LDRC Libel Defense Resource Center

BULLETIN

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LDRC BULLETIN NO. 8

THE MOTION TO DISMISS A LITIGATION DEVICE NOT TO BE FORGOTTEN IN MEDIA LIBEL AND PRIVACY ACTIONS

INTRODUCTION. LDRC studied 95 motions to dismiss in libel, privacy and related editorial tort cases (almost all involving media defendants). These cases were reported in the Media Law Reporter between April 7, 1981 and August 16, 1983 (Volumes 7, 8 and 9 [through Issue No. 29], with the exception of several unreported decisions found in LDRC's case files covering approximately the same period of time. (See note on LDRC data sample, infra.) The motions were made in both state and federal courts, including federal cases decided in fifteen districts and five circuits and state cases in twenty different states. (See Motions to Dismiss Case List and Case List by Jurisdiction, infra.)

The results of this LDRC study, reflected in the Tables and Case List below, document that the motion to dismiss procedure is an important one for media defendants. In the great majority of the cases studied, the motion resulted in either dismissal of the case in its entirety or else in the exclusion of key claims, parties or issues from the case. This impressive record of success -- in contrast to motion practice in other areas of civil litigation -- suggests that, at least as to certain legal issues or claims, motions to dismiss may in fact be the preferred method for responding to a libel or privacy complaint.

The LDRC study should provide guidance as to how and when motions to dismiss, instead of or in combination with motions for summary judgment, can best be employed to avoid trial of libel claims and the attendant adverse results -- as to both liability and damages -- that LDRC has previously documented. The LDRC motions to dismiss studyalso documents empirically what has been widely recognized -- i.e., that a great many libel complaints are legally deficient and that such meritless complaints can and should be disposed of at the earliest possible stage of the litigation. Media defense attorneys could do even more, it seems from the LDRC study, to work toward expanding the availability of early dismissal both as a matter of the substantive law pertaining to various legal issues and claims and as a matter of First Amendment procedure. In that regard, it would appear appropriate to attempt to persuade more courts in a variety of contexts that that special receptiveness to dismissal motions should be accorded in order to avoid the chilling effects of libel and privacy litigation on freedom of the press and the public's right to know.

SUMMARY OF FINDINGS

* Overall, the LDRC dismissal data reveals that more than 2 out of 3 of the motions to dismiss reported over the past two-plus years resulted in outright dismissal of the libel or privacy action.

* At the trial court level, just under 3 out of 4 motions were granted.

* If one includes cases in which some claims, issues or parties were eliminated as the result of a motion to dismiss, the rate of "success" increased to more than 3 out of 4 motions granted.

* The results after appeals were slightly less favorable, but defendants still prevailed in an impressive 67% of the appealed motions.

* Motions to dismiss were favorably granted on a broad range of legal issues and claims.

* Issues which were most often the subject of successful dismissal motions included gross irresponsibility (New York fault standard) (100% grant rate); intentional infliction of emotional distress and related torts (87%); invasion of privacy (all branches) (85%); opinion (80%); personal jurisdiction (79%); of and concerning (77%); defamatory meaning (68%).

* Lower but nonetheless excellent success rates were found on issues such as fair comment/report (71%); procedural matters (67%); damages (67%) and actual malice (62%).

* While the First Amendment has not been widely recognized as supporting a special procedural rule favoring motions to dismiss in media libel and privacy actions, a small number of the cases studied recognized such a special rule. Numerous other cases adverted to First Amendment principles in connection with substantive consideration of the legal bases asserted in support of the motion to dismiss -- e.g., on issues such as jurisdiction, defamatory meaning and constitutionally-protected opinion.

* Defense success rates on dismissal motions did not vary significantly as between state and federal courts (70% vs. 66%, respectively) or as between public and private figure actions (65% vs. 74%, with a 67% rate where plaintiff status was unclear or undecided).

BACKGROUND. Summary judgment, without doubt, is the name of the media defendant's game in many -- perhaps most -- libel and invasion of privacy actions. Last year's LDRC study of summary judgment documented just how effective such motions remain -- despite Justice Burger's footnote dictum in Hutchinson v. Proxmire -- with upwards of three out of four summary judgment motions granted in cases reported after Hutchinson through August, 1982. Nonetheless, the motion to dismiss (or demurrer) in defamation and privacy suits for failure of the complaint to state a valid cause of action or claim for relief, or for other procedural or substantive defects revealed in the pleadings, remains an important tool that should also be given serious consideration in many libel actions. In his treatise Bob Sack confirms the importance of pretrial dismissals and the fact that they are granted in libel actions "with relative frequency." R. Sack, Libel, Slander, and Related Problems 533-34 (PLI 1980). Sack attributes this higher than normal dismissal rate to the fact that, particularly in libel cases, the court actually has before it, in full black and white, the allegedly injurious communication. Thus according to Sack:

> "[t]he trial court may therefore, at the earliest stages, make sound determinations as to issues relating to the communication of which complaint is made. Thus courts routinely consider on motions to dismiss (or demurrers) issues such as whether the statement at bar is capable of bearing a defamatory meaning, whether it is 'of and concerning' the plaintiff, whether it is protected opinion, whether there is jurisdiction over the defendant, and whether the suit is barred by privilege and frequently grant motions on these grounds and others." Id. at 534.

Finally, Sack persuasively argues that such early dismissals "may serve the constitutionally rooted purpose of quickly disposing of unwarranted suits directed at speech and press." However, Sack suggests that "courts have rarely invoked constitutional principles in considering such motions." (But see "Motions to Dismiss and the First Amendment," infra.)

THE LDRC MOTION TO DISMISS STUDY. With this as background, LDRC undertook to chart the incidence and results of motions to dismiss in libel and invasion of privacy actions which LDRC has followed since developing its active case files in early 1981. (See note on LDRC sample data infra.) The results of this sampling, which should not be understood to represent anything approaching the universe of such motions even during this brief time period, are provided in order to give Bulletin readers some idea of the kinds of dismissal motions being made by media defendants, the kinds of issues involved and the results of such motions, initially and on appeal. LDRC will continue to monitor dismissal motions and periodically update this initial study. In this manner, over time, perhaps a more meaningful body of data regarding motions to dismiss can be made available for the guidance of media libel defendants. A more detailed section of LDRC's 50-State Survey in 1983 and in subsequent years, will also be devoted to motions to dismiss.

MOTIONS TO DISMISS -- DISPOSITIVE ISSUES. As is summarized in Table 4 (and the notes thereto), and as is obvious, the particular legal basis or bases asserted as grounds for dismissal will be the most significant factor in whether the motion is granted or denied. On the other hand, Table 4 also documents that success on particular dispositive issues is higher than the overall success rate for motions. This is so because grants as to particular motions may only be partial, leaving other issues or causes of action in the case that survive the motion to dismiss. Such partial grants may or may not suggest the wisdom of deferring motion practice to a later stage of the litigation. However, there are often substantial benefits that will accrue in the litigation from even the partial dismissal of certain claims, parties or issues. On the other hand, the "downside" risk that, for example, a denial or only partial grant may adversely affect the remainder of the litigation, perhaps by predisposing the judge against the defense case or by the premature crystalization of unfavorable law in the case, must always be given consideration before the decision is made to seek early dismissal.

With regard to particular dispositive issues, a few brief narrative comments may be in order to expand upon the bare statistics reflected in Table 4.

-- Pleading Matters. Dismissal motions are most frequently made and defense success rates are high, as might be expected, on various issues that come under the rubric of pleading matters. Thus, the issues of defamatory meaning, innocent construction and of and concerning were presented for consideration in 47 of the 95 cases in the LDRC Study. (To these could be added a number of the "procedure" dismissals based on the overall insufficiency of pleadings for lack of specificity, etc. See Table 4 (11) and note 9.) These matters, as noted by Sack, often can be decided on the pleadings because the Court generally has before it the entire

publication alleged to have caused injury and therefore all the information upon which it needs to base its ruling. Interestingly, although Illinois was at one time perhaps the most favorable jurisdiction in the nation for motions to dismiss for lack of defamatory meaning due to its liberal innocent construction rule, since Chapski (case # 19) the pendulum appears at least for the moment to have swung back sharply in the other direction. In the LDRC Study of the 10 Illinois motions based on defamatory meaning or innocent construction, only 50% were granted, less than the overall average for all jurisdictions. Of course, a number of these decisions reflect reversals on appeal of motions made and granted under the extreme innocent construction rule. A more realistic evaluation of the appropriateness of dismissal by defense counsel post-Chapski will presumably restore the balance and lead to a higher rate of success where defamatory meaning is not established under Chapski.

--Opinion. Closely related to such pure pleading matters is the failure of the complaint to allege actionable statements of fact as opposed to constitutionally-protected or otherwise privileged statements of opinion. Where such an issue is presented it is often an appropriate matter for consideration on pleadings as a matter of law and this is reflected in the high 80% success rate (12/15 motions granted) in the LDRC Study. Also, where the opinion issue is judged under Gertz, the Courts often refer to First Amendment considerations and this in turn seems to lead these Courts to a more favorable predisposition toward dismissal.

-- Privacy and Related Torts. The various branches of invasion of privacy and related torts such as intentional infliction of emotional distress, etc. (see Table 4, note 4) all appear to be particularly amenable to early motions to dismiss. Thus, overall, privacy and related motions were made in the greatest number of cases (54 -- 39, privacy; 15, related) and were granted with great frequency -- 87%, related; 85, privacy (all branches). It is clear that these torts are not as well established legally and are therefore viewed as weaker and more amenable to early dismissal than better established defamation claims (See, e.g., LDRC Bulletin No. 6 at 19-27, "Intentional Infliction of Emotional Distress"). Also, of course, these privacy and related claims are often pleaded as secondary causes of action. This enables courts to dismiss these claims with some liberality without entirely dismissing plaintiff's action.

--Fault. Failure sufficiently to plead fault is only an infrequent basis for motions to dismiss in the LDRC Study and such motions were less frequently granted. This is perhaps not surprising. What is noteworthy is that dismissal is at times granted even on the issue of actual malice, a supposedly fact-laden matter. (Similarly, 78% of the 9 motions based on truth or substantial truth, another apparently fact-intensive issue, were granted in the LDRC Study.) On the other hand, there were no motions to dismiss made (and therefore none granted) in the Study based on failure sufficiently to allege negligence in jurisdictions where this standard has been held to apply under Gertz to private figure plaintiffs. Once again, this is an indication of the problems that this exceptionally-loose fault standard can present in the defense of a media libel action. (See LDRC Bulletin No. 6 at 42-43). In contrast, in New York where the heightened gross irresponsibility standard applies, 100% of the 5 motions raising this issue were granted.

-- Jurisdiction. Personal jurisdiction in the LDRC Study was one of the key issues in which a number of Courts saw First Amendment considerations as coming into play. This approach to jurisdiction is, of course, now at issue before the Supreme Court in the Keeton and Calder cases -- see "Supreme Court Update," infra.

MOTIONS TO DISMISS AND THE FIRST AMENDMENT. As noted, in summary judgment motion practice a special rule had developed in lower state and federal courts, allowing for the more liberal grant of summary judgment in defamation cases than in other civil litigation. This special First Amendment rule was to some extent questioned by the Supreme Court in Hutchinson v. Proxmire, at least to the extent that the subjective and factually-oriented nature of the actual malice inquiry at times required in public-figure libel actions was suggested as an inappropriate context for summary disposition. However, footnote 9 has not by any means prevented courts from continuing to grant summary judgment in appropriate cases -- see LDRC Bulletin No. 4 (Part 2) at 2-35. And not infrequently courts still advert to the First Amendment importance of early summary disposition of constitutional libel actions, albeit perhaps less often than prior to Hutchinson -- see LDRC Bulletin No. 5 at 1-2 (reporting LDRC 50-State Survey findings regarding summary judgment).

In contrast to summary judgment, the general perception has been that special First Amendment rulings are not generally available at the motion to dismiss stage of libel proceedings. (See comment by Sack, supra.) Such a special dismissal rule has there-

fore not been widely sought or recognized. It is noteworthy, however, that the concerns expressed by the Supreme Court in Hutchinson note 9 regarding the special First Amendment grant of certain summary judgment motions would not have particular application to many of the issues presented on motions to dismiss. Moreover, early disposition by dismissal would serve the very same interest -- indeed more effectively -- in avoiding the First Amendment chilling effects of the prolonged pendency of meritless libel claims against the media. See, for example, the following expansive language from a recent non-media libel action that should, however, be equally applicable in the media context:

> "in reaching this result [dismissal of the complaint on the ground that the publication was a constitutionally protected expression of opinion], the court recognizes that a motion to dismiss on the pleadings is a somewhat disfavored vehicle for dispositive adjudication of the merits of a dispute, and that the motion must be denied if, under their complaint, plaintiffs could prove any set of facts that would entitle them to relief. On the other hand, the court also recognizes the primary values in our society reflected in the First Amendment and the significant risk that even a non-meritorious defamation action may stifle open and robust debate on issues of public importance. In this area, perhaps more than any other, the early sifting of groundless allegations from meritorious claims made possible by a Rule 12(b)(6) motion is an altogether appropriate and necessary judicial function. At the threshold it is the court, not the jury, that must vigilantly stand guard against even slight encroachments on the fundamental constitutional right of all citizens to speak out on public issues without fear of reprisal." Myers v. Plan Tacoma, Inc., not reported in Med.L.Rptr. (D.C.Super. 2/1/83) (Weisberg, J.)

First Amendment considerations are evidenced in a variety of cases and contexts, in the LDRC Motions to Dismiss Study, including those involving resolution of issues such as personal jurisdiction, privilege, opinion, defamatory meaning, of and concerning, actual malice, public official status, and false light invasion of privacy. In fact, the LDRC Study found that as many as 36 of the 95 cases studied adverted to First Amendment considerations in the libel (and privacy) context in deciding motions to dismiss. While

the greatest number of these involved substantive First Amendment rules applicable to the legal issues dispositive of dismissal motions, nonetheless a small number of the cases suggest that First Amendment considerations are pertinent to the very definition of procedural standards governing the availability or frequency of dismissal in libel actions, and a few even advert to the First Amendment as reason for creating a special rule favoring the grant of a defendant's motion to dismiss. In addition to Myers v. Plan Tacoma, supra, see, e.g., Barger v. Playboy (case # 7), 9 Med.L. Rptr. at 1658; Sobel v. Miami Daily News (case # 84), 5 Med.L.Rptr. at 2464.

