Beresky v. Teschner, 4 Med. L. Rptr. 1919, 1921-22 (Ill. App. 1978)

Jury Verdict: - 0 -

Holding: Affirms grant of Motion to Dismiss on emotional distress count (II)

5. Bilney v. Evening Star, 4 Med. L. Rptr. 1924, 1928 (Md. Cir. Ct. 1978)

Jury Verdict: - 0 -

Holding: Affirms grant of Summary Judgment on intentional infliction of emotional distress count.

6. Lewis v. Time, Inc., 5 Med. L. Rptr. 1790 (ED Cal. 1979)  
Jury Verdict: - 0 -  
Holding: Intentional infliction of emotional distress pleaded; no discussion or decision on that issue in opinion discussing removal/remand issue only.
7. Ross v. Burns, 612 F. 2d 271, 5 Med. L. Rptr. 2277 (6th Cir. 1980)  
Jury Verdict: \$ 5,000 compensatory  
\$35,000 punitive  
Holding: Jury verdict against reporter reversed and dismissed on appeal.
8. Weingarten v. Block, 102 Cal. App. 3d 129, 5 Med. L. Rptr. 2585, 2594 (1980)  
Jury Verdict: - 0 -  
Holding: Affirms grant of non-suit at close of plaintiff's case; holds that if libel case fails, so does plaintiff's case for intentional infliction.
9. Galvin v. Gallagher, 401 NE 2d 1243, 6 Med. L. Rptr. 1030, 1032 (Ill. App. 1980)  
Jury Verdict: - 0 -  
Holding: Affirms dismissal of intentional infliction of emotional distress count.
10. Khan v. News Group Publications, 6 Med. L. Rptr. 1429, 1430 (N.Y. Co. 1980)  
Jury Verdict: - 0 -  
Holding: Court interprets emotional distress count as contract claim and dismisses count on the ground that emotional anguish cannot form the basis of a contract claim.

11. Cape Publications v. Bridges, 8 Med. L. Rptr. 2535, (Fla. DCA 1982) See also 6 Med. L. Rptr. 1884 (Fla. App. 1980)

Jury Verdict:                 \$1,000 compensatory  
                                  9,000 punitive

Holding:                     Reverses jury award for invasion of privacy, intentional infliction of emotional distress and trespass; privacy award overturned due to newsworthiness of the publication; intentional infliction of emotional distress claim overturned due to absence of "outrageous" conduct.

12. Clifford v. Hollander, 6 Med. L. Rptr. 2201 (N. Y. Civ. Ct. 1980)

Judgment:                   \$10,000

Holding:                    Trial court imposes damage award for intentional infliction of emotional distress based upon knowingly false advertisement falsely linking plaintiff to "pornographic" advertisement.

13. MacManamon v. Daily Freeman, 6 Med. L. Rptr. 2245, 2248 (N. Y. Kings Co., 1980)

Jury Verdict:               - 0 -

Holding:                    Dismisses intentional infliction of emotional distress claim based upon unauthorized publication of photograph of "stoutish" smiling woman on ground that such publication is neither extreme nor outrageous.

14. Fry v. Ionia Sentinel, 101 Mich. App. 725, 300 N.W. 2d 687, 6 Med. L. Rptr. 2497, 2500 (Mich. App. 1980)

Jury Verdict:               - 0 -

Holding:                    Affirms grant of Summary Judgment on intentional infliction of emotional distress claim based upon news report of death of unrelated persons in cottage fire.

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15. Marley v. IRE, Reported in News Notes, 7 Med. L. Rptr., No. 18

Jury Verdict: \$15,000

Holding: Jury verdict on defamation claim in this highly publicized action for defendants; however, modest damage award for plaintiff on issue of intentional infliction of emotional distress; case thereafter settled.

16. Fleury v. Harper & Row, 7 Med. L. Rptr. 1795 (S. D. Cal. 1981), aff'd, 9 Med. L. Rptr. \_\_\_\_\_ (9th Cir. 1983)

Jury Verdict: - 0 -

Holding: Claims for defamation, invasion of privacy and intentional infliction of emotional distress all dismissed due to expiration of statute of limitations.

17. MacDonald v. Time, Inc., 7 Med. L. Rptr. 1981, 1983-84 (DNJ 1981)

Jury Verdict: - 0 -

Holding: Claims involving one of two publications at issue dismissed on grounds of expiration of statute of limitations; identical statute applied as to both libel and intentional infliction of emotional distress counts.

18. Dougherty v. Capital Cities Communications, 7 Med. L. Rptr. 2535 (ED Mich. 1981).

Jury Verdict: - 0 -

Holding: In case involving claims of defamation, invasion of privacy and intentional infliction of emotional distress, court denies plaintiff's motion to remand; case removed to federal court.

FINDINGS OF THE LDRC 50-STATE SURVEY:  
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/OUTRAGE

The LDRC 50-State Survey 1982 gathered state by state information regarding the availability of intentional infliction of emotional distress and outrage causes of action. The 50-State Survey findings on this issue can be briefly summarized.\* According to the Survey, the emotional distress tort is generally recognized in at least forty jurisdictions (Arkansas, Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, District of Columbia, Virgin Islands), while in four jurisdictions an independent emotional distress tort is not recognized (Indiana, Kentucky, New Jersey, Texas). As to application of the tort in the media context, the tort has been applied in the media context in at least four jurisdictions (Arkansas (1), Colorado (2), New York (3), Washington (4)), while in as many as twenty-five jurisdictions it has not been applied in the media context (Alabama, Arizona, Connecticut, Delaware, Idaho, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia, District of Columbia).

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- (1) Citing Young v. Skaggs Drug Centers, Inc., 487 F. Supp. 1184 (E.D. Ark. 1980).
  - (2) Citing Gilbert v. Medical Economics, 665 F. 2d 305 (10th Cir. 1981).
  - (3) Citing Church of Scientology v. Siegelman, 475 F. Supp. 950, 5 Med. L. Rptr. 2021, (S.D.N.Y. 1979).
  - (4) Citing Moloney v. Tribune Publishing Co., 613 P. 2d 1179, 6 Med. L. Rptr. 1426 (Wisc. 1980).

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\* NOTE TO READERS:

In preparing this summary a printing error in the LDRC 50-State Survey has been discovered. On page 625 of the survey text of page 624 was erroneously reduplicated, thereby omitting a portion of the code and notes to the issue status summary item XVIIIA -- Intentional Infliction of Emotional Distress/Outrage and a portion of the notes and code to item XVIIIB -- Trade Libel/Product Disparagement. A copy of the correct page 625 is enclosed with this Bulletin and can be inserted in your copy or copies of the 1982 Survey.

OTHER CASES OF INTEREST  
EMOTIONAL DISTRESS/OUTRAGE

Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979) (successful emotional distress claim -- against the doctor who provided the information and not against the newspaper or its sports writer -- based on false news report that plaintiff was suffering from a fatal illness).

Cole v. Dun & Bradstreet, F.2d (6th Cir. 10/22/81) (Affirmed directed verdict in favor of Dun's Review on several claims including intentional and negligent infliction of emotional distress).

Firestone v. Time, Inc., 305 So.2d 1972 (Fla. 1974), vacated and remanded, 424 U.S. 448 (1976) (Florida statute permitted recovery for emotional distress in a libel action without proof of injury to reputation).

Galella v. Onassis, 353 F. Supp. 1976 (S.D.N.Y. 1972), aff'd in part, rvs'd in part, 487 F.2d 986 (2d Cir. 1973) (photographer Galella guilty of intentional infliction of emotional distress, among other torts).

Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978), rvs'd on other grounds, 443 U.S. 111 (1979) (if alleged defamatory statements are privileged, they must be privileged as well in connection with emotional distress claim).

Loft v. Fuller, 408 So. 2d 619 (Fla DCA 4, 1982) (references to dead pilot in non-fiction account of air crash not actionable by widow).

Martin v. Municipal Publications, 510 F.Supp. 255 (E.D. Pa. 1981) (Emotional distress claim based on caption under photograph of a "mummer" upheld citing Chuy, supra).

Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980) (refers to intentional infliction of emotional distress cause of action as a "wanly proffered claim...").

Tappen v. Ager, 599 F.2d 376 (10th Cir. 1979) (treats claim for punitive damages "arising from...outrageous conduct" as a separate cause of action and dismisses the count for failure to meet the Restatement outrageousness standard).

Watkins v. Campbell, 9 Med. L. Rptr. 1039 (Mich. Cir. Ct. 1982) (intentional infliction of emotional distress claim regarding newspaper advertisement requesting information about a police detective fails for absence of outrageousness).

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LDRC BRIEF BANK -- NEW BRIEFS  
ADDED SINCE BULLETIN No. 5

As promised in Bulletin No. 5, LDRC has continued to receive additional libel and privacy briefs from around the country. These briefs are then digested, the digested information entered into computer format and the briefs themselves stored in the files maintained at LDRC. Briefs in approximately forty additional cases, covering more than fifty legal topics have been added since our last report. A summary of these additional materials, listed alphabetically by case name, and also alphabetically by area of law and topic follows.

A blue order form that can be used to order either digests, or copies of the briefs themselves (or portions thereof) is attached at the end of this Bulletin.

Once again, we recommend that Bulletin subscribers save this and related bibliographic listings (see also Bulletin No. 5, pp. 17-39) for future reference. Then, when researching a particular topic or case, refer to these listings and order needed digests or materials from LDRC. Finally, please note we are still ironing out the kinks in our computerized information and order fulfillment system and may soon be shifting the computer processing from the CBS Law Department\* to in-house at LDRC. Accordingly, we apologize for any delays that may be caused by these administrative complications, and particularly to those readers who did not receive a copy of the Brief Bank Order Form with Bulletin No. 5.

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\* New briefs at CBS are not included in this issue's listing, but will be reported again in future Bulletins.

LDRC/CBS BRIEF BANK - BY NAME OF CASE

<u>CASE NAME/COURT</u>	<u>AREA OF LAW</u>	<u>TOPIC</u>
ldr <u>Bailey v. Time, Inc.</u> C.D. Cal.	Defamation	Jurisdiction/Venue
ldr <u>A.H. Belo v. Rayzor</u> Ct. of App./Tex.	Defamation	Damages
ldr <u>A.H. Belo v. Rayzor</u> Ct. of App./Tex.	Defamation	Fair Comment
ldr <u>A.H. Belo v. Rayzor</u> Ct. of App./Tex.	Defamation	Truth
ldr <u>Bloch v. Compton</u> U.S. Sup. Ct./Vir.	Defamation	Truth
ldr <u>Brown v. Conn. Circle</u> D. Conn.	Defamation	Motion to Dismiss
ldr <u>Bufalino v. Assoc. Press</u> U.S. Sup. Ct./N.Y.	Defamation	Common Law Privilege
ldr <u>Bufalino v. Assoc. Press</u> U.S. Sup. Ct./N.Y.	Defamation	Public Figure
ldr <u>Davis v. Summa Corp.</u> Cal. Super. Ct.	Defamation	Jurisdiction/Venue
ldr <u>Dietz v. Larson</u> N.Y. Sup. Ct.-Westchtr	Defamation	Damages
ldr <u>Doe v. Lee Enterprises</u> Ct. of App./Wisc.	First Amendment	Negligent Publication
ldr <u>Fernandes v. Tenbruggencate</u> Hawaii Supreme Ct.	Defamation	Summary Judgment
ldr <u>Fischer v. Darrach</u> C.D. Cal.	Defamation	Rule 12(c), Fed.R. Civ.Proc.
ldr <u>Fischer v. Miami Herald</u> Cal. Super. Ct. LA	Defamation	Jurisdiction/Venue
ldr <u>Geiger v. Dell Publishing</u> D. Mass.	Defamation	Public Figure
ldr <u>Geiger v. Dell Publishing</u> D. Mass.	Defamation	Republication/ Rebroadcast
ldr <u>Gertz v. Robert Welch</u> U.S. Sup. Ct./Ill.	Defamation	Actual Malice
ldr <u>Gertz v. Robert Welch</u> U.S. Sup. Ct./Ill.	Defamation	Punitive Damages
ldr <u>Goodrich v. Repub-Amer.Inc.</u> Sup. Ct., Conn.	Defamation	Fair Comment
ldr <u>Goodrich v. Repub-Amer.Inc.</u> Sup. Ct., Conn.	Defamation	Hyperbole
ldr <u>Goodrich v. Repub-Amer.Inc.</u> Sup. Ct., Conn.	Defamation	Neutral Reportage



<u>CASE NAME/COURT</u>	<u>AREA OF LAW</u>	<u>TOPIC</u>
ldr <u>Grund v. Leith</u> Ct.Comm. Pleas/Pa.	Defamation	Common Law Privilege
ldr <u>Grund v. Leith</u> Ct.Comm. Pleas/Pa.	Defamation	Summary Judgment
ldr <u>Holt v. Bergen Record</u> D.N.J.	Defamation	Discovery
ldr <u>Huddleston v. Lee Enter.</u> Cir. Ct./Wisc.	Defamation	Defamatory Meaning
ldr <u>Huddleston v. Lee Enter.</u> Cir. Ct./Wisc.	Defamation	Substantial Truth
ldr <u>Jones v. Calder</u> Ct. of App./CA	Defamation	Jurisdiction
ldr <u>Keeton v. Hustler Mag.</u> U.S. Sup. Ct./N.Hamp.	Defamation	Jurisdiction
ldr <u>Kotlikoff v. Community News</u> NJ Sup. Ct.	Defamation	Actual Malice
ldr <u>McBride v. Merrell Dow</u> D.C. Cir.	Defamation	Defamatory Meaning
ldr <u>MacDonald v. Time, Inc.</u> D.N.J.	Defamation	Survival of Claim
ldr <u>Marchiondo v. Brown</u> Sup. Ct./N.Mex.	Defamation	Public Figure
ldr <u>Marchiondo v. Brown</u> Sup. Ct./N.Mex.	Defamation	Standard of Liability
ldr <u>Mech. Nat'l Bank v. LA Mag.</u> Cal. Super. Ct. (L.A.)	Defamation	California Libel Statute
ldr <u>Mech. Nat'l Bank v. LA Mag.</u> Cal. Super. Ct. (L.A.)	Defamation	Standard of Liability
ldr <u>Morrisette v. Corvette</u> Sup. Ct./N. Hamp.	Defamation	Defamatory Meaning
ldr <u>Morrisette v. Corvette</u> Sup. Ct./N. Hamp.	Defamation	Privilege
ldr <u>Morrisette v. Corvette</u> Sup. Ct./N. Hamp.	Defamation	Summary Judgment
ldr <u>Nesbitt v. Multimedia, Inc.</u> W.D. N.Caro.	Defamation	Common Law Priv.
ldr <u>Nesbitt v. Multimedia, Inc.</u> W.D. N.Caro.	Defamation	Retraction
ldr <u>Newsday v. C.L. Peck</u> NY App. Div. 1st Dept.	Defamation	Actual Damages
ldr <u>Newsday v. C.L. Peck</u> NY App. Div. 1st Dept.	Defamation	Slander <u>per se</u>
ldr <u>Pasculli v. Jersey Journal</u> NJ Super. Ct. App.Div.	Defamation	Opinion