In sum, libel defendants should not overlook the possibility of arguing, in appropriate cases, that the First Amendment not only may have a bearing upon substantive law applicable to the motion, but that it might also suggest the propriety of special and more sympathetic consideration of dismissal as a procedural means of protecting important First Amendment interests.

NOTE ON DATA SAMPLE. The Motions to Dismiss Case List, which follows the Tables below, comprises information culled from 95 defamation and invasion of privacy cases in which motions to dismiss, made by defendants in media actions, have been ruled upon either by a trial or appellate level tribunal. These 95 cases were primarily discovered by a review of over 400 defamation and privacy cases reported in volumes 7, 8 and 9 of Media Law Reporter and of unreported decisions obtained by LDRC from media defense counsel as well as soon-to-be reported cases for which advance opinions were obtained by LDRC from BNA.

TABLE 1

OVERALL RESULTS OF MOTIONS TO DISMISS (TRIAL OR APPELLATE REVIEW)

TABLE 1-A - TOTAL DEFENDANT WINS(1)

65/95 -- (68%)

TABLE 1-B - TOTAL PLAINTIFF WINS

30/95 -- (32%)

(1) Note that LDRC overall data includes, to the extent possible, the latest disposition of the motions to dismiss studied, either at the trial or at the appellate level. In those cases where dismissal was granted as to media defendants but denied as to non-media defendants, or where granted as to publisher but denied as to author, the case is considered a defendant win. On the other hand, where the motion was granted as to some media defendants but not the publisher, or as to some but not all issues, these cases were considered plaintiff's wins. Thus, Table 1 to some extent understates defense success on motions to dismiss. If partial wins were included, the overall success rate would increase to 77% (73/95).

TABLE 2

LDRC DATA
TRIAL COURT
DISPOSITION OF MOTIONS
TO DISMISS

DEFENDANT'S MOTION TO DISMISS	DEFENDANT'S MOTION TO DISMISS

LDRC DATA

Granted	Denied
70/95 (74%)	25/96 (26%)

FRANKLIN DATA(1)

Granted	Denied
43/50(86%)	7/50 (14%)

(1) Note that the Franklin data does not include motions, granted or denied, that were not appealed. The figures provided here are only trial dispositions of those motions that were appealed. It is thus difficult to compare the percentage of wins/losses as between the LDRC and the Franklin trial data. In fact, the data may well overstate the percentage of grants since in many jurisdictions denials cannot immediately be appealed.

TABLE 3-A

APPELLATE DISPOSITION OF TRIAL COURT RULINGS ON DEFENDANT'S MOTION TO DISMISS*

Ruling by Trial Court on Motion to Dismiss

	LDRC DATA			FRANKLIN DATA	
APPELLATE DISPOSITION	OF 35 MOTIONS TO DISMISS GRANTED BY TRIAL COURT	OF 11 MOTIONS TO DISMISS DENIED BY TRIAL COURT	APPELLATE DISPOSITION	OF 43 MOTIONS TO DISMISS GRANTED BY TRIAL COURT	OF 7 MOTIONS TO DISMISS DENIED BY TRIAL COURT
Affirmed	20	0	Affirmed	30	4
Reversed and Remanded	15	--	Reversed and Remanded	13	1
Reversed and Dismissed	--	11	Reversed and Dismissed	0	2

* Includes only those LDRC cases (46/95) in which appellate rulings have been issued regarding grant or denial of a defendant's motion to dismiss.

TABLE 3-B

RESULTS OF APPELLATE REVIEW OF MOTIONS TO DISMISS

LDRC DATA

Defendant's motion prevails after appeal- - - - - - - - - -	31/46	(67%)
Defendant's motion rejected after appeal- - - - - - - - - -	15/46	(33%)

FRANKLIN DATA

Defendant's motion prevails after appeal- - - - - - - - - -	32/50	(64%)
Defendant's motion rejected after appeal- - - - - - - - - -	18/50	(36%)

TABLE 4

MOTIONS TO DISMISS--
GRANTS OR DENIALS
AS TO SPECIFIC LEGAL ISSUES(1)

	ISSUE	MOTION PREVAILS(2) AS TO ISSUE	MOTION REJECTED(2) AS TO ISSUE
1.	Actual malice	8 (62%)	5 (38%)
1A.	Public figure Status	1 (25%)	3 (75%)
2.	Damages (3)	4 (67%)	2 (33%)
3.	Defamatory Meaning/ Innocent Construction	23 (68%)	11 (32%)
4.	Fair Comment/ Fair Report	5 (71%)	2 (29%)
5.	Gross Irresponsibility	5 (100%)	0 (0%)
6.	Intentional Infliction of Emotional Distress (and related torts)(4)	13 (87%)	2 (13%)
7.	Invasion of Privacy (all branches)	33 (85%)	6 (15%)
	(i) False light	7 (78%)	2 (22%)
	(ii) Misappropriation	10 (83%)	2 (17%)
	(iii) Private Facts	6 (100%)	0 (0%)
	(iv) Intrusion	2 (100%)	0 (0%)
	(v) Other(5)	4 (67%)	2 (33%)

ISSUE	MOTION PREVAILS[2] AS TO ISSUE	MOTION REJECTED[2] AS TO ISSUE
(TABLE 4, Cont'd)		
8. Of and Concerning[6]	10 (77%)	3 (23%)
9. Opinion[7]	12 (80%)	3 (20%)
10. Jurisdiction[8]		
(i) Personal	11 (79%)	3 (21%)
(ii) Subject matter	1 (50%)	1 (50%)
11. Procedure[9]	6 (67%)	3 (33%)
12. Statute of Limitations	5 (71%)	2 (29%)
13. Truth/Falsity (including substantial truth)	7 (78%)	2 (22%)
14. Miscellaneous		
(i) Absolute privilege	1	0
(ii) Civil rights(§1983)	1	0
(iii) Consent	1	0
(iv) Copyright	1	0
(v) Personal liability for corporation	1	0
(vi) Trademark	0	1
(vii) Municipal corporation as plaintiff	1	0
(viii) Reply privilege	0	1

NOTES TO TABLE 4

(1) Note that the total number of issues determined (235) far exceeds the number of cases (95). This is because each issue raised and considered on the motions to dismiss was recorded and often more than one issue was determined. For similar reasons, the total number of issues on which defendants prevailed (179) is higher than the total number of motions granted overall (65). This demonstrates that even motions that do not entirely dismiss the action do often have the presumed benefit of dismissing at least some issues, claims, and/or parties from the case.

(2) For purposes of Table 4, the issue "prevails" or is "rejected" based upon ultimate dispositions after any appeal, or at trial court if no appeal was taken. An issue can prevail even if other aspects of the motion are denied, and vice versa. If an issue was granted in part and denied in part it is listed as both a grant and a denial.

(3) Includes rulings on punitive damages (2 wins) and special damages (1 win; 2 losses).

(4) Also includes negligent infliction, negligent publication, injurious falsehood, prima facie tort, wrongful interference, fraud, conspiracy, unfair competition. The 2 losses involved allegations of negligent publication or negligent infliction.

(5) Includes right of publicity (1 win; 1 loss), constitutional privacy claim (1 win) and unspecified privacy claims (2 wins; 1 loss).

(6) Includes 1 fiction case (defendant prevails).

(7) Includes at least 1 hyperbole case (defendant prevails).

(8) Includes service of process (1 win) and venue (1 loss). One of the grants was as to some defendants only.

(9) Procedural matters include sufficiency or specificity of pleadings (3 wins; 1 loss); failure to allow, serve or timely serve, amended complaints (2 wins; 1 loss) and failure to provide discovery (1 loss).

TABLE 5-A

LDRC DATA
RESULTS OF MOTIONS TO DISMISS
INVOLVING PUBLIC OFFICIAL/FIGURE PLAINTIFFS(1)

DEFENDANT'S MOTION PREVAILS		DEFENDANT'S MOTION REJECTED	
Granted	12	Denied	6
Affirmed Grant	8	Affirmed Denial	0
Reversed Denial	2	Reversed Grant	6
	22 (65%)		12 (35%)

TOTAL CASES: 34

TABLE 5-B

LDRC DATA
RESULTS OF MOTIONS TO DISMISS
INVOLVING NON-PUBLIC FIGURE/OFFICIAL PLAINTIFFS(2)

DEFENDANT'S MOTION PREVAILS		DEFENDANT'S MOTION REJECTED	
Granted	14	Denied	4
Affirmed grant	4	Affirmed denial	0
Reversed denial	7	Reversed grant	5
	25 (74%)		9 (26%)

TOTAL CASES 34

(1) (2) See Footnotes, next page.

TABLE 5-C

RESULTS OF MOTIONS TO DISMISS INVOLVING CASES IN WHICH PUBLIC/PRIVATE FIGURE STATUS IS UNCLEAR OR UNDECIDED(3)

DEFENDANT'S MOTION PREVAILS		DEFENDANT'S MOTION REJECTED	
Granted- - - - - - -	9	Denied- - - - - - - - -	5
Affirmed Grant- - - -	8	Affirmed Denial- - - - -	0
Reversed Denial- - -	1	Reversed Grant- - - - -	4
	18 (67%)		9 (23%)

TOTAL CASES 27

FOOTNOTES TO TABLE(S) 5-A, 5-B, 5-C

(1) Public figure or public official cases included the following numbered cases: 1(official); 5; 7; 9 (official); 15 (official); 18; 20; 21 (official); 22; 23 (official); 27(official); 29 (official); 32; 33; 35 (official); 42 (official municipality); 44 (official); 46 (official); 47 (official); 48 (official); 57; 60 (official); 62 (corporation); 66; 67 (official); 68; 71; 75; 79; 80; 81 (official); 88 (corporation); 90 (official); 91 (official).

(2) Private figure cases included the following numbered cases: 4; 6; 12; 13; 14**; 16; 17 (corporation); 19; 26; 28; 34; 37; 38; 39; 40; 41; 43; 45; 49; 50; 54; 55; 63; 64; 73; 74; 77; 78; 84; 85; 86; 87; 89; 94.

(3) The public or private figure status of plaintiffs was unclear or undecided in the following numbered cases: 2; 3; 8; 10; 11; 24; 25; 30; 31; 36; 51; 52; 53; 56; 58; 59; 61; 65; 69; 70; 72; 76; 82; 83; 92; 93; 95. In a number of cases studied, because the defenses asserted did not require it, the court did not have occasion to inquire into the public figure status of the libel plaintiff. Nonetheless, in many of the cases the court's recitation of facts appeared strongly to suggest public or private status. If not, the issue is considered unclear or undecided. In at least one case (# 14) the court expressly noted its view that the plaintiff (a large public corporation) might be a public figure but that the defendant did not choose to argue the public figure issue and therefore that the motion was being decided as if the plaintiff were a private figure.

TABLE 6

LDRC DATA
COMPARISON OF RESULTS OF
MOTIONS TO DISMISS IN FEDERAL vs. STATE CASES(1)

Federal -- 32 Cases Total

DEFENDANT'S MOTION PREVAILS	DEFENDANT'S MOTION REJECTED
21/32 (66%)	11/32 (34%)

State - 63 Cases Total

DEFENDANT'S MOTION PREVAILS	DEFENDANT'S MOTION PREVAILS
44/63 (70%)	19/63 (30%)

(1) See list of motion to dismiss cases by jurisdiction, federal and state, infra.

HOW TO READ THE CASE LIST

The cases are listed in alphabetical order by case name. Citations are generally to Media Law Reporter and, in some cases, to an official or West reporter. Each case listing adheres to the following format:

#. Name of case and citation

(a) Ruling on defendant's motion to dismiss
(b) Dispositive Issue(s)
(c) Procedural Dismissal Standard Employed
(d) Substantive Dismissal Standard Employed
(e) First Amendment Reference
(f) Other Comments

In addition to the alphabetical listing that follows, for the convenience of our readers the LDRC motion to dismiss cases are also broken down by jurisdiction and by issue in two listings at the end of the case list.

1. American Federation of Police v. Gordon, 8 Med. L. Rptr. 1392 (Fla. Cir. Ct., 11th Cir. 1982)

(a) granted
(b) 1 service of process
2 personal jurisdiction
(c) --
(d) 1 service quashed under Florida statute
2 minimum contacts -- to determine if sufficient, court must look to "quality and nature of activity in relation to the fair play and orderly administration of the purpose of the due process clause"
(e) mentioned; in the libel context, First Amendment considerations require more contacts between non-resident and forum state than usual to establish personal jurisdiction
(f) --

2. American Land Program v. Bonaventura, 9 Med. L. Rptr. 1874 (10th Cir. 1983)

(a) grant affirmed in part and reversed in part
(b) personal jurisdiction
(c) Fed.R.Civ.P. 12(b)(2)
(d) on a motion to dismiss for lack of personal jurisdiction, allegations of complaint are taken as true to extent they are not contradicted by affidavits. Conflicts between affidavits submitted on the issue are resolved in favor of the plaintiff in making out prima facie case for exercise of personal jurisdiction
(e) court explicitly rejects Fifth Circuit cases requiring a greater showing of contact to satisfy due process claim in libel actions than is necessary over other types of tortious activity
(f) dismissal granted as to executive and editor of defendant publisher who had no contacts with the forum; mere allegation of "conspiracy" with in-forum defendants insufficient

3. Antonelli v. Field Enterprises, 9 Med. L. Rptr. 1848 (Ill. App. Ct., 1st Dist. 1983)

(a) affirmed grant
(b) defamatory meaning
(c) court may dismiss complaint where it deems, in its discretion, the complaint fails to state a cause of action
(d) innocent construction rule
(e) mentioned in support of early dismissal using innocent construction only
(f) court suggests plaintiff, who had a long history of arrests and convictions, may have been libel proof in any event; plaintiff was proceeding pro se; post-Chapski

4. Arrington v. New York Times, 8 Med L. Rptr. 1351 (N.Y.Ct. App. 1982), cert. denied, 103 S.Ct.787 (1983)

(a) grant affirmed in part; reversed in part
(b) 1 misappropriation
2 false light invasion of privacy
3 constitutional invasion of privacy
(c) plaintiff's allegations and submissions must be given their "most favorable intendment" on a motion to dismiss
(d) 1 a picture illustrating an article on a matter of public interest not considered for purposes of trade or advertising within the prohibition of N.Y. Civil Rights Law §§50 and 51 unless it has no real relationship to the article, or unless the article is an 'advertisement in disguise.'
2 New York has not recognized false light claim, but in any event publication must be highly offensive to a person of ordinary sensibilities
3 there is no constitutional right of privacy enforceable by civil suit against media defendants
(e) mentioned in connection with both misappropriation and false light claims
(f) --

5. Bahr v. Statesman Journal, 7 Med. L. Rptr. 1099 (Ore. Ct. App. 1981)

(a) affirmed grant
(b) truth
(c) matters constituting a complete defense to plaintiff's claim appeared on face of complaint
(d) --
(e) not mentioned
(f) --

6. Baker v. Burlington County Times, Inc., 9 Med. L. Rptr. 1967 (D.N.J. 1983)

(a) granted
(b) 1 § 1983 civil rights suit
2 damage (to constitutionally guaranteed right)
3 statute of limitations
(c) motion to dismiss treated as one for summary judgment upon submission of affidavits
(d) 1 was plaintiff deprived of a constitutional right?
2 was defendant acting under color of state law?
3 plaintiff failed to satisfy elements for cause of action alleged, and statute of limitations had run out
(e) not mentioned
(f) pro se plaintiff

7. Barger v. Playboy Enterprises, 9 Med. L. Rptr. 1656 (N.D. Cal. 1983)

(a) granted
(b) 1 of and concerning (group libel)
2 actual malice
(c) --
(d) 1 group numbered over 25, plaintiffs cannot show statements were of and concerning them
2 plaintiffs allegations assumed to be true on the issue of actual malice
(e) mentioned -- "of and concerning" may take on constitutional significance due to chilling effect of pendency of baseless libel suit; therefore pleading of actual malice with greater specificity required
(f) court had previously dismissed action with leave to replead

8. Binstein v. NBC, No. 81C 2122, slip op. (N.D. Ill. 1982)

(a) granted
(b) 1 personal jurisdiction
2 opinion
3 truth
4 fair comment
5 defamatory meaning
(c) --
(d) 1 doesn't meet requirements of Illinois long-arm statute
2 article protected by opinion doctrine, innocent construction rule, and privilege to report on acts of government officials
(e) mentioned in connection with defamatory meaning: fair comment and opinion; court also cited Fifth Circuit First Amendment case in support of personal jurisdiction issue
(f) court notes defendant NBC's motion to dismiss is in fact a motion for summary judgment, but merely says it grants motions made by all defendants; pre-Chapski

9. Blouin v. Anton, 7 Med. L. Rptr. 1714 (Vt. 1981)

(a) grant affirmed
(b) defamatory meaning/libel per se
(c) V.R.C.P. 12(c) - test is whether movant is entitled to judgment as a matter of law on basis of pleadings. All well pleaded facts in non-movant's pleadings and all reasonable inferences to be drawn therefrom are assumed to be true
(d) --
(e) mentioned -- defendant's remarks were hyperbole, and thus protected by First Amendment
(f) --

10. Bowe v. Palm Beach Newspapers, 8 Med. L. Rptr. 2247 (Fla. Cir. Ct., 15th Cir., Palm Beach Co. 1982)

(a) granted
(b) truth
(c) no genuine issue of material fact
(d) statements published by defendant about plaintiff were true and allegations of plaintiff to contrary were palpably and inherently false
(e) not mentioned
(f) on defendant's motion to strike two counts of the complaint; court had held an evidentiary hearing

11. Bradlee v. Cassels, 8 Med. L. Rptr. 1968 (Ga. 1982)

(a) grant affirmed (trial court had granted as to one defendant, denied as to another; intermediate appellate court reversed denial and Supreme Court affirmed appellate court)
(b) personal jurisdiction
(c) --
(d) Georgia's long-Arm Statute and "minimum contacts
(e) mentioned; greater showing of contact required by First Amendment considerations surrounding the law of of libel to satisfy due process clause
(f) --

12. Brower v. The New Republic, 7 Med. L. Rptr. 1605 (N.Y.Sup. Ct. N.Y.Co. 1981)

(a) denied in part(personal jurisdiction); granted in part(defamatory meaning)
(b) 1 personal jurisdiction
2 defamatory meaning
3 opinion
(c) --
(d) 1 minimum contacts -- states' interest in adjudicating matter must be balanced against reasonableness of requiring defendant to defend subject action
2 construe writing in its entirety, interpret words in their accepted, ordinary rather than most inflammatory or offensive meaning, and consider construction that would be placed upon them by the ordinary reader
(e) mentioned regarding constitutionally protected opinion
(f) --

13. Brown v. Johnson Newspapers, 7 Med L. Rptr. 2202 (N.Y.App. Div. 3d Dept. 1981)

(a) reversed denial
(b) 1 defamatory meaning
2 gross irresponsibility
(c) --
(d) 1 whether the publication complained of is reasonably susceptible of the meaning ascribed to it, and, in so evaluating, consideration must be given to cumulative effect of all defamatory statements in context, including text and headlines
2 bald assertions or unsupported conclusions of gross irresponsibility in the complaint or affidavit by plaintiff's attorney will not meet plaintiff's burden of coming forward with proof to demonstrate triable issue of fact on question of fault
(e) not mentioned
(f) Court seems to equate motions to dismiss with motions for summary judgment

14. Brown & Williamson v. Jacobson, 9 Med. L. Rptr. 1936 (7th Cir. 1983)

(a) grant reversed (defamation); grant affirmed (other issues)
(b) 1 fair report
2 special damages/libel per se/ corporate defamation
3 wrongful interference with business relations
4 consumer fraud and deceptive practices
(c) assumes all well-pleaded allegations
(d) fair report -- privilege not available where discrepancy between official report and published summary "amplifies the libelous effect"
(e) expressly held First Amendment not at issue in connection with dispositive issues identified
(f) defendant did not argue, at least for purposes of its motion to dismiss, that Brown & Williamson is a public figure

15. Buratt v. Capital City Press, 399 So.2d 687, 7 Med. L. Rptr. 1856 (La. Ct. App. 1st Cir. 1981)

(a) reversed grant
(b) 1 defamatory meaning
2 actual malice
(c) all facts that are pertinent and well-pleaded in the plaintiff's petition are admitted
(d) 1 words taken in entirety, together with reasonable inferences to be drawn therefrom, to determine if they would tend to injure plaintiff
2 does the petition sufficiently allege actual malice -- facts which, if proven, would constitute knowing or reckless falsity
(e) not mentioned
(f) in considering defamatory meaning, headlines to be considered as well as text

16. Cantrell v. ABC, 8 Med. L. Rptr. 1239 (N.D. Ill. 1981)

(a) denied
(b) 1 defamatory meaning
2 of and concerning
3 libel per se
4 false light privacy
(c) F.R.Civ.P. 12(b)(6)
(d) 1 whether language is susceptible of innocent construction must be resolved by reading the language "stripped of innuendo"
2 as to a private figure, allegations of actual malice are sufficient to defeat motion to dismiss false light privacy claim
(e) not mentioned
(f) pre-Chapski

17. Carlucci v. Poughkeepsie Newspapers, 8 Med. L. Rptr. 2503 (N.Y.Ct.App.), aff'g, 8 Med. L.Rptr. 1837 (N.Y.App.Div.2d Dept. 1982)

(a) affirmed reversed denial (trial court had denied; intermediate appellate court reversed denial)
(b) 1 of and concerning
2 gross irresponsibility

(c) --
(d) the reading public acquainted with parties and subject could not take article as of and concerning corporation because corporation wasn't mentioned (and because corporation cannot be arrested, i.e., participate in activity article described)
(e) not mentioned
(f) intermediate appellate court had dismissed on the alternative ground that no triable issue of fact was presented as to gross irresponsibility; Court of Appeals did not reach the issue in light of its disposition on the of and concerning theory

18. Caton v. Schenectady Gazette, 7 Med. L. Rptr. 1725 (N.Y.App. Div. 3d Dept. 1981)

(a) reversed denial
(b) procedure -- failure to serve complaint
(c) --
(d) Plaintiffs did not demonstrate reasonable excuse for delay in serving complaint; when filed, complaint did not allege sufficient facts which, if proven, would establish a meretorious claim
(e) not mentioned
(f) --

19. Chapski v. Copley Press, 8 Med. L. Rptr. 2403 (Ill. 1982), rvs'g 7 Med. L. Rptr. 2426 (Ill. App.Ct. 2d Dist. 1981)

(a) reversed grant; intermediate appellate court had affirmed grant
(b) defamatory meaning/innocent construction
(c) --
(d) innocent construction rule modified to require consideration of defamatory meaning in context of words and implications therefrom given their natural and obvious meaning
(e) mentioned; Sullivan and progeny cited as rationale for limiting common law innocent construction rule
(f) --

20. Church of Scientology v. Cazares, 7 Med. L. Rptr. 1668 (5th Cir. 1981)

(a) affirmed grant
(b) 1 defamatory meaning
2 opinion
(c) --
(d) when read in proper context, the allegedly defamatory statements constituted mere conclusions or opinions
(e) mentioned in connection with constitutionally-protected opinion
(f) part of the second amended complaint was left standing; that portion was dismissed when the court granted defendant's motion for summary judgment on the third amended complaint

21. Cibenko v. Worth Publishers, 7 Med. L. Rptr. 1298 (D.N.J. 1981)

(a) granted
(b) 1 of and concerning (libel claim)
2 defamatory meaning
3 opinion;
4 false light privacy
(c) --
(d) words read in context to determine what a recipient of them "correctly or mistakenly, but reasonably, understands" -- is communication in question capable of bearing a particular meaning which is highly offensive to a reasonable person
(e) mentioned in connection with constitutionally-protected opinion
(f) defendant's alternative motion for summary judgment on grounds that statute of limitations had run is moot because of grant of defendant's motion to dismiss; defamatory meaning to be judged on same bases for purposes of both libel and false light privacy claims

22. Commerce Union Bank v. Coors, 7 Med. L. Rptr. 2204 (Tenn. Chancery Ct. 1981)

(a) granted in part and denied in part
(b) 1 right of publicity
2 fraud
3 invasion of privacy
4 unfair competition
(c) --
(d) --
(e) not mentioned
(f) the court held that plaintiff's claims for violation of right of publicity and trademark infringement sufficiently stated a cause of action because right of publicity is "descendible" and therefore withstood defendant's motion to dismiss, whereas plaintiff's other claims premised on fraud, invasion of privacy and unfair competition do not state causes of action

23. Costello v. Capital Cities Media, 445 N.E.2d 13, 9 Med. L. Rptr. 1434 (Ill. App. Ct. 1982)

(a) reversed grant
(b) 1 defamatory meaning/libel per se
2 actual malice
(c) --
(d) 1 innocent construction rule -- but court should not strain to find a possible, but unnatural, innocent meaning when a defamatory meaning is far more probable.
2 complaint to be liberally construed in considering whether actual malice has adequately been pleaded
(e) not mentioned
(f) post-Chapski

24. Cox Enterprises v. Holt, 8 Med. L. Rptr. 1701 (11th Cir. 1982)

(a) reversed denial
(b) personal jurisdiction
(c) --
(d) minimum contacts
(e) mentioned -- greater showing of contact between publisher and forum required by First Amendment in order for due process clause requirements to be satisfied -- distinguished from other types of tortious activity

(f) defendant challenges jurisdiction as well as denial of summary judgment

25. Dannemann v. Doubleday, 9 Med. L. Rptr. 1247 (S.D.N.Y. 1983)

(a) granted
(b) statute of limitations
(c) although generally on a motion to dismiss all inferences must favor plaintiff, this is true only where motion is decided on pleadings alone; where there is an evidentiary hearing, as in determining the factual context of first publication for statute of limitations purposes, the preponderance of evidence rule, applicable to civil trials, would apply
(d) --
(e) not mentioned
(f) --

26. Davis v. Keystone Printing, 9 Med. L. Rptr. 1712 (Ill. App. Ct. 2d Dist. 1982)

(a) reversed grant
(b) 1 actual malice
2 public figure status
(c) motion to dismiss under Rule 48(1)(i) Ill. Civil Practice Act, permits presentation of affidavits in support of motion to dismiss where grounds for dismissal do not appear on the face of the pleading. Under Rule 48 "a reviewing court should interpret the facts alleged in the complaint in the light most favorable to the plaintiff, and a complaint should not be dismissed unless. . .no set of facts could be proved that would entitle a plaintiff to relief. . .pleadings should be liberally construed. . .
(d) --
(e) not mentioned
(f) Rule 48 appears to approach summary judgment; post-Chapski

27. DeRoburt v. Gannett, No. 78-0375 (D. Hawaii 1982)

(a) granted
(b) falsity
(c) court foreclosed from considering question of the truth or falsity of the publication about activities of a foreign government case by act of state doctrine;
(d) --
(e) not mentioned in connection with motion to dismiss
(f) --

28. Diportanova v. New York News, 7 Med. L. Rptr. 1187 (N.Y.App. Div. 1st Dept. 1981), aff'g, 6 Med. L. Rptr. 1376 (Sup.Ct.N.Y.Co. 1980)

(a) affirmed grant
(b) 1 defamatory meaning
2 of and concerning
3 invasion of privacy
(c) -- none articulated
(d) trial court had held that publication must be considered as a whole and the court should not strain to give it a meaning which it does not have; as to statutory privacy claim, it fails because the photo was of a house and not of a living person
(e) not mentioned
(f) --