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<u>CASE NAME/COURT</u>	<u>AREA OF LAW</u>	<u>TOPIC</u>
ldr <u>Pasculli v. Jersey Journal</u> NJ Super. Ct. App. Div.	Defamation	Summary Judgment
ldr <u>Postill v. Booth Newsp. Inc.</u> Ct. of App./Mich.	Defamation	Actual Malice
ldr <u>Postill v. Booth Newsp. Inc.</u> Ct. of App./Mich.	Defamation	Punitive Damages
ldr <u>Renwick v. Greensboro News</u> NCaro. Ct. App.	Defamation	Republication/ Rebroadcast
ldr <u>Renwick v. The News</u> NCaro. Ct. App.	Defamation	Opinion
ldr <u>Resorts Int'l v. NJM Assoc.</u> Sup. Ct./N.J.	First Amendment	Confidential Sources
ldr <u>Rogers v. Doubleday</u> Sup. Ct./Tex.	Defamation	Punitive Damages
ldr <u>Rogers v. Doubleday</u> Sup. Ct./Tex.	Defamation	Republication/ Rebroadcast
ldr <u>Rothballer v. Wanless</u> U.S. Sup. Ct./Ill.	Defamation	Actual Malice
ldr <u>Rothballer v. Wanless</u> U.S. Sup. Ct./Ill.	Defamation	Truth
ldr <u>Sisler v. Gannett Co., Inc.</u> Super. Ct./N.J.	Defamation	Standard of Liability
ldr <u>Tavoulereas v. Wash. Post</u> D.D.C.	First Amendment	Open Courtroom
ldr <u>Tribune Pub. Co. v. Hyde</u> U.S. Sup. Ct./Wisc.	First Amendment	Negligent Publication
ldr <u>Walker v. Southeastern Newsp.</u> Co. Ct./Ga.	Defamation	Opinion
ldr <u>Wynberg v. Nat'l Enquirer</u> C.D. Cal.	Defamation	Libel Proof Plaintiff
ldr <u>Wynberg v. Nat'l Enquirer</u> C.D. Cal.	Defamation	Opinion

LDRC/CBS BRIEF BANK -- BY AREA OF LAW AND TOPIC

<u>AREA OF LAW</u>	<u>TOPIC</u>	<u>CASE NAME/COURT</u>
ldr Defamation	Actual Damages	<u>Newsday v. C.L. Peck</u> NY App. Div. 1st Dept.
ldr Defamation	Actual Malice	<u>Gertz v. Robert Welch</u> U.S. Sup. Ct./Ill.
ldr Defamation	Actual Malice	<u>Kotlikoff v. Community News</u> NJ Sup. Ct.
ldr Defamation	Actual Malice	<u>Postill v. Booth Newsp. Inc.</u> Ct. of App./Mich.
ldr Defamation	Actual Malice	<u>Rothballe v. Wanless</u> U.S. Sup. Ct./Ill.
ldr Defamation	California Libel Statute	<u>Mech. Nat'l Bank v. LA Mag.</u> Cal. Super. Ct. (L.A.)
ldr Defamation	Common Law Privilege	<u>Bufalino v. Assoc. Press</u> U.S. Sup. Ct./N.Y.
ldr Defamation	Common Law Privilege	<u>Grund v. Leith</u> Ct. Comm. Pleas/Pa.
ldr Defamation	Common Law Priv.	<u>Nesbitt v. Multimedia, Inc.</u> W.D. N. Caro.
ldr Defamation	Damages	<u>A.H. Belo v. Rayzor</u> Ct. of App./Tex.
ldr Defamation	Damages	<u>Dietz v. Larson</u> N.Y. Sup. Ct.-Westchtr
ldr Defamation	Defamatory Meaning	<u>Huddleston v. Lee Enter.</u> Cir. Ct./Wisc.
ldr Defamation	Defamatory Meaning	<u>McBride v. Merrell Dow</u> D.C. Cir.
ldr Defamation	Defamatory Meaning	<u>Morrisette v. Corvette</u> Sup. Ct./N. Hamp.
ldr Defamation	Discovery	<u>Holt v. Bergen Record</u> D.N.J.
ldr Defamation	Fair Comment	<u>A.H. Belo v. Rayzor</u> Ct. of App./Tex.
ldr Defamation	Fair Comment	<u>Goodrich v. Repub-Amer. Inc.</u> Sup. Ct., Conn.
ldr Defamation	Hyperbole	<u>Goodrich v. Repub-Amer. Inc.</u> Sup. Ct., Conn.
ldr Defamation	Jurisdiction	<u>Jones v. Calder</u> Ct. of App./CA
ldr Defamation	Jurisdiction	<u>Keeton v. Hustler Mag.</u> U.S. Sup. Ct./N. Hamp.

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<u>AREA OF LAW</u>	<u>TOPIC</u>	<u>CASE NAME/COURT</u>
ldr Defamation	Jurisdiction/Venue	<u>Bailey v. Time, Inc.</u> C.D. Cal.
ldr Defamation	Jurisdiction/Venue	<u>Davis v. Summa Corp.</u> Cal. Super. Ct.
ldr Defamation	Jurisdiction/Venue	<u>Fischer v. Miami Herald</u> Cal. Super. Ct. LA
ldr Defamation	Libel Proof Plaintiff	<u>Wynberg v. Nat'l Enquirer</u> C.D. Cal.
ldr Defamation	Motion to Dismiss	<u>Brown v. Connecticut Circle</u> D. Conn.
ldr Defamation	Neutral Reportage	<u>Goodrich v. Repub-Amer. Inc.</u> Sup. Ct., Conn.
ldr Defamation	Opinion	<u>Pasculli v. Jersey Journal</u> NJ Super. Ct. App. Div.
ldr Defamation	Opinion	<u>Renwick v. The News</u> NCaro. Ct. App.
ldr Defamation	Opinion	<u>Walker v. Southeastern Newsp.</u> Co. Ct./Ga.
ldr Defamation	Opinion	<u>Wynberg v. Nat'l Enquirer</u> C.D. Cal.
ldr Defamation	Privilege	<u>Morrisette v. Corvette</u> Sup. Ct./N. Hamp.
ldr Defamation	Public Figure	<u>Bufalino v. Assoc. Press</u> U.S. Sup. Ct./N.Y.
ldr Defamation	Public Figure	<u>Geiger v. Dell Publishing</u> D. Mass.
ldr Defamation	Public Figure	<u>Marchiondo v. Brown</u> Sup. Ct./N. Mex.
ldr Defamation	Punitive Damages	<u>Gertz v. Robert Welch</u> U.S. Sup. Ct./Ill.
ldr Defamation	Punitive Damages	<u>Postill v. Booth Newsp. Inc.</u> Ct. of App./Mich.
ldr Defamation	Punitive Damages	<u>Rogers v. Doubleday</u> Sup. Ct./Tex.
ldr Defamation	Republication/ Rebroadcast	<u>Geiger v. Dell Publishing</u> D. Mass.
ldr Defamation	Republication/ Rebroadcast	<u>Renwick v. Greensboro News</u> NCaro. Ct. App.
ldr Defamation	Republication/ Rebroadcast	<u>Rogers v. Doubleday</u> Sup. Ct./Tex.