29. Dostert v. Washington Post, 8 Med. L. Rptr. 1170 (N.D. W.Va. 1982)

(a) granted in part (count involving headline); denied in part (defamatory meaning)
(b) 1 substantial truth (headline)
2 defamatory meaning
(c) F.R.Civ.P. 12(b)(6)
(d) a factual issue exists as to defamatory meaning of statement complained of, and court cannot conclude plaintiff could prove no set of facts which would entitle him to relief
(e) not mentioned
(f) --

30. Duffy v. Ogden Newspapers, 8 Med. L. Rptr. 1879 (W.Va.Sup.Ct. 1982)

(a) affirmed grant
(b) statute of limitations
(c) --
(d) statutory construction - lack of survivability of cause of action
(e) not mentioned
(f) --

31. Dymond v. NBC, 9 Med. L. Rptr. 1811 (D. Del. 1983)

(a) granted
(b) statute of limitations (conflict of laws)
(c) --
(d) In a multi-state defamation action Federal District Court must apply conflict of law rules of the forum state in which it is sitting to determine what state law will govern, and the state law governing will provide the applicable statute of limitations via a borrowing statute
(e) not mentioned
(f) --

32. Falwell v. Penthouse, 7 Med. L. Rptr. 1891 (W.D.Va. 1981)

(a) granted
(b) 1 "false light" invasion of privacy
2 actual malice
3 misappropriation
4 copyright
(c) --
(d) 1 no common law cause of action for "false light" exists in Virginia
2 plaintiff's allegations do not constitute, on their face, a claim of actual malice, since plaintiff concedes the publication was accurate, truthful and consistent with plaintiff's statements at the time of the interview
3 publication complained of does not qualify as a trade or advertising purpose under Virginia's invasion of privacy statute [Va. Code §8.01-40(1950)]
(e) mentioned in connection with the propriety of dismissal where claim insufficient as a matter of law
(f) --

33. Fanelli v. Bodyscience, 8 Med. L. Rptr. 1766 (E.D.Pa. 1982)

(a) denied
(b) 1 subject matter jurisdiction
2 personal jurisdiction
(c) Fed.R.Civ.P. 12(b)(1) and (b)(2)
(d) 1 claimed by plaintiff that amount in controversy exceeds $10,000 is apparently made in good faith, and it does not appear to legal certainty that claim is for less than jurisdictional amount
2 minimum contacts satisfied when defendant has "purposely availed" himself of privilege of conducting activities within the forum
(e) mentioned in footnote reference to 5th Circuit First Amendment jurisdiction cases but does not expressly adopt First Amendment rule
(f) other concerns on personal jurisdiction issue involve federalism criteria -- does the forum have a clear interest in resolving the dispute between the citizen of the state in which the forum court sits and the foreign defendant?

34. Flanders v. Associated Newspapers, 9 Med. L. Rptr. 1669 (D. Minn. 1983)

(a) granted
(b) personal jurisdiction
(c) Fed.R.Civ.P. 12(b)(2)
(d) Long Arm Statute Construction; minimum contacts
(e) not mentioned
(f) --

35. Fogus v. Capital Cities Media, 444 N.E.2d 1100, 9 Med. L. Rptr. 1141 (Ill. App. Ct. 1982)

(a) reversed grant
(b) 1 defamatory meaning
2 actual malice
(c) --
(d) 1 defendants allege no plausible innocent construction of their statements
2 sufficiently alleged in complaint, although in somewhat conclusory manner -- the complaint sets forth factual allegations from which actual malice may reasonably be said to exist
(e) not mentioned
(f) post-Chapski

36. Fredericksen v. New York Post, 8 Med. L. Rptr. 1799 (N.Y.Sup. Ct. Queens Co. 1982)

(a) granted
(b) 1 defamatory meaning/libel per se
2 of and concerning
3 punitive damages
(c) CPLR 3211 (a)(7)
(d) article complained of must be read as a whole, statements should be construed together and measured by effect they'd have on average reader
(e) not mentioned
(f) also dismissed -
- plaintiff's allegations as to headline because it was fair index of substance to which it refers
- cause of action on behalf of corporate plaintiff because of absence of any reference to it in the article
- 2d cause of action for punitive damages because it does not state a separate claim for relief, but is merely an incident of damages

37. Fried v. Jacobson, 8 Med. L. Rptr. 1905 (Ill. App. Ct. 3d Div. 1982).

(a) affirmed grant
(b) defamatory meaning
(c) --
(d) innocent construction -- publication to be read as whole; words given natural, obvious meaning, and "words allegedly libelous that are capable of being read innocently must be so read and declared non-actionable as a matter of law"
(e) not mentioned
(f) even without resort to innocent construction rule, statements complained of were not libelous per se; post-Chapski

38. Giaimo v. Literary Guild, 7 Med. L. Rptr. 1039 (N.Y.App. Div. 1st Dept. 1981)

(a) affirmed grant
(b) 1 of and concerning
2 invasion of privacy
(c) --
(d) where person allegedly defamed is not named in publication, it is necessary, if it is to be held actionable as to him, that the language used be such that persons reading it will, in light of surrounding circumstances, be able to understand that it refers to the person complaining
(e) not mentioned
(f) privacy claim was dismissed by trial court but not mentioned by majority on appeal; dissenters would have reinstated false light privacy claim

39. Gleason v. Hustler, 7 Med. L. Rptr. 2183 (D.N.J. 1981)

(a) granted
(b) descendability of -
1 public disclosure of private facts
2 misappropriation/right of publicity
(c) Under Fed.R.Civ.P. 12(b) the court must resolve all ambiguities and draw all inferences from the pleadings and the record in favor of the non-moving party when trying to determine if there is any genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law
(d) heirs of aggrieved party were bringing suit; such derivative or descended claims unavailable as a matter of law
(e) not mentioned
(f) because defendants submitted matters outside of the consideration, the motion to dismiss was treated as a motion for summary judgment under Fed.R.Civ.P. 12(b) and 56

40. Golden v. Elmira Star Gazette, 9 Med. L. Rptr. 1183 (N.Y.Sup.Ct., Ontario Co. 1983)

(a) granted
(b) opinion
(c) --
(d) nature of communication must be taken as a whole and consideration given as to how it would be understood by the ordinary reader
(e) mentioned in connection with constitutionally-protected opinion
(f) restaurant review

41. Golub v. Warner Communications, 7 Med. L. Rptr. 1647 (N.Y.Sup.Ct. N.Y.Co. 1981)

(a) granted
(b) 1 defamatory meaning
2 intrusion
3 misappropriation
(c) motion based on alleged failure to state a cause of action [CPLR 3211(a)(7)]
(d) 1 references to plaintiff are not reasonably susceptible of any defamatory meaning
2 plaintiff's name used in context of matter of public concern, and not for trade purposes
3 cause of action vague, conclusory, and without factual support, and nowhere does it appear plaintiff is real party in interest
(e) not mentioned
(f) --

42. Grafton v. ABC , 7 Med.L. Rptr. 1134 (Ohio Ct.App. 9th Dist. 1980)

(a) affirmed grant
(b) 1 absolute privilege
2 defamation of a municipal corporation
3 fair report privilege

(c) --
(d) 1 criticism of government, even of its proprietary activities, is absolutely privileged
2 a municipal corporation, as a governmental entity, is an embodiment of the people, and therefore does not have a separate personality which can be defamed
3 publications of fair and impartial report of proceedings before governmental bodies, or fair synopses thereof, are privileged, even where proven erroneous, unless it is proven the publication was made maliciously (common law malice)
(e) mentioned in connection with holding that criticism of government must be absolutely privileged and that municipality may not maintain a defamation action
(f) --

43. Griffith v. Rancocas Valley Hospital, 8 Med. L. Rptr. 1760 (N.J.Super.Ct. 1982)

(a) granted as to media defendant; denied as to non-media defendant
(b) 1 invasion of privacy [public disclosure of private facts (medical records)]
(c) Rule 4:6-2
(d) 1 substantial relevance of plaintiff's name to reporting of newsworthy event (crime committed on adult matter of public concern)
2 on motion for judgment of dismissal addressed to sufficiency of complaint the court must assume as a matter of law that all facts alleged in complaint and recited before court are true
(e) mentioned in connection with substantive invasion of privacy standard
(f) court appears to use "motion to dismiss" and "summary judgment" synonymously

44. Haggerty v. Globe Newspaper, 419 N.E.2d 844, 7 Med. L. Rptr. 1615 (Mass. 1981)

(a) reversed grant
(b) false light/invasion of privacy

(c) a complaint should not be dismissed, under Mass. R.Civ.P. 12(b)(6), for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief
(d) statutory privacy claim under Mass. G.L. c.214, §1B sufficiently alleges reckless publication of false ten-year old material
(e) not mentioned
(f) --

45. Hartman v. Associated Newspapers, 9 Med. L. Rptr. 1699 (D. Minn. 1983)

(a) granted
(b) 1 sufficiency of pleadings
2 personal jurisdiction
(c) Fed.R.Civ.P. 12(b)(1) and (b)(2)
(d) 1 no analysis given of why pleadings did not state a claim upon which relief could be granted
(e) not mentioned
(f) see case # 34, Flanders v. Associated Newspapers, supra

46. Hentell v. Knopf, 8 Med. L. Rptr. 1908 (N.Y.Sup. Ct. N.Y.Co. 1982)

(a) granted
(b) 1 defamatory meaning
2 opinion
(c) CPLR 3211(a)(7)
(d) writing construed in its entirety; words interpreted in their accepted, ordinary meaning; construction that would be placed upon words by average reader
(e) mentioned in context of plaintiff's motion for summary judgment and his status as public official
(f) public policy-free press arguments balanced against reputational interests

47. Herrell v. Twin Coast, 7 Med. L. Rptr. 1216 (Cal. Ct.App. 2d Dist. 1981)

(a) affirmed grant
(b) 1 defamatory meaning/false light
2 disclosure of private facts
(c) A trial court's ruling sustaining a demurrer for failure to state a cause of action will be upheld only if appellants have failed to state a cause of action under any possible legal theory
(d) a publication challenged as false and defamatory is to be construed with a view to the whole scope and apparent purpose of the writer. Newsworthiness of facts published about an individual, however embarrassing the facts may be, is the test --
- social value of facts published
- depth of article's intrusion into ostensibly private affairs
- extent to which party voluntarily acceded to position of public notoriety
(e) not mentioned
(f) --

48. Hines v. Florida Publishing, 7 Med. L. Rptr. 2605 (Fla. Cir. Ct. 4th Cir. 1982)

(a) granted
(b) 1 public officials/status
2 actual malice
(c) --
(d) 1 from face of complaint plaintiffs are public officials
2 plaintiff's complaint failed to allege facts sufficient to prove actual malice; a mere bare allegation of knowing or reckless falsity is not enough
(e) mentioned in connection with constitutional actual malice
(f) dismissed without prejudice; the plaintiffs may file amended complaints; defendants' motion for summary judgment directed to amended complaint subsequently granted -- see 8 Med.L.Rptr. 1592 (Fla. Cir. Ct. 4th Cir. 1982)

49. Hyde v. City of Columbia, Missouri, No. WD 32,406, slip op. (Mo. Ct. App. 1982)

(a) reversed grant
(b) 1 negligent publication
2 invasion of privacy
(c) a complaint is sufficient to defeat a motion to dismiss if the averments, when accorded every reasonable intendment, invoke a substantive remedy. Pleader need only allege a state of ultimate facts which show petitioner is entitled to relief and demands such judgment
(d) to plead actionable negligence, plaintiff must describe duty owed by defendant, breach, and injury
(e) mentioned only in connection with access to public records
(f) --

50. Jackson v. Playboy Enterprises, Inc. 9 Med. L. Rptr. 1575 (S.D. Ohio 1983)

(a) granted
(b) invasion of privacy
(c) motion may be granted only if it appears plaintiff can prove no set of facts in support of his claim which would entitle him to relief
(d) court analyzes all four privacy torts and finds that plaintiff has failed to state a cause of action under any theory
(e) not mentioned
(f) --

51. Jones v. Himstead, 7 Med. L. Rptr. 2433 (Mass. Super. Ct. 1981)

(a) denied motion for summary judgment; granted motion to dismiss (made in the alternative) in part
(b) 1 defamatory meaning
2 substantial truth
3 public figure status
(c) --

(d) 1 need not be only possible reading if defamatory reading is a reasonable one and inference required to construe it as defamatory are reasonable
2 no standard articulated
(e) mentioned in connection with denial of motion for summary judgment on basis of contested issues of plaintiff's public figure status and truth
(f) the court denies motion for summary judgment even on statements made by defendants which it determines are true, because under Massachusetts statute a plaintiff "may still recover for publication of a truthful assertion if he or she is able to prove actual malice." Court does grant defendant's motion to dismiss on this issue, but with leave to amend complaint to allege malice.

52. Keeton v., Hustler, 682 F.2d 33, 8 Med. L. Rptr. 1748 (1st Cir. 1982), cert. granted, 103 S.Ct.813 (1983).

(a) affirmed grant
(b) personal jurisdiction
(c) --
(d) in considering due process challenge, court must assess whether it is "reasonable" or basically "fair" to subject defendant to suit in particular forum under particular circumstances of case
(e) not mentioned
(f) court considered case on individual facts alleged in complaint

53. Kilgore v. Younger, 8 Med. L. Rptr. 1886 (Cal. 1982).

(a) affirmed grant
(b) 1 fair report privilege
2 intentional infliction of emotional distress
3 invasion of privacy
(c) --
(d) 1 whether reports are fair and true, and therefore privileged, should be determined by assessing the publication's natural and probable effect on the average reader. Standard of interpretation to be used is how those in community where matters were published would reasonably understand them
2 fair report privilege also defeats intentional infliction claim
3 private facts claim cannot encompass previously published facts
(e) not mentioned
(f) --

54. Koczka v. Avon Books, 7 Med. L. Rptr. 1919 (N.Y.Sup. Ct. N.Y.Co. 1981)

(a) granted
(b) misappropriation -- incidental use
(c) --
(d) the circumstances, extent, degree or character of an incidental mention of a person's name must be weighed to determine if the use is prohibited under N.Y. Civil Rights Law §50; are the uses of a fleeting and incidental nature? plaintiff must demonstrate his name was used in a substantial, non-incidental manner
(e) not mentioned
(f) --

55. Kuan Sing v. Wang, 8 Med. L. Rptr. 1087 (N.Y. App.Div. App. Div. 1st Dept. 1982), rvs'g, 6 Med.L.Rptr. 2375 (Sup.Ct.N.Y.Co. 1980)

(a) reversed denial
(b) 1 opinion
2 gross irresponsibility
(c) --
(d) facts upon which opinion based were set forth; honest mistake, not prompted by [actual] malice or gross irresponsibility
(e) mentioned in connection with constitutionally-protected opinion
(f) defendants moved for dismissal or in the alternative for summary judgment; appellate court, in reversing, grants defendant's motion for summary judgment

56. Kutz v. Independent Publishing, 8 Med. L. Rptr. 1125 (N.M. Ct.App. 1981)

(a) reversed grant
(b) opinion
(c) N.M. R.Civ.P. 12(b)(6)
(d) a court properly determines that a statement is an opinion and absolutely privileged when the facts upon which the opinion is based are fully set forth in the published communication, but when the opinion can be read as based upon undisclosed, underlying accusatory statements of fact, the plaintiff's complaint is sufficient to withstand a motion to dismiss for failure to state a claim
(e) mentioned in connection with constitutionally-protected opinion
(f) because allegedly defamatory article was introduced as

Exhibit at argument on motion to dismiss, motion was converted to one for summary judgment

57. Lane v. The New York Times, 8 Med.L.Rptr. 1623 (W.D.Tenn. 1982)

(a) granted
(b) sufficiency of pleadings/actual malice
(c) --
(d) viewed in its totality, the complaint is fatally defective where it merely alleges conclusions, not facts showing actual malice
(e) not mentioned
(f) because matters outside the pleadings were presented to and not excluded by the Court, pursuant to Fed.R.Civ.P. 12(c), the motion has been treated as one for summary judgment and disposed of under Fed.R.Civ.P.56; court also suggests absence of defamatory meaning

58. LaVey v. Smith, 8 Med.L.Rptr. 1363 (N.D.Cal. 1982)

(a) granted
(b) of and concerning
(c) --
(d) excerpts must be construed in light most favorable to plaintiff's claim; alleged libelous statements must be considered in context of entire publication; would average reader believe statements to be of and concerning plaintiff
(e) not mentioned
(f) book distributor's motion to dismiss granted without opposition

59. McBride v. Merrell Dow Pharmaceuticals Inc., No. 81-2639, slip op. (D.D.C. 1982)

(a) granted
(b) defamatory meaning
(c) --
(d) the allegedly defamatory remark must be more than merely unpleasant or ridiculous; the language must make plaintiff appear "odious, infamous, or ridiculous"
(e) not mentioned
(f) other grounds for motion -- statute of limitations and personal jurisdiction -- not reached in light of disposition on issue of defamatory meaning

60. McCall v. Oroville Mercury, 9 Med. L. Rptr. 1701 (Cal. Ct. App. 3d Dist. 1983)

(a) granted
(b) 1 invasion of privacy
2 intentional infliction of emotional distress
3 conspiracy
(c) whether publication by newsmedia of criminal record is in violation of state penal code section prohibiting dissemination of such records
(d) 1 newsworthy facts
2 exception to penal code provision
(e) mentioned in connection with privilege cloaking truthful publication of newsworthy facts
(f) plaintiff, a public official, apparently conceded that publication was constitutionally privileged unless made in violation of the state code

61. MacDonald v. Time, Inc., 9 Med. L. Rptr. 1025 (D.N.J. 1983)

(a) denied
(b) discovery
(c) motion to dismiss as sanction under Fed.R.Civ.P.37 for plaintiff's failure to submit to discovery is inappropriate where plaintiff was not ordered to submit to discovery but merely denied discovery of defendant until he likewise submitted to defendant's discovery
(d) --
(e) not mentioned
(f) defendants also moved for summary judgment on grounds that cause of action abated with plaintiff's death -- this motion was also denied

62. Maine Yankee v. Maine Nuclear Referendum Committee, 9 Med.L.Rptr. 1561 (Maine Super. Ct. 1983)

(a) granted
(b) 1 falsity
2 actual malice

(c) rejects heightened summary judgment scrutiny; no other standard for reviewing motion articulated
(d) based upon material before the court, plaintiff will be unable to prove falsity or actual malice
(e) mentioned in connection with consideration of alternative motion for summary judgment
(f) motion for summary judgment in the alternative granted

63. Marchiondo v. Brown, 649 P.2d 462, 8 Med. L. Rptr. 2233 (N.M.1982)

(a) reversed denial
(b) opinion
(c) --
(d) editorials deemed to be constitutionally protected opinion, and cause of action based upon them should be dismissed
(e) mentioned in connection with constitutionally-protected opinion
(f) other issues decided as motions for summary judgment; on those issues, the trial court order granting summary judgment was reversed and the case remanded for trial

64. Mayers v. Michals, 9 Med.L.Rptr. 1484 (N.Y.Sup.Ct. N.Y.Co. 1983)

(a) granted in part (libel claim) and denied in part (privacy claim)
(b) 1 defamatory meaning
2 privacy (misappropriation)
(c) allegations of complaint are assumed to be true for purposes of motion to dismiss; dismissal inappropriate where evidentiary material is considered upon a motion to dismiss for failure to state a cause of action, unless it is shown that a material fact is otherwise than stated by plaintiff
(d) 1 no reasonable person would see use of photograph as libelous
2 privately commissioning a photograph does not imply consent to use photo for other, public purposes
(e) not mentioned
(f) --

65. Merton Center v. Rockwell International, 7 Med.L.Rptr. 2586 (Pa. Sup. Ct. W. Dist. 1981)

(a) grant affirmed; intermediate reversal overturned
(b) defamatory meaning
(c) --
(d) court must consider full context of publication complained of to determine effect it is fairly calculated to produce, impression it would naturally engender in the minds of average persons among whom it is intended to circulate
(e) not mentioned
(f) this is actually a non-media action, although defendants' allegedly defamatory statements were made to the Associated Press and reported by the Pittsburgh Post-Gazette

66. Midwife v. Copley, 7 Med. L.Rptr. 1393 (Cal.Ct.App. 4th Dist. 1981)

(a) affirmed grant
(b) 1 actual malice
2 abuse of discretion by trial court in sustaining defendant's demurrer without leave to amend complaint
3 personal liability of publisher's officers and editors for torts of corporation
4 invasion of privacy
(c) --
(d) 1 plaintiff had not specified how he would amend his complaint so as to state a cause of action, and has thus failed to carry the burden of proving trial court's abuse of discretion
2 pleading must allege facts, not mere legal conclusions that an act is wrongful
(e) mentioned in connection with discussion of failure to allege requisite actual malice
(f) --

67. Miskovsky v. Tulsa Tribune Company, 9 Med. L. Rptr. 1954 (Okla. Sup.Ct. 1983)

(a) affirmed grant
(b) 1 defamatory meaning (innuendo)
2 special damages

(c) --
(d) 1 libel per se: natural meaning of statement in context of entire writing to see if it could be understood to charge plaintiff with anything planitiff might not have legally and properly done
2 special damages: amended petition demurrably deficient "in failing to show" by proper averment how special damages were occasioned
3 innuendo: if capable of innocent construction, plaintiff must aver an innuendo showing (1) words are intended by defendant in defamatory sense, and (2) hearers may have understood language as conveying alleged defamatory meaning
(e) not mentioned
(f) Court held complaint was not capable of being amended to state a cause of action because "all the publications before us...are clear and unequivocal in their meaning and import and defendant immutable to innuendo"

68. Mulvihill v. Forbes, 9 Med. L. Rptr. 1137 (D.N.J. 1982)

(a) granted upon defendant's alternative motion for summary judgment
(b) 1 defamatory meaning
2 pleading - lack of specificity
3 false light privacy
(c) Fed.R.Civ.P.12(b)(6) and 56
(d) test of defamatory meaning is, when article is read in context, the impression it would naturally engender, in minds of average readers
(e) mentioned in connection with summary judgment
(f) granted as summary judgment; motion to dismiss made in the alternative based upon complaint's lack of specificity

69. Nezelek v. Sunbeam Television Corporation, No.81-5, slip op. (Fla.Dist.Ct.App. 1982)

(a) reversed grant
(b) failure to timely amend complaint
(c) Fla.R.Civ.P. 1.420(b) - rule governing involuntary dismissal

(d) dismissal for failure to timely amend complaint reversed for failure to provide "express notice" to plaintiff
(e) not mentioned
(f) initial motion granted on ground that complaint failed to state a cause of action but with leave to replead; the grounds for that initial grant were unclear, according to the Court of Appeal, but may have been based on very technical pleading defects

70. Patzer v. Liberty Communications, 8 Med. L. Rptr. 2590 (Ore.Ct.App. 1982)

(a) reversed grant
(b) of and concerning
(c) --
(d) because plaintiff's surname is part of corporation name, plaintiff should be allowed to prove allegedly libelous remarks were understood to be of and concerning plaintiff
(e) not mentioned
(f) motion to strike treated by trial court as motion to dismiss; appellate court remands with instructions to allow plaintiff to amend

71. Phillips v. Washingtonian, 9 Med. L. Rptr. 1601 (Md.Cir.Ct. 1983)

(a) granted
(b) 1 sufficiency of complaint
2 actual malice
(c) --
(d) plaintiff has pleaded no fact, nor is there any fact that can be pleaded, from which actual malice of defendants may be inferred -- court looked at allegedly defamatory statement, which was incorporated into the pleadings, in its entirety
(e) not mentioned
(f) initial complaint had been dismissed with leave to replead

72. Rasky v. CBS, 7 Med. L. Rptr. 2305 (Ill. App. Ct. 1st Div. 1981)

(a) affirmed grant
(b) defamatory meaning
(c) --
(d) innocent construction rule -- statement read as whole, words given natural obvious meaning, then if statement is capable of two constructions, one defamatory, and the other innocent, the innocent construction must be chosen
(e) not mentioned
(f) decided before Chapski

73. Reichenbach v. Call-Chronicle, 9 Med. L. Rptr. 1438 (Pa. Ct.Com. Pleas 1982)

(a) granted
(b) intentional infliction of emotional distress
(c) to determine whether a demurrer may be granted, court presumes all well pleaded facts set forth in pleading to be true, as well as all inferences reasonably deducible therefrom, but not conclusions of law
(d) article is not so extreme or outrageous as to meet the test for intentional infliction of emotional distress
(e) not mentioned
(f) claim for negligent infliction previously striken

74. Renard v. CBS, Inc., 9 Med. L. Rptr. 1908 (Ill. Cir. Ct. 1983)

(a) granted
(b) 1 defamatory meaning/libel *per se*
2 opinion
(c) Ill. Sec. 2-615
(d) plaintiff's complaint held insufficient to state a cause of action for libel because: 1 words claimed to be defamatory are not reasonably or fairly capable of meaning assigned by plaintiff, and 2 statements were at worst non-actionable opinion
(e) not mentioned
(f) post-Chapski

75. Renwick v. News and Observer Publishing Company, 9 Med. L. Rptr.____ (N.C. Ct.App. 1983)

(a) reversed grant
(b) 1 defamatory meaning/libel per se
2 opinion
3 fair comment
4 false light privacy
(c) under N.C.12(b)(6) complaint sufficient to withstand motion to dismiss where no insurmountable bar to recovery appears on face of complaint and allegations give adequate notice of nature and extent of claim
(d) 1 editorial generally held susceptible to a defamatory meaning so as to present jury question on both defamation and false light issues
2 as to opinion court finds that editorial states or suggests actionable defamatory facts
3 dismissal as fair comment is seldom appropriate where actual malice is pleaded
(e) mentioned by both majority and dissent in connection with constitutionally-protected opinion
(f) 1 judgment dismissing consolidated defamation and privacy complaints fails to state grounds upon which dismissal was considered appropriate
2 dissent strongly emphasizes supremacy under First Amendment of public's interest in robust speech over individual's reputational interests

76. Rivera v. Republican Company, 7 Med. L. Rptr. 1722 (D.Mass. 1981)

(a) denied (accepting recommendation by magistrate)
(b) statute of limitations
(c) Mass.R.Civ.P. -- relation back of amendments; whenever claims or defense asserted in amended pleading arose out of conduct, transaction or occurrence set forth...in original pleading, amendment relates back to original pleading
(d) --
(e) not mentioned
(f) de novo review of challenged portions of magistrate's report; Mass. procedure expressly found to be "more liberal" than federal with regard to relation back of amendments

77. Rubinstein v. New York Post, 9 Med. L. Rptr. 1581 (N.Y.Sup.Ct. N.Y.Co. 1983)

(a) denied
(b) negligent infliction of emotional distress
(c) CPLR 3211(a)(7)
(d) "issues of causation, substantiality and genuineness of harm done should all be left to the trier of the facts"
(e) not mentioned
(f) publication was an erroneous death notice

78. Rudin v. Dow Jones, 7 Med. L. Rptr. 1105 (S.D.N.Y. 1981); see also 9 Med.L.Rptr. 1305 (S.D.N.Y. 1983) (bench trial)

(a) denied
(b) 1 defamatory meaning
2 retraction
(c) --
(d) publication must be considered in its context and the words must be given their natural import and plain and ordinary meaning; publication is to be tested by its effect upon the average reader
(e) not mentioned
(f) motion to dismiss on retraction statute (Calif. Law) cannot be sufficiently considered on face of complaint; therefore the motion is denied without prejudice to its renewal on a sufficient record