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<u>AREA OF LAW</u>	<u>TOPIC</u>	<u>CASE NAME/COURT</u>
ldr Defamation	Retraction	<u>Nesbitt v. Multimedia, Inc.</u> W.D. N.Caro.
ldr Defamation	Rule 12(c), Fed.R. Civ.Proc.	<u>Fischer v. Darrach</u> C.D. Cal.
ldr Defamation	Slander <u>per se</u>	<u>Newsday v. C.L. Peck</u> NY App. Div. 1st Dept.
ldr Defamation	Standard of Liability	<u>Marchiondo v. Brown</u> Sup. Ct./N.Mex.
ldr Defamation	Standard of Liability	<u>Mech. Nat'l Bank v. LA Mag.</u> Cal. Super. Ct. (L.A.)
ldr Defamation	Standard of Liability	<u>Sisler v. Gannett Co., Inc.</u> Super. Ct./N.J.
ldr Defamation	Substantial Truth	<u>Huddleston v. Lee Enter.</u> Cir. Ct./Wisc.
ldr Defamation	Summary Judgment	<u>Fernandes v. Tenbruggencate</u> Hawaii Supreme Ct.
ldr Defamation	Summary Judgment	<u>Grund v. Leith</u> Ct. Comm. Pleas/Pa.
ldr Defamation	Summary Judgment	<u>Morrisette v. Corvette</u> Sup. Ct./N. Hamp.
ldr Defamation	Summary Judgment	<u>Pasculli v. Jersey Journal</u> NJ Super. Ct. App. Div.
ldr Defamation	Survival of Claim	<u>MacDonald v. Time, Inc.</u> D.N.J.
ldr Defamation	Truth	<u>A.H. Belo v. Rayzor</u> Ct. of App./Tex.
ldr Defamation	Truth	<u>Bloch v. Compton</u> U.S. Sup. Ct./Vir.
ldr Defamation	Truth	<u>Rothballer v. Wanless</u> U.S. Sup. Ct./Ill.
ldr First Amendment	Confidential Sources	<u>Resorts Int'l v. NJM Assoc.</u> Sup. Ct./N.J.
ldr First Amendment	Negligent Publication	<u>Doe v. Lee Enterprises</u> Ct. of App./Wisc.
ldr First Amendment	Negligent Publication	<u>Tribune Pub. Co. v. Hyde</u> U.S. Sup. Ct./Wisc.
ldr First Amendment	Open Courtroom	<u>Tavoulereas v. Wash. Post</u> D.D.C.

STATE STANDARDS OF FAULT IN PRIVATE FIGURE  
LIBEL ACTIONS UNDER GERTZ:  
IS THE BATTLE REALLY LOST?  
(Part I)

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Gertz v. Robert Welch, Inc., 418 U. S. 323 (1974), was the mandate for a radical rewriting of state libel laws in deference to constitutional principles. Although Gertz refused to require proof of actual malice by private figures in matters of public concern, it did bar imposition of liability without proof of "fault" and left open the adoption of more favorable (from the media defendant's point of view) fault standards, state by state, up to and including actual malice. In theory at least, therefore, there were opportunities as well as risks in the new Gertz formulation.

It is rapidly approaching ten years since Gertz was handed down and at least a superficial reading of the Gertz scorecard suggests that libel defendants have taken a bad beating in their efforts to secure the most favorable possible Gertz fault standards. Some twenty-two states have adopted one form of "negligence" standard or another, according to the LDRC 50-State Survey 1982; only five states have adopted a higher standard of fault. Nonetheless, almost half of the states have not definitively ruled on the matter.

Is it inevitable that the remaining states will adopt the minimum standard under Gertz? What arguments can be made -- legal, public policy, constitutional -- to support adoption of higher standards? Is it appropriate to assume that the choice of standards is limited to two or at most three options -- mere negligence, gross negligence, actual malice? Are there other factors that could serve to protect media libel defendants even in jurisdictions where a negligence standard is in effect? And are there other privileges and rules applicable to private figure plaintiffs that could supplement or supercede Gertz standards where they fail to offer media defendants sufficient protection? How bad is the negligence standard in practice as compared to the seemingly more protective standards of fault?

These and similar questions are being raised anew as libel defendants around the country gird for a renewed effort to secure better fault law under Gertz.

LDRC Bulletin No. 6

In Florida,\* two cases are on their way to the Florida Supreme Court that could finally resolve the Gertz standard issue in that state. Experienced libel counsel for the parties and local press amici recently met in St. Petersburg with other experts from around the country to discuss how the Florida Supreme Court might be convinced to move away from the minimal standards adopted recently by so many other states.

In Virginia, at least three Gertz cases\*\* are pending seeking writs of appeal to the Virginia Supreme Court, another court as yet undecided on the Gertz issue. In each of the cases a jury awarded the private plaintiff substantial damages based upon a mere negligence standard; in each the alleged publisher error or "fault" was minimal at best. The Virginia Press Association is planning to submit an amicus curiae brief in at least one of these cases urging adoption of a more favorable standard of fault under Gertz.

In Colorado, which has previously adopted a more favorable actual malice standard,\*\*\* legislative hearings are currently being held to consider whether some lesser degree of fault should be imposed by statutory command.

All of these developments, and the sheer fact that the issue still remains to be decided in almost half the states, strongly suggests the need for, and usefulness of, further consideration within the media defense community of the nature of standards of fault in libel actions and of the best possible arguments for standards -- and applications of standards -- as favorable as possible to obtain.

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\* The Miami Herald Publishing Co., v. Ane, not reported in Media Law Reporter ( Fla. DCA3, 10/12/82 -- No. 79-1463); The Tribune Co. v. Hogan, not reported in Media Law Reporter (Fla. DCA2, 12/1/82 -- No. 81-1361)

\*\* Lewis v. Port Packet Corporation; Harris v. The Gazette, Inc.; Matthews v. Charlottesville Newspapers, Inc. See Damages Watch, supra, pages 5 and 6.