79. Shelton v. Lerner Communications, Inc., No. 80-2992, slip op. (Ill. App. Ct. 1982)

(a) reversed grant
(b) defamatory meaning
(c) --
(d) words of publication and implications therefrom given their natural and obvious meaning to determine if one would reasonably interpret the publication capable of innocent construction
(e) not mentioned
(f) post-Chapski

80. Shields v. Gross, 9 Med.L.Rptr. 1466 (N.Y.Ct.App. 1983), modifying, 8 Med.L.Rptr. 1928 (App.Div.1st Dept. 1982)

(a) partial denial reversed; Court of Appeals strikes intermediate appellate court injunction against use of photos for advertising or trade purposes; affirms dismissal of remaining claims
(b) 1 invasion of privacy
2 consent
(c) --
(d) N.Y. Civil Rights Law §51 provides method for obtaining valid consent to avoid liability for use of photo of infant for advertising and trade purposes; consents in compliance with statutory requirements are valid and cannot be disaffirmed; a defendant's immunity from claim for invasion of privacy is no broader than the consent executed to him
(e) not mentioned
(f) --

81. Shiver v. Apalachee Publishing, 9 Med. L. Rptr. 1053 (Fla. Ct. App. 1983), aff'g, 7 Med. L. Rptr. 2160 (Fla. Cir.Ct., Franklin Co. 1981)

(a) grant affirmed
(b) opinion
(c) court must assume all well-pleaded allegations of the plaintiff to be true and all allegations of the defendant that are denied to be false; any undisputed facts that appear in the pleadings must be assumed to be true
(d) --
(e) mentioned by the trial court in connection with constitutionally-protected opinion; by the court of appeal in connection with burden of proof of a public official
(f) trial court found that either defendant's motion for judgment on pleadings or defendant's motion for summary judgment should be granted on basis of pleadings and undisputed facts; district court of appeal treated appeal only as from grant of summary judgment

82. Silvester v. ABC, 9 Med. L. Rptr. 1051 (S.D. Fla. 1983)

(a) denied
(b) 1 opinion
2 truth
3 neutral reportage
4 public figure/actual malice
5 venue
(c) --
(d) 1 affirmative defenses such as public figure/actual malice and neutral reportage are not properly or appropriately resolved on motions to dismiss
2 factual issues exist as to truth and therefore dismissal is not appropriate
3 as to venue, the court denied the motion because Florida was "one of two equally plausible districts" for bringing the cause of action, but the court did certify the venue question for immediate action
(e) not mentioned
(f) defendant's motion was "to dismiss and to enter final summary judgment" -- Court also denied defendant's motion for summary judgment on statute of limitations issue; defendant also sought dismissal of other unidentified causes of action but that was denied on the ground that plaintiff had sufficiently alleged facts stating a claim upon which relief could be granted

83. Smith v. Taylor County Publishing, 8 Med. L. Rptr. 1294 (Fla. Cir., Ct. 2d Dist., Leon Co. 1982)

(a) granted
(b) 1 opinion
2 neutral reportage
(c) all well-pleaded allegations of ultimate facts in complaint must be accepted as true
(d) article was disinterested report of newsworthy event, upon which no reasonable reading could be found to be defamatory
(e) mentioned in connection with constitutionally-protected opinion and neutral reportage privilege
(f) --

84. Sobel v. Miami Daily News, 7 Med. L. Rptr. 1100 (Fla.Dist.Ct.App. 3d Dist. 1981) (per curiam), aff'g, 5 Med. L. Rptr. 2462 (Cir.Ct., Dade Co. 1980)

(a) affirmed grant
(b) 1 defamatory meaning/of and concerning
2 actual malice
3 invasion of privacy/misappropriation
(c) circuit court recognized that well-pled facts must be taken as true in considering a motion to dismiss
(d) 1 as to defamatory meaning circuit court held the alleged falsity did not give rise to a defamatory meaning
2 leave granted to attempt properly to replead actual malice
3 invasion of privacy claim does not sufficiently allege disclosure of highly objectionable, private facts; publication of undistorted photo in connection with a news article is also not actionable
(e) circuit court had adverted to freedom of the press in connection with the need to apply strict rules in considering dismissal in libel context
(f) per curiam decision affirming trial court's grant of defendant's motion to dismiss, citing Firestone, Gertz, Rosenbloom and Cox v. Cohn

85. Spiegel v. Newsday, 7 Med. L. Rptr. 1759 (N.Y.Sup.Ct. Nassau Co. 1981)

(a) granted
(b) 1 opinion
2 fair comment
3 gross irresponsibility
(c) defendant moved in the alternative to dismiss [under CPLR 3211(a)(7)] or for summary judgment (under CPLR 3212)
(d) 1 fair reading of allegedly defamatory publication
2 clearly not defamatory if publication presents reasonable and fair comments on a matter of public importance, free from malice and ill will
3 plaintiff failed to meet his burden of demonstrating defendant acted with gross irresponsibility
(e) mentioned in connection with constitutionally-protected opinion
(f) not entirely clear, with regard to each of the dispositive legal issues, whether court dismissed by grant of motion for summary judgment or motion to dismiss

86. Sprecher v. Dow Jones, 450 N.Y.S.2d 330, 8 Med. L. Rptr. 1681 (N.Y.App.Div.1st Dept. 1982)

(a) reversed denial
(b) 1 defamatory meaning
2 fair report of judicial proceedings (§74 N.Y. Civil Rights Law)
3 prima facie tort, malicious interference with business, injurious falsehood and abuse of process
(c) --
(d) 1 courts will not strain to find a statement susceptible of defamatory meaning ascribed to it
2 substantial accuracy test as to fair report privilege
(e) not mentioned
(f) trial court had dismissed all claims except defamation claim

87. Springer v. Viking Press, 8 Med.L.Rptr. 2613 (N.Y.App.Div. 1st Dept. 1982), modifying, 7 Med. L. Rptr. 2040 (Sup.Ct.N.Y.Co. 1981)

(a) modified trial court order which granted motion to dismiss in part and denied in part, thereby dismissing remaining causes of action
(b) 1 of and concerning (fiction)
2 misappropriation
3 punitive damages
4 prima facie tort
(c) --
(d) 1 description of fictional character must be so closely akin to plaintiff that a reader, knowing real person, would have no difficulty linking the two; superficial similarities insufficient, as is common name
2 no cause of action exists under N.Y.Civil Rights Law §§50 and 51 for misappropriation where plaintiff fails to show likeness is being used for commercial rather than editorial purposes
3 punitive damages are not separate cause of action but merely an element of single total claim for damages
4 showing required to sustain action for prima facie tort -- that act was aimed solely at harming plaintiff, and that plaintiff suffered reasonably identifiable losses -- are lacking

(e) not mentioned
(f) --

88. Sullivan v. Affiliated Publications, 8 Med. L. Rptr. 1654 (Mass. Super. Ct. 1982)

(a) denied
(b) of and concerning
(c) --
(d) if text and context of complained-of statement preclude reasonable person's interpreting it as referring to corporate plaintiff, a court must declare complaint defective as a matter of law
(e) not mentioned
(f) 1 the parties limited consideration to of and concerning issue; court notes it must assume, arguendo, that statements were false & defamatory
2 headline source of connection between principal and corporation; not within text of article

89. Summerlin v. Washington Star, 7 Med. L. Rptr. 2460 (D.D.C. 1981)

(a) granted
(b) of and concerning
(c) dismissal not justified unless it is clear and apparent to the court that from the allegations it cannot be deducted under any state of facts that the publication was of and concerning the plaintiff
(d) "person libeled need not be specifically named, but the surrounding circumstances must leave no doubt in the reader's mind as to the person's identity" (emphasis in original); additional information in the publication made sufficiently clear that plaintiff was not the person identified therein
(e) not mentioned
(f) --

90. Westmoreland v. CBS, 9 Med. L. Rptr. 1521 (S.D.N.Y. 1983)

(a) denied
(b) 1 failure to plead libel with sufficient specificity
2 special damages
3 opinion
4 reply privilege
(c) whether the complaint is sufficiently detailed to enable defendant to respond and to raise defense of res judicata if appropriate
(d) 1 in this case the cause of action was not excessively vague and it sufficiently specified the legal nature of the claim
2 the court summarily rejected dismissal as to special damages, constitutionally-protected opinion and right of reply
(e) mentioned but only in connection with motion to compel
(f) plaintiff had moved to compel discovery of internal memorandum prepared by defendant, and defendant had moved for protective order against its production which was denied; the motion to dismiss was only as to a libel cause of action arising out of a summary of the internal memorandum

91. Wilder v. Johnson Publishing, 9 Med. L. Rptr. 1145 (E.D.Va. 1982)

(a) denied in part and granted in part
(b) defamatory meaning
(c) Fed.R.Civ.P. 12(b)(6); allegations of complaint presumed to be true
(d) plaintiff's claim is libel per quod; one of two "proposed innuendos" cannot properly be drawn and will be dismissed; the second, however, "naturally follows by innuendo from the published words and the inducement" and cannot be dismissed as a matter of law
(e) not mentioned
(f) --

92. Williams v. RHG Publishing Corp., 7 Med. L. Rptr. 1372 (N.Y. Sup.Ct. N.Y.Co. 1981)

(a) denied
(b) statute of limitations
(c) --
(d) single publication rule - statute is triggered by initial general receipt by the public of the great bulk of the publication
(e) not mentioned
(f) --

93. Wrenn v. Widmann, No. L-82-143, slip op. (Ohio Ct. App. 1982)

(a) affirmed grant
(b) 1 subject matter jurisdiction
2 personal jurisdiction
3 statute of limitations
(c) --
(d) as to the statute of limitations, plaintiff's attempt to cast his complaint as one sounding in negligence is unavailing to avoid 1-year libel statute; also, original complaint against the state only was dismissed on jurisdictional grounds and newly-filed complaint against publisher did not properly relate back for purposes of statute
(e) not mentioned
(f) --

94. Zetes v. Richman, 336 N.Y.S.2d 778, 8 Med. L. Rptr. 1588 (N.Y.App.Div. 4th Dept. 1982)

(a) reversed denial
(b) fault-gross irresponsibility
(c) 3211(a)(7)
(d) pleadings barren of facts suggesting circumstances that would justify an inference of fault; thus complaint raised no triable issue of fact as to whether defendant was grossly irresponsible in proceeding with the republication
(e) not mentioned
(f) qualified privilege of republisher to rely on research of original publisher (wire service) in absence of substantial reasons to question accuracy of articles or bona fides of reporter

95. Ziegler v. Ring Publishing, 9 Med. L. Rptr. 1303 (S.D.Fla. 1982)

(a) granted
(b) personal jurisdiction
(c) Fed.R.Civ.P. 12(b)(2)
(d) insufficient contacts such that maintenance of the suit would offend notions of fair play and substantial justice
(e) not specifically mentioned but cites and relies upon New York Times v. Connor, 365 F.2d 567 (5th Cir. 1966), which is the leading case that does rely upon a First Amendment jurisdiction analysis in media libel actions
(f) even though defendant magazine publisher was technically within the reach of Florida's long-arm statute, it did not do business in Florida, had no regular reporters or "stringers" in the state and its circulation in Florida was only 3.5% of total circulation; individual editor defendant had even fewer contacts

MOTION TO DISMISS CASE LIST BY JURISDICTION

I. FEDERAL CASES

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II. STATE CASES

SUPREME COURT UPDATE -- CONSOLIDATED CASE LIST OF ALL ACTIONS IN 1982-83 TERM

All actions of the Supreme Court in libel and privacy cases for the 1982-83 Term, except the two noted below, have been previously listed in earlier LDRC Bulletins -- See LDRC Bulletins No. 5 at 6-9, No. 6 at 14-19 and No. 7 at 50-57. However, for the convenience of Bulletin readers, these listings are combined below with a final total of cases in each of several categories. Cross-references to descriptions of the holdings in these cases from previous LDRC Bulletins are also provided.

In comparison to the actions in defamation cases during the 1981-82 Term (See Bulletin No. 4 at 19-23), more petitions were filed this Term (44 as compared to 24 -- a significantly greater number); and more petitions were acted upon by the Court (37 as compared to 18). Also, more media-related petitions were filed , both by defendants challenging unfavorable decisions in the lower courts (12 petitions this Term as compared to 4 last); and by plaintiffs challenging decisions in favor of the media (15 this Term as compared to 5 last). It would appear that media and other libel defendants are more willing to bring cases to the Supreme Court despite the Court's continuing unfavorable attitude toward such defendants.

Finally, of course, the Supreme Court has granted cert. in two cases which held favorably for the defendant in the court below -- Bose Corporation v. Consumers Union of the U.S., Inc. and Keeton v. Hustler Magazine, Inc., and in one case decided unfavorably in the court below -- Calder v. Jones -- See LDRC Bulletin No. 6 at 14-15 and No. 7 at 50-51. Accordingly, one can already safely predict, before the Supreme Court is even in session, that the 1983-84 Term will be far more significant for libel law than have been the previous several Terms.

I. Certiorari granted -- Favorable Decision Below (2)

Bose Corporation v. Consumers Union of the United States, Inc., 692 F.2d 189, 8 Med.L.Rptr. 2391 (1st Cir. 1982), cert. granted, 51 U.S.L.W. 3774 (4/25/83, No. 82-1246). See LDRC Bulletin No. 6 at 8-17.

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, No. 82-485). See LDRC Bulletin No. 6 at 15.

II. Certiorari granted -- Unfavorable Decision Below (1)

Calder v. Jones, 138 Cal. App. 128, 187 Cal. Rptr. 825 (Ct.App. 2d Dist., Div. 1 1982), prob. juris. noted, 51 U.S.L.W. 3756 (4/18/83, No. 82-1401). See LDRC Bulletin No. 6 at 17.

III. Media Defendants -- Unfavorable Decisions Left Standing (11)

American Broadcasting Companies, Inc. v. Clark, 684 F.2d 1208, 8 Med. L.Rptr. 2049 (6th Cir. 1982), cert. denied, 51 U.S.L.W. 3685 (3/21/83, No. 82-1288). See LDRC Bulletin No. 7 at 53.