\*\*\* See Walker v. Colorado Springs, 188 Colo. 86, 538 P. 2d 250, cert. denied, 423 U. S. 1025 (1975)

What follows is the first of a two-part article on private figure standards under Gertz. In Part I, below, we briefly review the current status of private figure standard implementation under Gertz. We then discuss data compiled by LDRC that tends to document the adverse consequences that can result from the application of minimal state standards of fault. These consequences are distinctly seen in the less frequent grant of summary judgment in negligence cases, and in poorer success rates on appeal where negligence is the dispositive issue.

In Part 2, we shall discuss the arguments that have and can be made to secure more protective fault standards -- legal, public policy, state constitutional the protections that may be available between the least protective and most protective fault standards; the arguments that can be made even under a mere negligence standard to secure the greatest possible protection; and the use of other state common law privileges to bolster Gertz standards.

#### PRIVATE FIGURE UNDER GERTZ - CURRENT STATUS

<u>Actual Malice (4):</u>	Alaska, Colorado, Indiana Michigan.
<u>Gross Negligence (1):</u>	New York
<u>Negligence (22):</u>	Arizona, Arkansas, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maryland, Mass- achusetts, New Hampshire, New Mexico, Ohio, Oklahoma, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, District of Columbia, Guam, Virgin Islands
<u>Leaning Toward Negligence (4):</u>	Florida, Montana, Pennsyl- vania, South Carolina
<u>Unclear, no Definitive ruling or case law (23):</u>	Alabama, California, Connecticut, Connecticut, Delaware, Georgia, Idaho, Iowa, Maine, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Car- olina, North Dakota, Oregon, Rhode Island, South Dakota, Vermont, Virginia, Wyoming



A closer look at the various state standards, however, begins to suggest certain subtle variations that belie the simplicity, and bad news, of this Gertz scorecard. Again, borrowing from the LDRC 50-State Survey 1982, the following points must be noted:

(i) Actual Malice

The LDRC 50-State Survey 1982 documents, as will be noted further in part 2, that state "actual malice" standards will not necessarily parallel the federal constitutional definitions of actual malice under Sullivan and its progeny. For example, in Michigan the definition of actual malice, although it generally parallels Sullivan, is seen as deriving from the state's common law public interest privilege. In Colorado, the Supreme Court adopted actual malice with the express caveat that its definition of reckless disregard would follow traditional Colorado tort law, rather than the unique definition set forth in St. Amant v. Thompson, 390 U.S. 727, 731 (1968). This may mean that such standards are not quite as protective as the maximum protection available under Sullivan. However, it also suggests that state courts might be persuaded to adopt some modified actual malice standard without feeling that they had failed adequately to balance their state's common law tradition of protecting individual reputation against the First Amendment claims of the press.

(ii) Negligence

Many of the states that have adopted what for shorthand purposes can best be labelled as a "negligence" test under Gertz, have defined their standard of fault in ways that suggest important variations that could be exploited to the advantage, or to the disadvantage, of the libel defendant.

A number of state courts have expressly referred to or adopted the standard of fault set forth in Restatement (Second) of Torts, Section 580B.\* These include, for example, Arizona and Maryland.

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\* Curiously, the Restatement actually appears to list both the actual malice and ordinary negligence standards in the alternative. If a state purports to adopt the entire section 580B one must assume, however, that this amounts to imposition of a negligence standard since the lesser standard of fault would presumably counteract the greater. At least one observer has suggested that Section 580B simply sets forth alternatives for the states to consider and does not take a position on the appropriate standard. This is said to be suggested by Professor Wade, who participated in the drafting of Section 580B -- See Wade, "The Communicative Torts and the First Amendment," 48 Miss. L.J. 671, 706 (1977).

Some states appear to have defined negligence as failure to exercise ordinary care defined by the standards of a "reasonable" man: See, e.g., Illinois (expressly rejecting journalistic practice standard); Kentucky; Tennessee (expressly rejecting journalistic practice test).

But other states appear to have agreed with the Restatement\* that negligence should be defined in relation to customary journalistic practice: See, e.g., Hawaii; Kansas; Maryland; Oklahoma; Utah.

Finally, other states have appeared to adopt a negligence standard but have simply not yet defined the contours of negligence for these purposes: See, e.g., Arkansas, Louisiana, Ohio, Washington.

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\* See Restatement Section 580B, comment (g):

The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession. Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though a custom is not controlling.

(iii) Gross Irresponsibility

The gross irresponsibility, or gross negligence, standard adopted by New York in Chapadeau v. Utica Observer-Dispatch, 38 N.Y. 2d 196, 341 N.E. 2d 569, 1 Med. L. Rptr. 1693 (1975), although it has not yet been followed in any other jurisdiction, still provides a useful target for libel defendants seeking to secure a standard of fault more favorable than mere negligence. While one must assume that it is more difficult for a private libel plaintiff to prevail on a claim governed by Chapadeau in New York, (See data on summary judgment below) there is no evidence to suggest that the gross irresponsibility standard has tipped the balance too far in favor of the press or has denied private libel plaintiffs their day in court. At least no such arguments are, to our knowledge, today being made in the courts, or the legislature, in New York. It should be noted, in connection with the unique Chapadeau fault standard, that New York has chosen to apply it only in cases "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition." New York courts have generally given such public concerns a broad definition -- a position seemingly mandated by use of the word "arguably" in the Court of Appeals formulation. But see Gaeta v. New York News, Inc., 187 N.Y.L.J. 104 (Sup. Ct. N.Y. Co., 6/1/82, at 13, col. 5). New York adopted a preponderance of the evidence test with the focus on "objective" rather than subjective standards.

GERTZ STANDARDS IN PRACTICE --  
SUMMARY JUDGMENT

There is some preliminary indication, in LDRC data, as to the very practical impact of the selection of a Gertz standard on the litigation process. Perhaps the most demonstrable impact is found in the LDRC Summary Judgment Study -- see Bulletin No. 4 (Part 2) at 14, Table 4. That table documents a striking difference in the success rates of libel defendants' motions for summary judgment, depending upon the applicable standards of fault.

Where the dispositive issue to be considered was actual malice, defendants' success rate was 83% (55/66 motions studied prevailed).

Where the dispositive issue was gross irresponsibility 50% of the motions prevailed (2/4).

Finally, where the issue was mere negligence, only 33% prevailed (2/6).

There thus appears to be a direct and dramatic correlation between the availability of summary judgment and the applicable degree of fault.

Although the sample of summary judgment motions in non-actual malice cases is rather small, we do not think this invalidates the import of LDRC's data. Indeed, the paucity of motions may well itself be indicative of the significance of the choice of standard on pre-trial motion practice -- suggesting that fewer defendants will even attempt to seek summary judgment where lesser standards of fault apply and, where sought, fewer such motions will be granted. Most courts consider negligence to be peculiarly a question of fact appropriate for resolution by a jury and not by the court. On the other hand, the far more demanding standard of fault in actual malice cases -- and the higher clear and convincing evidentiary burden -- have kept the success rate on summary judgment in actual malice cases high, despite footnote 9 of Hutchinson v. Proxmire.