Associated Press v. Bufalino,, 692 F.2d 266, 8 Med.L.Rptr. 2384 (2d Cir. 1982), cert. denied, 51 U.S.L.W. 3872 (6/6/83, No. 82-1527). See LDRC Bulletin No. 7 at 53.

Forum International, Ltd. v. Cher, 692 F.2d 634, 8 Med. L.Rptr. 2484 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3883 (6/13/83, No. 82-1719). See LDRC Bulletin No. 7 at 53.

Hustler Magazine, Inc. v. Guccione, 7 Med.L.Rptr. 2077 (Ohio Ct.App. 1981), cert. denied, 51 U.S.L.W. 3254 (10/4/82, No. 81-2102). See LDRC Bulletin No. 5 at 7.

Mertz v. Denny, 8 Med.L.Rptr. 1369 (Wisc. 1982), cert. denied on grounds of non-finality, 51 U.S.L.W. 3258 (10/4/82, No. 81-2376). See LDRC Bulletin No. 5 at 7.

National Enquirer, Inc. v. Superior Court of California, Los Angeles County, ___Cal. Rptr.___, ___Med.L.Rptr.___(1983), cert. denied, 51 U.S.L.W. 3902, (6/20/83, No. 82-1770). See LDRC Bulletin No. 7 at 54.

Northern Publishing Co., Inc. v. Green, ___P.2___, 8 Med.L.Rptr. 2515 (Alaska 1982), cert. denied, 51 U.S.L.W. 3919 (6/27/83, No. 82-1797). See LDRC Bulletin No. 7 at 54.

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 (2/22/83, No. 82-994). See LDRC Bulletin No. 6 at 15.

Rothballer v. Wanless, unreported, Illinois App. Ct. 3d Dist., No. 57107, cert. denied, 51 U.S.L.W. 3611 (2/22/83, No. 82-1145). See LDRC Bulletin No. 6 at 15.

Sun Publishing Co., Inc. v. Jones, 292 S.E. 2d 23, 8 Med.L.Rptr. 1388 (S. Carolina 1982), cert. denied, 51 U.S.L.W. 3304 (10/18/82, No. 82-338). See 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). See LDRC Bulletin No. 6 at 16.

IV. Media Defendants -- Favorable Decisions Left Standing (13)

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, No. 82-828). See LDRC Bulletin No. 6 at 16.

Bloch v. Compton, (Unreported), cert denied, 51 U.S.L.W. 3419 (11/29/82, No. 82-604). See LDRC Bulletin No. 6 at 16.

Cher v. News Group Publications, Inc., 692 F.2d 634, 8 Med.L.Rptr. 2484 (9th Cir. 1982), cert. denied 51 U.S.L.W. 3883 (6/13/83, No. 82-1740). See LDRC Bulletin No. 7 at 54.

Cole v. Westinghouse Broadcasting Co., 8 Med.L.Rptr. 1828 (Mass. 1982), cert. denied, 51 U.S.L.W. 3419 (11/29/82, No. 82-499). See LDRC Bulletin No. 6 at 16.

Lampkin Asam v. Miami Daily News, 7 Med.L.Rptr. 2487 (Fla. Dist. Ct. App. 3d Dist. 1981), app. dism., cert. denied, 51 U.S.L.W. 3252 (10/4/82, No. 82-193). See LDRC Bulletin No. 5 at 7.

Lawrence v. Bauer Publishing & Printing Ltd., 9 Med.L. Rptr. 1536 (N.J. 1982), cert. denied 51 U.S.L.W. 3360 (11/8/82, No. 82-130). See LDRC Bulletin No. 5 at 8.

Maressa v. New Jersey Monthly, 8 N.J. 187, 445 A. 2d 276, 8 Med.L.Rptr. 1473 (N.J. 1982), cert. denied, 51 U.S.L.W. 3287 (10/6/82, No. 82-197). See LDRC Bulletin No. 5 at 8.

Miskovsky v. Oklahoma Publishing Co., 7 Med.L.Rptr. 2607 (Okla. 1982), cert. denied, 51 U.S.L.W. 3284 (10/6/82, No. 81-2407). See LDRC Bulletin No. 5 at 8.

Pring v. Penthouse International, Ltd., 695 F.2d 438, 8 Med. L.Rptr. 2409 (10th Cir. 1982), cert. denied, 51 U.S.L.W. 3902 (6/20/83, No. 82-1621) See LDRC Bulletin No. 7 at 55.

Rasky v. CBS, Inc., 7 Med.L.Rptr. 2305 (Ill. App. 1st. Div. 1981), cert. denied, 51 U.S.L.W. 3211 (10/4/82, No. 82-180). See LDRC Bulletin No. 5 at 8.

Resorts International, Inc. v. New Jersey Monthly, 89 N.J. 212, 8 Med.L.Rptr. 1487 (N.J. 1982), cert. denied, 51 U.S.L.W. 3287 (10/6/82, No. 82-205). See LDRC Bulletin No. 5 at 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, No. 82-1178). See LDRC Bulletin No. 6 at 17.

Stack v. Capital-Gazette Newspapers, Inc., 445 A.2d 1038, 8 Med.L.Rptr. 1704 (Md. Ct. App. 1982), cert. denied, 51 U.S.L.W. 3363 (11/8/82, No.82-384). See LDRC Bulletin No. 5 at 8.

V. Non-media Defendants -- Favorable Decisions Left Standing (9)

Butler v. Peabody Institute of the City of Baltimore, ___ Md. App. ___, ___ A.2d ___ (Ct. Spec. App. 1982), cert. denied, 51 U.S.L.W. 3789 (5/2/83, No. 82-1546). See LDRC Bulletin No. 7 at 55.

*Davis Co. v. United Furniture Workers of America, 674 F.2d 557 (6th Cir. 1982) (Sixth Circuit had held that Federal labor law, rather than state defamation law, governs defamation claims by employer against union and its president arising out of "special bulletin" published by the union regarding alleged cheating in connection with overtime pay dispute)

Kinsel v. Wolfe, ___ Wyo. ___ (Wyo. 1982), cert. denied, 51 U.S.L.W. 3339 (11/1/82, No., 81-2195). See LDRC Bulletin No. 5 at 9.

*Kondrat v. Martinet, unreported, (Ohio Ct. App. 11th Dist. 10/19/82), (Ohio Court of Appeal had held that use of municipal funds to defend libel suit against councilman was not improper)

Mazaleski v. May, ___ F.2d ___ (4th Cir.), cert. denied, 51 U.S.L.W. 3256 (10/4/82, No. 82-66). See LDRC Bulletin No. 5 at 9.

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, No. 82-656). See LDRC Bulletin No. 5 at 9.

Queen v. Tennessee Valley Authority, 689 F.2d 80 (6th Cir. 1982), cert. denied, 51 U.S.L.W. 3756 (4/18/83, No. 82-1148). See LDRC Bulletin No. 7 at 9.

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* case not previously listed or described in LDRC Bulletin.

Walters v. Tennessee Valley Authority, ___ F.2d ___ (6th Cir. 1982), cert. denied, 51 U.S.L.W. 3254 (10/4/82, No. 81-1976). See LDRC Bulletin No. 5 at 9.

Williams v. Pasma, 656 P.2d 219, 9 Med.L.Rptr. 1004 (Mont. 1982), cert. denied, 51 U.S.L.W. 3841 (5/23/83, No. 82-1640). See LDRC Bulletin No. 7 at 55-56.

VI. Non-media Defendants -- Unfavorable Decision Left Standing (1)

Vince v. DeJohn, (La. Ct. App., 1st Cir. 198_), unpublished decision, cert. denied, 51 U.S.L.W. 3789 (5/2/83, No. 82-1537). See LDRC Bulletin No. 7 at 56.

VII. Cases Filed But Not Yet Acted Upon (7)

Demos v. Commercial Union, ___F.2d___(7th Cir. 1983), cert. filed, 51 U.S.L.W. 3921 (6/28/83, No. 82-2703). See LDRC Bulletin No. 7 at 56.

Fisher v. Larson, 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (Ct. App. 4th Dist. 1982), cert. filed, 52 U.S.L.W. 3001 (6/22/83, No. 82-2130). See LDRC Bulletin No. 7 at 56.

Levine v. Silsdorf, ___A.D.2d___, 447 N.Y.S.2d 936, 9 Med.L.Rptr. 1815, (1st Dept. 1982), cert. filed, 52 U.S.L.W. 3005 (7/5/83, No. 82-2165). See LDRC Bulletin No. 7 at 57.

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, ___F.2d___(4th Cir. 1983), cert. filed, 52 U.S.L.W. 3005 (7/1/83, No. 82-2153). See LDRC Bulletin No. 7 at 57.

Larson v. Fisher, 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (Ct. App. 4th Dist. 1982), cert. filed 51 U.S.L.W. 3921 (6/28/83, No. 82-2082). See LDRC Bulletin No. 7 at 57.

Rhinehart v. Seattle Times, 98 Wash. 2d 226, 654 P.2d 673, 8 Med.L.Rptr. 2537 (1982), cert. filed, 51 U.S.L.W. 3807 (4/27/83, No. 82-1758). See LDRC Bulletin No. 7 at 57.

Seattle Times v. Rhinehart, 98 Wash. 2d 226, 654 P.2d 673, 8 Med.L.Rptr. 2537 (1982), cert. filed, 51 U.S.L.W. 3791 (4/22/83, No. 82-1721). See LDRC Bulletin No. 7 at 57.

RECENT BROADCASTER EXPERIENCE AT TRIAL AND ON APPEAL

In response to a news media inquiry, LDRC has had occasion to review its previously published data on trials and appeals in an effort to document the extent to which broadcasters in particular have been affected by recent trends. To put LDRC's findings in perspective earlier studies by Marc Franklin, covering the period 1976 - 1980, had documented a not entirely explicable total absence of successful libel actions against broadcasters (television and radio). Thus, in Franklin's media libel study, out of 291 cases, 44 or 16%, of which involved broadcasters, 0 ultimately resulted in a win for the plaintiff. 16 went to trial and 4 broadcasters apparently lost at trial, but all won on appeal. See Franklin, "Suing the Media for Libel: A Litigation Study," 1981 A.B.F.Res. J. 795, 810-11 and Table 14 (1981).

Franklin had no definitive explanation for this remarkable broadcaster success. He did suggest, however, that such success "might be due in part to the fact that broadcasters rarely report in great depth, are less likely to produce exposes, and are much less likely to use names and addresses of specific individuals than are newspapers, and, to a lesser extent, magazines." While Franklin conceded that programs like "60 Minutes" are targets for legal action, he did feel that the "print-broadcast difference" he had documented, although "not statistically significant" was "at least suggestive." (Id. at 811 n.38; see also Franklin, "Winners and Losers and Why: A Study of Defamation Litigation," 1980 A.B.F.Res. J. 455, 499 (1980).

A review of LDRC's trial and appeals data suggests that while broadcasters apparently continue to comprise only a modest percentage of total media libel litigants (at least among reported cases), in those cases where they are libel defendants they are now experiencing results far more closely paralleling their print media brethren. Thus of the 90 trials* that have

* LDRC Bulletin No. 4 (Part 1) -- 54 cases; Bulletin No. 5 -- 2 (new) cases; Bulletin No. 6 -- 20 (new) cases; Bulletin No. 7 -- 14 (new) cases.

been studied by LDRC, covering the period 1980 through mid-1983, 13, or 15%, involved broadcasters. (The 13 LDRC broadcast cases are charted below.) Of these, broadcasters lost 9 cases at trial and won 4. Of the 9 judgments, two are still apparently pending on appeal. Of the 7 appeals that were decided, 2 plaintiffs' verdicts were affirmed and a third case was affirmed as to liability, although the damage award was significantly reduced. The remaining 4 judgments were reversed.*

Although this LDRC data base of broadcaster experience is limited and should not be considered entirely complete,** there can be little doubt the available data demonstrates the obvious -- that broadcasters, like all other media entities, are at risk in libel actions. At trial broadcasters seem to be fairing somewhat better than average, with "only" a 69% loss ratio (compared to almost 90% overall). Post-trial and on appeal, at a 57% reversal rate, and a 71% reversal or modification rate, they are fairing perhaps slightly worse than average, thus far, in overturning or modifying judgments. Interestingly, the level of damage awards -- particularly if the Cramlet case, which did not technically involve editorial content, is excluded -- has remained relatively low in these cases despite the arguably pervasive and powerful reach and influence of the broadcast media. Only one of the awards (Cramlet) exceeded a million dollars. The remaining 8 awards ranged from $5500 to $675,000 with an average of $188,000. The three affirmed judgments, following overall trends, were at the lower end of the range -- $50,000; $65,000 and $175,000, or an average of $97,000.

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* Cert. was granted in one of these reversed cases, Wilson v. Scripps-Howard, but the case was settled before plaintiff's appeal was heard by the Supreme Court.

** LDRC's "damages watch" data is gathered through various means, including advance access to cases reported in Media Law Reporter, review of other published decisions, news clippings, trade publications and reports direct from media defense counsel. Nonetheless, trials particularly jury trials, do not always result in reported decisions. Also, trials involving smaller media organizations or modest damage awards do not always attract attention and may escape notice. LDRC continually seeks to improve its capacity to secure complete and accurate trial-related information and to update or correct its data where necessary. Readers are again urged to advise LDRC of all pertinent developments.

In sum, the brief period of broadcaster non-liability, if it ever meaningfully existed as suggested by Franklin, can no longer be seen as an ongoing phenomenon. In all likelihood, as Franklin conceded, the earlier data was probably as much a statistical oddity as a rational, explicable phenomenon. Thus, the all appeals have been exhausted. LDRC data can best be viewed not as defining a new trend, but merely as documenting the obvious fact that any "publisher" of news or information about living individuals in any medium, broadcast or print, is potentially subject to libel litigation and that although broadcasters, like other media defendants, will continue to win most of those cases, some will almost inevitably experience occasional adverse results at trial and even after all appeals have been exhausted.