GERTZ STANDARDS IN PRACTICE --  
Post Trial and On Appeal\*

The most important point to be made is that LDRC's data does not reveal a single case tried to a negligence standard in which a verdict or judgment for the plaintiff was reversed based exclusively upon an appellate ruling that the finding of negligence was erroneous.\*\*

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\* Based upon LDRC Damages Watch cases listed in LDRC Bulletin No. 4 (Part 1) at pages 8-17; Bulletin No. 5 at pages 10-11 and supra, at pages 5-13. Excludes a small number of cases in which standard of fault applied has not been ascertained.

Note also that no significant correlation between the negligence standard and trial results is immediately discernible. Defendant's recent success rates have been exceedingly low, LDRC data has previously demonstrated, in all trials -- especially jury trials. Therefore, as compared to LDRC's overall trial data, defendant's success rates in trials where a negligence standard was applied as the dispositive legal standard was no better nor worse than the overall data. Defendants have won four trials under a negligence standard out of 29 cases identifiably tried to a negligence standard. Thus, defendants lost 25/29 of such negligence trials as compared to 66/77 cases overall. This is an 86% loss rate in both instances.

The size of damage awards also does not appear to be distinctly correlated, one way or the other, to the applicability of a negligence standard. Moreover, (with one or two exceptions) the largest awards result from the imposition of punitive damages -- damages that in theory require a finding of actual malice.

\*\* Note that in Belo Corporation v. Rayzor, 8 Med. L. Rptr.2431, the Court, in addressing all points of error raised by defendants on appeal, did hold the evidence insufficient to support a finding of negligence. Id. at 2433. However, since the court had already held that the publication did not contain any false statements of fact, this holding on the negligence issue was moot as there could not have been a finding of actionable defamation under any applicable standard, as the Court of Appeals so noted.

Those private figure judgments that were reversed on appeal were primarily reversed on other grounds. Thus, those 16 cases tried to a negligence standard with a resulting verdict or judgment for the plaintiff, where a post-trial motion on the merits or appeal has been decided, 6 judgments were affirmed and 10 judgments were reversed. This 62.5% reverse rate is itself somewhat below the overall reverse rate of 70% reflected in the LDRC data. And, as noted, all of the judgments reversed were reversed on other grounds -- such as, truth or substantial truth, fair comment, opinion, absence of damage to reputation. While this suggests that appeals in private figure cases can be won, it also strongly suggests that it is not "negligence" as a fault standard that can be expected to provide the protection for libel defendants on appeal, but the absence of other basic elements of the defamation tort. In other words, once the basic elements are established the requirement of proving negligence does not generally appear to prevent juries from finding for the libel plaintiff, or to provide higher courts with a useful handle for reversing such verdicts on appeal.

LIBEL NEWS:

MOBIL BUYS LIBEL INSURANCE FOR ITS TOP EXECUTIVES

In the wake of its President, William Tavoulereas' thus far successful, but costly, libel action against the Washington Post, (See LDRC Bulletin No. 4 (part 1) at page 17), Mobil Oil has announced a new perk for its top corporate executives -- plaintiff's libel insurance.

That's right! If you were to write or publish an article that the wrong executive at Mobil didn't like, he's now got insurance to cover the cost of prosecuting a libel suit to protect his honor and good name. According to the Wall Street Journal, National Union Fire Insurance of Pittsburgh has written the policy to help put out libel fires at a premium of less than \$1,000 per employee covered. Covered Mobil executives get up to \$5 million in legal fees, minus a \$10,000 deductible. Asked if the insurance wouldn't encourage excessive suits, Mobil's mouthpiece Herb Schmertz was said to reply: "It's no different from the libel insurance you guys (in the press) get -- that gives you carte blanche to commit libel."

In response to an LDRC inquiry, Larry Worrall of Media/Professional Insurance replies that the Mobil insurance "is nothing more than a form of prepaid legal expense, which I believe is not sanctioned by the Insurance Department of New York. National Union is a non-admitted company in New York and may be able to circumvent the usual rules with respect to prepaid legal expense. . . . "It is rather 'heartwarming' to know that the plaintiffs are put to such an expense themselves that they now have to take out insurance to subsidize what is probably a bad cause of action. . . . All the insurance in the world is not going to convert a meritless libel action into a case that does have merit. This so-called 'defamation insurance' may actually help media defendants in the long run since it enhances the 'chilling effect' argument to a certain extent and it might also encourage counterclaims by media defendants when their stories are accurate and premised upon First and Fourteenth Amendment protections."



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ANNUAL REPORT

The idea that ultimately led to the formation of the LDRC had its genesis several years ago with the informal meetings and discussions of the "Ad Hoc Libel Group," several attorneys representing media organizations concerned about the adverse developments in the libel field. Later, in 1979 and early 1980, there came proposals to formalize such meetings under the aegis of a new "umbrella" organization. Finally, in late 1980, these efforts by a number of organizations culminated in the formation of a Steering Committee, the election of a Chairman and the retention of a General Counsel for a new entity, the "Libel Defense Resource Center."

In 1981 we were pleased to report that during its first full year of operations the LDRC moved rapidly from theory to reality. Substantial funding was provided by an impressive array of leading trade groups, professional organizations and media entities. An information bank and clearing house system was established and increasingly utilized by libel defendants and their attorneys. The availability of LDRC's activities and services was given wide coverage in association publications trade journals and the general media as well. Several useful special projects and studies were formulated and undertaken.

In the report that follows the particulars of LDRC's impressive development during its second year of operations are presented. The picture that emerges, we hope you will agree, is of a vital and creative organization that has firmly established itself and is now largely fulfilling the hopes of those who initially conceived of and supported it. LDRC is looked to as a source of useful and authoritative information by attorneys practicing in the field as well as by journalists, academics, government officials and others who have an interest in libel and privacy developments. Institutionally, LDRC has demonstrated a growing capacity to mobilize substantial resources for the benefit of the entire media community. The full benefits of such cooperation should continue to be realized through the ongoing work of LDRC and its supporters throughout the country.

Finally, we would simply add our thanks to those many, many individuals and organizations who gave their time and support -- moral and financial -- to LDRC in 1982. We look forward gratefully to continued support as LDRC enters its third year with an ambitious agenda for useful action.

New York City  
January 6, 1983

Harry M. Johnston, III, Chairman  
Henry R. Kaufman, General Counsel



### Organization

LDRC was formed in 1981 as an unincorporated, not-for-profit tax exempt 501(c)(6) entity governed by a Steering Committee comprised of one representative from each of LDRC's supporting organizations. Under its by-laws, LDRC's day to day operations are supervised by an Executive Committee of between 9 and 13 individuals, chosen from the larger Steering Committee, headed by a Chairman selected by the Executive Committee, and administered by a retained General Counsel, staff coordinator and a part time clerical assistant. LDRC has its headquarters at the offices of its General Counsel. Members of LDRC's Executive and Steering Committees include a number of the nation's most knowledgeable libel defense attorneys and representatives of numerous leading media organizations.

### Finances

In 1982, LDRC obtained voluntary contributions from 27 of its supporting organizations totalling \$60,000. With this money LDRC was able to pay for legal fees; fees for administrative staff; the stipend for law student interns; fees for other legal research; rent for office space; separate telephone lines; printing and distribution of quarterly bulletins; the expansion and computerization of a libel brief bank and information clearinghouse; the publication of LDRC's 50-State Survey of legal developments; the implementation of two major studies, as summarized in this report, and all other day to day operations of the Center.

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LDRC Supporters

The forty-one organizations supporting LDRC in 1982 represent a broad spectrum of leading media groups, publishers, broadcasters, journalists, editors, authors and libel insurance carriers, some of whom may never have previously worked together in a formal way but all of whom share a common interest in responding effectively to continuing problems in the libel field. They are: Alabama Press Association; American Association for the Advancement of Science; American Newspaper Publishers Association; American Society of Journalists and Authors; American Society of Newspaper Editors; Association of American Publishers; Association of American University Presses; Authors League of America; Bantam Books; Bergen Evening Record Corporation; Capital Cities Communications, Inc.; CBS, Inc.; CNA Insurance; Council of Writers Organizations; Doubleday & Company, Inc.; Dow Jones & Company; Dun & Bradstreet; Employers Reinsurance Corporation; Gannett Co., Inc.; Hearst Corporation; Macmillan, Inc.; Magazine Publishers Association; Mediatex Communications Corporation; Media/Professional Insurance, Inc.; Mutual Insurance Company Ltd. of Hamilton, Bermuda; National Association of Broadcasters; National Newspaper Association; Newhouse Newspapers; P.E.N. American Center; Penthouse International, Ltd.; 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; Warner Communications, Inc.; The Washington Post Company; Writers Guild of America, East; Writers Guild of America, West.

LDRC 50-State Survey

By far LDRC's most ambitious project for the year was the development and implementation of its 50-State Survey of current developments in media libel and invasion of privacy law. This ambitious project resulted in the publication by LDRC of a 650-page book (with a striking cover designed by the art department of Warner Books) that has already been widely received as an indispensable tool providing never-before-available access to the most up-to-date and comprehensive summaries of the law of media libel and privacy, jurisdiction by jurisdiction, for use by the practicing attorney, journalist and scholar. The 50-State Survey required the careful drafting of a survey instrument, the creation of a comprehensive informal network of attorneys in each state, expert on libel matters, and willing to prepare the brief but thorough survey reports required from each U. S. jurisdiction. Reports from all 54 jurisdictions were received, edited, revised and then organized into final form for publication. Also prepared were front-matter, including an Introduction by Robert D. Sack, and back-matter, including a 30-page "issue-status" section of detailed charts and notes summarizing the status of some two-dozen key legal issues and a 17-page "issue index" providing state by state page locations for more than 30 key issues and cross referencing upwards of an additional 100 topics. 1000 copies of

the 50-State Survey were printed and it is hoped that sales of the Survey will pay for the entire cost of the project. If the complete printing is sold out the Survey may even generate a surplus that can be used to support other LDRC programs. It is envisioned that the 50-State Survey will be updated and re-published annually, generally utilizing the informal network of state survey preparers now in place.

### LDRC Litigation Studies

During 1982 LDRC also published two important studies of litigation trends that were widely publicized and that have already been cited both as providing the most authoritative data in the field and as the basis for calls for reforms that would be favorable to the media.

#### (i) Trials, Damages and Appeals

LDRC's study of the results of 54 recent libel cases that went to trial, published in August, is the leading recent study in the field. It documented a shockingly poor success rate at trial for media libel defendants, particularly before juries. Overall, more than four out of five of the trials studied, covering the period 1980-82, resulted in judgments against the media defendant. And of those, adverse judgments were entered in nearly nine out of ten cases that were tried before juries. This LDRC study also documented the imposition of markedly increased and often outrageously large damage awards against media defendants, with many judgments of six and even seven figures, including both compensatory and punitive elements. On the other hand, the LDRC study documented impressive media success rates post-trial and on appeal. Of those post trial motions and appeals that had been decided, the media successfully overturned upwards of three out of four of these judgments on appeal, and if post-trial rulings and damage reductions are included, a total of some four out of five of the judgments were modified or reversed in the media's favor. Also, none of the million dollar awards have yet been sustained on appeal and those few awards that have been affirmed generally have been modest in size. Since the Trial, Damages and Appeals study was published LDRC has continued to monitor such developments through its "Damages Watch" project and plans to continue to monitor further developments and to update these figures periodically.

#### (ii) Summary Judgment Study

In October, LDRC published the findings of its study of 110 motions for summary judgment in libel actions since Hutchinson v. Proxmire was decided by the Supreme Court in 1979. Despite concern that Hutchinson's questioning of the summary judgment mechanism might significantly reduce the availability of this crucially-important remedy, the LDRC study found that summary judgment "remains the rule rather than the exception in libel litigation." Of the motions studied, LDRC found that three out of four were granted in favor of the moving defendant. Even

after appeal, summary judgment was sustained in seven out of every ten cases decided. These LDRC findings provide hope that trial can be avoided in many libel cases. The LDRC data have already been widely cited and it is hoped that such findings will influence media defense counsel to undertake to seek summary judgment to the greatest possible extent and will at the same time reassure judges faced with such motions that often it is entirely appropriate to grant summary judgment in libel actions despite the Supreme Court's unfortunate dictum in Hutchinson.

### Brief Bank and Other Information Services

#### (i) LDRC/CBS Computer Brief Bank

A special project was undertaken in 1982, with the invaluable cooperation of the CBS Law Department, to digest and computerize substantive and bibliographic information regarding briefs on file at LDRC and at CBS. Over the summer a law student intern digested more than 100 key briefs in LDRC's files encompassing more than 150 legal points covered in those briefs. These digests were then entered into the CBS Wang computer and merged with pre-existing digests of pertinent libel and First Amendment briefs already on file at CBS. In the fall, in Bulletin No. 5, LDRC published two listings of computerized briefs in the LDRC/CBS bank, one organized alphabetically by issue and the other alphabetically by case name. The combined bibliography covered some 75 key legal issues in 125 cases and encompassed 250 legal points made in the digested briefs. Full digests and photocopies of any briefs in the LDRC/CBS brief bank can now be ordered through LDRC. LDRC will continue to add digests to the system as new briefs are received and to publish updated listings periodically in the LDRC Bulletin.

#### (ii) General Information Gathering

In 1982, in addition to the computer brief bank, the further development of LDRC as a clearinghouse of information was given high priority. LDRC continued to develop a number of important sources for rapid and comprehensive access to information about developments in the libel and privacy field.

-- LDRC's most notable new source for information in 1982 was the informal but comprehensive network of contacts in every American jurisdiction set in place as part of the implementation of LDRC's 50-State Survey project. The basic information received from these contacts was published in the 1982 Survey and will be updated annually. Equally useful, however, will be the ongoing communication, or communication capability, that will be maintained throughout the year with the informal network of LDRC's state survey preparers.

-- LDRC's special arrangement was continued with the Bureau of National Affairs to receive advance copies of court opinions, gathered through the BNA network, several weeks before their publication in Media Law Reporter. This enables LDRC to

alert supporters to important developments that may require responsive actions. It also enables LDRC to obtain briefs and other pertinent litigation materials in such cases and to have them on hand at or around the time that the opinions are actually published in the Media Law Reporter. Our grateful thanks go to the BNA for their continued, invaluable cooperation.

-- Special arrangements have been continued with certain LDRC supporters, who maintain lobbying networks at the federal, state and local levels, to provide LDRC with information regarding pertinent legislative developments. In particular, Doubleday & Company's legislative counsel has provided LDRC with useful periodic reports of legislative activity throughout 1982. Thanks go to Doubleday for this service.

-- Finally, mailing lists and other formal and informal contacts and communications continue to be maintained with libel insurance carriers, individual publishers and broadcasters, and libel defense attorneys around the country to alert LDRC to important judicial opinions or other pertinent developments in libel and privacy cases.

#### (iii) Information Analysis and Indexing

Once judicial opinions or other pertinent documents are received by LDRC, they are reviewed by LDRC's General Counsel and then indexed and filed by an LDRC staff assistant in LDRC's growing brief and opinion library. Opinions and briefs are indexed by case name, state, and legal issue(s) presented. Requests for further information, briefs and other materials are then made regarding important cases and issues and periodic follow-ups are also scheduled. As of the end of 1982, LDRC had developed active files of such opinions, briefs and other materials in more than three hundred cases pending in fifty-three jurisdictions.

In 1982 LDRC continued to maintain its active issue file covering more than one hundred key legal issues, closely paralleling libel and invasion of privacy issues identified in the Media Law Reporter's classification guide. Also, LDRC has continued to add to its numerous "special issue files," collecting materials in addition to those contained in the active case files or general archival materials, on high priority issues such as damages, burden of proof, reporters privilege in libel actions, state Gertz standards, statute of limitations, summary judgment, use of expert witnesses, counterclaims for malicious prosecution, definition of public figure, printer and distributor liability and venue in libel actions, among many others. Finally, special files for law review articles and a separate collection of jury instructions and other litigation forms are maintained.

#### (iv) Information Dissemination

The information and materials contained in LDRC's issues index, its open case files, its brief bank and its special issue, jury instructions, law review, form and other files were all made available in 1982, through various means, to LDRC supporters, libel



defendants and their counsel, essentially without charge. (Only out-of-pocket expenses such as photocopying, and at times postage, were billed to users of LDRC. In 1983, as noted below, certain modest user fees will be established to help defray some of the cost of these LDRC programs. Also, certain limitations will be imposed on the availability of LDRC information and services to those not representing libel defendants.)

#### -- LDRC Bulletin

In 1982 the primary means of disseminating information about LDRC's resources and materials was the LDRC Bulletin. Published quarterly and distributed free of charge to some five hundred regular recipients, directly or through LDRC supporting organizations, the Bulletin provided news of recent developments and notices of available reports and materials which could be ordered from LDRC. More than 350 copies of the Bulletin were also distributed to attorneys attending the Tenth Annual PLI Communications Law Institute in New York City. In addition, hundreds of copies of the Bulletin, or special reports contained therein, were distributed or sold to the press and interested members of the public. In a change of policy implemented in November, 1982 by the LDRC Steering Committee, the Bulletin will no longer be given away, but will be distributed only to subscribers. It is hoped and expected that this policy, adopted to secure reasonable revenues from users to help underwrite LDRC's programs, will not diminish LDRC's ability in the year ahead to disseminate effectively useful information to those who need or can benefit from it.

#### -- Direct Inquiries to LDRC

In addition to providing general information through mass publication to LDRC's entire constituency, in 1982 LDRC counsel and staff continued to be available to provide general information and to answer specific inquiries from libel defendants or their counsel and other interested organizations or individuals who contacted LDRC, by telephone or by mail, for such special assistance. Such assistance, which was provided without fee in 1982, ranged from simply alerting the caller or correspondent to recent developments or legal opinions and providing available briefs or materials pertinent to the particular inquiry, to more extensive legal research or investigations initiated by LDRC counsel, or staff, often utilizing LDRC's network of knowledgeable organizations, attorneys and other individuals. Such inquiries -- more than 150 in 1982 -- covered the gamut of issues and problems that can be presented in libel counselling or libel litigation. Inquiries not involving specific litigations or legal issues, primarily from news media, scholars or researchers interested in general developments in the libel field also demanded the time and attention of LDRC staff. Finally, a small number of callers have sought assistance in securing knowledgeable libel counsel or in alerting potential amici curiae to issues and appeals of interest to them.

## Publicity

In order to operate effectively -- both in securing information about current legal developments as well as in alerting libel defendants to the availability of LDRC's resources and services -- it is important to publicize LDRC and its programs and activities adequately. In 1982, by various means, the news of LDRC's existence and programs continued to be effectively broadcast. In addition to continuing coverage of LDRC in various media trade publications and organizational newsletters too numerous to mention, LDRC's major studies received important national media coverage that was not only gratifying, but also appeared to be influencing opinion leaders, if not public opinion generally, in a manner favorable to the media's First Amendment interests. For example, LDRC's dramatic findings regarding adverse judgments and huge damage awards were covered nationally over the AP wire service and found their way into national publications such as The New York Times, Newsweek and the Wall Street Journal. Such prominent and influential figures as Judge Irving Kaufman of the Second Circuit (in an article appearing in The New York Times), Anthony Lewis (in a major public lecture at Columbia University) and Bruce Sanford (in an Op-Ed piece appearing in the Wall Street Journal), cited LDRC data in decrying recent trends. All of this publicity, in one way or another, also discernibly prompted contact with and usage of LDRC by libel defendants and their attorneys and by media and trade organizations around the country.

## 1983 Programs and Projects

In 1983 LDRC expects to continue to maintain, refine and in some cases expand its support and information services and its capacity to monitor comprehensively and respond to current developments. Administrative priorities will include implementation of the changeover to greater reliance on modest user fees to support LDRC budget and programs, more efficient use of staff time and still greater utilization of law student interns and other cooperative ventures with the academic and legal communities. Current programs, including the computerized brief bank, the case file bank, the "Damages Watch" project, the quarterly Bulletin, the annual 50-State Survey, and the monitoring of Supreme Court developments, will be continued and updated. New projects will include the possible mounting of one or more educational workshops open exclusively to libel defense counsel, the publication of a comprehensive jury instruction manual, possibly including "model" jury instructions on key legal issues, the development of additional useful statistical data on the incidence and costs of libel litigation, and the possible computerization of other information available at LDRC, to be made available to defense counsel through the LDRC Bulletin and other means.

1983 Budget

For 1983, LDRC's Steering Committee has determined that in addition to voluntary contributions from supporting organizations LDRC should begin to develop new sources of income. Therefore, as of 1983 an annual subscription fee of \$50 (\$35 for not-for-profit organizations) will be charged for the LDRC Bulletin. In addition, a modest \$5.00 administrative fee, as well as photocopying and postage and handling charges, will be passed along to individuals and firms requesting information from LDRC. Supporting organizations will, of course, continue to receive the LDRC Bulletin free of charge and will be billed only for the cost of photocopying additional information.

These sources of income, as well as the sale of the 50-State Survey, will help to assure LDRC's long-term viability. Such fees should also relieve LDRC's supporting organizations of at least a part of the burden of contributing to LDRC's budget that they have so graciously accepted heretofore. Thus, if current projections hold, reliance upon voluntary contributions to support LDRC activities will be reduced dramatically from approximately 90% of LDRC's total 1981 and 1982 budgets, to less than 55% in 1983.