Broadcast Case List

1. Boddie v. American Broadcasting Cos.,Inc., (N.D.Ohio,Eastern Div.-Civ.Action No.C80-675A) Not reported in Med.L.Rptr. (verdict for defendants)

2. Burns v. McGraw-Hill, 9 Med.L.Rptr. 1257(Colo. 1983), reversing, 6 Med.L.Rptr. 2415(Colo. Ct. App. 1980) ($175,000) (affirmed)

3. Cole v. Westinghouse Broadcasting Co.,Inc., 8 Med.L.Rptr. 1637(N.Y.App.Div.2d Dept.1981) ($100,000) (reversed)

4. Cramlet v. Multi-media Program Productions, Inc. unreported -- see "News Notes," 9 Med.L.Rptr. No. 17 (5/24/83) (D. Colo.) ($5.9 million) (appeal pending)

5. Embrey v. Holly, 8 Med.L.Rptr.1409 (Md.1982) ($65,000) (affirmed)

6. Fred Frederick Chrysler-Plymouth v. WJLA, Inc., unreported, (D.Md., Civil Action No. 481-3151) (verdict for defendant)

7. Galloway v. CBS, Inc., unreported (Cal. Super Ct., L.A. Co., No. C 345900) (verdict for defendants)

8. Hawkins v. Oden, ___ R.I. ___, ___ A.2d ___, 9 Med.L.Rptr. 1750 (1983) (directed verdict for defendants)

9. Health Unlimited, Inc. v. Loyola University, 9 Med.L.Rptr. 1511 (La. Ct. App. 5th Cir. 1983 (see LDRC Bulletin No. 4 (Part I) at 12) ($165,000) (reversed)

10. Himango v. Prime Time Broadcasting, not reported in Med.L.Rptr. (Snohomish Co., Washington No. 80-2-02782-2) ($250,000 reduced to $70,000 at trial) (appeal pending)

11. Lechtner v. Brownyard, 7 Med.L.Rptr. 2377 (W.D.Pa.1981), rvs'd, 8 Med. L. Rptr 1788 (3d Cir.1982) ($5500) (reversed)

12. Nevada Independent Broadcasting Corp. v. Allen ___ Nev. ___, ___P.2d ___, 9 Med.L.Rptr. 1769 (5/27/83) (see LDRC Bulletin No. 4 (Part I) at 15 ($675,000) (reduced to $50,000 on appeal) (affirmed)

13. Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 7 Med.L.Rptr 1169 (6th Cir.), cert.dismissed, 102 S.Ct. 984(1981) ($75,000 reduced to $30,000 at trial) (reversed but settled after grant of cert.)

NEWS BRIEFS

LDRC ANNUAL DINNER WILL BENEFIT JURY PROJECT

LDRC's annual Steering Committee business meeting and dinner, traditionally scheduled to coincide with the PLI Communications Law Seminar, will be open to the public this year for the first time. The $100 a plate dinner, to be held at the Waldorf-Astoria Hotel in mid-town Manhattan on Thursday evening November 17 beginning at 8:00 p.m., will kick-off LDRC's Jury Project (see below). A generous grant from CNA Insurance will enable LDRC to dedicate a larger share of ticket revenues to the Jury Project. Speakers, to be named shortly, are expected to include a prominent judge and a nationally-recognized journalist. The theme for the evening will be "Libel, Juries and the First Amendment" from the judicial and press points of view. It is hoped that, in addition to representatives of LDRC supporting organizations, many LDRC Bulletin readers, particularly those who are in New York for PLI, will plan to attend.

INVITATIONS AND PROGRAM DETAILS WILL BE SENT OUT SHORTLY. IN THE INTERIM, MARK YOUR CALENDARS AND ALERT YOUR COLLEAGUES TO THIS PROGRAM OF INTEREST.

LDRC JURY PROJECT

Background: Recent LDRC studies have documented the media's distressingly poor record in defending libel and privacy claims that are tried before juries. Three out of four pretrial motions for summary judgment are successful, as are as many as four out of five post-trial motions and/or appeals. However, in libel cases that are tried before juries, almost 90% result in judgments against the media defendant.

Purpose: To embark upon a comprehensive series of projects designed to study and understand jury behavior in libel cases and attempt to respond effectively to -- if not reverse -- these disturbing trends.

Methodology: With LDRC serving as the focal point, coordinator, catalyst and/or "contractor," to set in motion a series of related studies and activities all designed to deal with the problem of juries in libel litigation. These activities might include the collection and organization of a manual of jury instructions in libel actions; the drafting and testing of "model" jury instructions; a study of jury attitudes by means either of a national demographic survey of public attitudes toward defamation and the media, or of systematic interviews of actual jurors in previous libel trials, or both; the commissioning of a series of scholarly papers on historical, sociological and legal issues related to jury trials and jury behavior in libel actions; and the mounting of a major colloquium or seminar to discuss all of these issues and to review the findings of the LDRC Jury Project. Some aspects of the project could be done by LDRC alone alone; some might be done through cooperative undertakings with other media organizations or even law schools, journalism schools or universities.

Funding: Certain of the studies could be commissioned for LDRC; some research or activities might be stimulated by the LDRC Project and be done without charge or be funded by others, without the need to provide direct LDRC support or financing. Special grants might be sought through or independent of LDRC from foundations, universities or other donors. Some of the activities could be self-funding, in whole or in part through, for example, sale of resulting publications or fees from related seminars or colloquia.

Timing: The LDRC Jury Project should commence as soon as possible, with aspects of the project being completed within the next few months. Other aspects of the project can be expected to require additional time and effort. The LDRC Jury Project would therefore be considered an ongoing program, with the primary, or first, series of activities slated to be completed over a period of perhaps one year to eighteen months. Kick-off for the Jury Project will be at LDRC's annual dinner, November 17, 1983 (see above).

JURY ATTITUDES -
STANFORD STUDENT STUDIES
MCCOY v. HEARST JURY

Ellen Leslie Kaufman, now associated with Gibson, Dunn & Crutcher in Los Angeles, has provided LDRC with the results of a fascinating empirical study she undertook last year while a student at Stanford Law School. Ms. Kaufman, under the guidance of Professor Marc A. Franklin, interviewed jurors who had entered a verdict against the San Francisco Examiner and two of its investigative reporters in the case of McCoy v. The Hearst Corporation (See LDRC Bulletin No. 4 (Part 1) at 14.) In that case, the jury awarded compensatory and punitive damages totalling $4.56 million to the plaintiffs, two San Francisco policemen and a prosecutor. The plaintiffs were accused, in a series of articles, of having improperly procured the conviction of a Chinese youth for a Chinatown gangland murder. Ms. Kaufman was able to interview seven of the twelve jurors, including the jury foreman. (Unfortunately, all three dissenting jurors were unavailable to be interviewed.)

In an as yet unpublished paper Ms. Kaufman noted the following key findings:

1. Although there was a voir dire it was apparently not entirely effective in screening out all jurors with natural sympathies to law enforcement and with some animus toward the media. Indeed, in the Kaufman study one juror admitted to having always disliked the Examiner and felt it to be notoriously inaccurate and sensational. According to Kaufman, this juror claimed not to have been asked about these views, although the voir dire transcript reveals that the juror was questioned about any bias or prejudice toward the Examiner, but did not admit to it at the time.

2. The jurors interviewed all liked plaintiffs' attorney.

3. Conversely, none of the jurors liked the defense lawyers. In fact, they found one of the reporter's lawyers' argumentative, combative and unreasonable, with a "superior" and insolent attitude. Also, they were upset that the publisher's lawyer in their view did not attempt to defend or explain why an erroneous story was published, instead choosing to argue that any award of damages should be small.

4. The reporter-defendants made less of an impression on the jurors, although the position they took in defending their extensive investigative reporting apparently fell on unsympathetic ears. In fact, their testimony backfired, with the jurors concluding that if this was such an elaborate investigation by "top-notch" investigative reporter-defendants should have exercised even greater care and should have gotten the story right. Apparently the judge's charge on actual malice did not leave an impression either, since the jurors felt strongly that the defendants had a duty to report the truth. The jurors were also left with the impression that the reporters were out to "make" the story rather than determine its accuracy. All of the details of the elaborate investigation simply left the jurors wondering why more of an effort was not made to corroborate the particular allegations made against plaintiffs.

5. Plaintiffs also did not leave a strong impression on the jury, although there was apparently some sympathy by at least certain of the jurors for the plight of law enforcement officials dealing with the criminal element. All of the jurors were quite sympathetic, however, to plaintiffs' testimony regarding emotional trauma and reputational damage.

6. As noted, the jurors apparently did not accept or at least take to heart, the actual malice standard. Whether or not they consciously "nullified" the judge's charge in this regard, it is clear that years later their recollections and views of liability in the case leave little room for the actual malice defense. The jurors were "incensed" by the argument that the Examiner

had a right to publish stories that turned out to be false or that the stories that were published were the result of "good journalism." As summarized by Ms. Kaufman, "the jurors felt that the seriousness of the accusations and the potential damage to reputations required the defendants to be sure the story was true before printing it."

7. Relatedly, the jurors were impressed by the defendants' lack of remorse and self-righteous and non-apologetic attitude. They found the defense's "honest mistake" argument inconsistent with the fact that no retraction was published.

8. The jurors all agreed that the damages issues were the hardest to decide. Their calculations were "imprecise" but they nonetheless wished to fully compensate plaintiffs for the "emotional trauma" and "intangible loss to reputation" that "would follow plaintiffs for the rest of their lives." (The compensatory award was $3 million.) With regard to the punitive damage award ($1.56 million), the jurors wanted to punish the Examiner in part for its "unacceptable journalism" but perhaps even more for its continued remorselessness at the trial. Two of the three dissenters apparently disagreed with the damage award, feeling that it was simply too high.

It is believed that additional studies of this kind will be an indispensible element in seeking to improve media performance before juries in libel actions. To this end, it is expected that the methodology employed in the Kaufman Study can be used to advantage in developing additional jury attitude studies to be undertaken by, or in conjunction with, the LDRC Jury Project. Ms. Kaufman is to be commended for her groundbreaking work.

LDRC EXPERT WITNESS PROJECT

LDRC has previously reported on what appears to be a growing incidence of the use of "expert" witnesses in libel actions and at libel trials. See LDRC Bulletin No. 1 at 17-18; LDRC Bulletin No. 2 at 33. Since those publications LDRC has continued to receive information about expert witnesses, including transcripts of testimony, and motions and briefs arguing for or against the use, or limitation of, expert testimony for both libel plaintiffs and defendants. An awareness of previous favorable or unfavorable experience with such expert testimony could be invaluable in the preparation of the defense in media libel actions. For example,

knowledge of the strengths or weaknesses of prior testimony and the alleged credentials of a plaintiff's expert can be used to advantage in moving to exclude or limit such testimony or in attacking its strength or credibility in motions or on cross-examination. Conversely, an awareness of available defense experts and their areas of expertise, strengths and potential weakenesses can assist in the selection and preparation of such witnesses for the defense.

LDRC has been asked to expand its files and to serve as a clearinghouse for such information. Defense counsel who have used or faced expert witnesses in libel cases are urged to contact LDRC with such information. Defense counsel needing such information should also remember to check with LDRC as a part of their preparations in this area. **Information from LDRC's Expert Witness Project will be made available only to media defendants and their counsel by specific request.**

LIBEL RESEARCH PROJECT --
UNIVERSITY OF IOWA

A study of non-litigation ways to deal with libel complaints is underway at the University of Iowa. The study, financed by a grant from the John and Mary R. Markle Foundation of New York, is scheduled to take two years. The first year is being devoted to in-depth interviews with libel plaintiffs, primarily those whose cases have been finally adjudicated. The interviews are aimed chiefly at determining what plaintiffs wanted initially at the time of publication or broadcast and how they responded to the article or program, but the study is expected to yield a wealth of additional information about the characteristics, outlook and experiences of libel plaintiffs.

The interviews will form the basis for examining the feasibility of designing non-litigation forums for resolving libel disputes. Several forums are expected to be established on an experimental basis to demonstrate their utility in actual cases diverted from the courts.

Director of the study is Gilbert Cranberg, former editor of the editorial page of the Des Moines Register who is George Gallup Professor at the University of Iowa. An interdisciplinary committee from the College of Law and School of Journalism and Mass Communication advises and oversees the study. Inquiries can be directed to Libel Research Project, 205 Communications Center, University of Iowa, Iowa City, Ia. 52242. Phone (319) 353-5414.

LDRC/ANPA/NAB LIBEL DEFENSE WORKSHOP

The Libel Defense Workshop, co-sponsored with LDRC by ANPA and NAB, was held as scheduled in Chicago on August 25-26. The program was oversubscribed with more than 175 paid attendees and a total audience, including panelists and speakers, of over 200. All aspects of the program were greeted with apparent enthusiasm. Highlights included videotape presentations of portions of two libel trials (Burnett -- witness examination; Galloway -- summation) and the three featured mealtime speakers -- Judge Harold Tyler (Patterson, Belknap, Webb & Tyler - New York City); James Squires (Editor, Chicago Tribune) and James Brosnahan (Morrison & Foerster, San Francisco). Notes from these three talks are on file at LDRC. Certain statistics not generally available regarding jury results and damage awards in other types of civil litigation were provided by speaker Brosnahan and will be summarized in the Damages Watch section of a future LDRC Bulletin. All of the speakers and panelists are to be thanked and congratulated for their indispensible role in making the Workshop so useful to all concerned. Thanks must also go to the co-sponsoring organizations ANPA and NAB, for their generous support and the excellent work of their respective attorneys and staffs. Because of the overall success of the Chicago Workshop, because a number of registrants had to be turned away, and because many attendees indicated a desire to attend other similar workshops in the future, serious consideration will be given to an LDRC role in mounting future educational programs. Bulletin readers will be kept advised.

NEW LDRC PUBLICATIONS

(1) **LDRC 50-State Survey 1983: Current Developments in Media Libel and Invasion of Privacy Law** (publication date, November 15, 1983; $60.00 plus $2.00 postage and handling; 10% discount for standing orders; 20% discount for LDRC Steering Committee members, State Survey Preparers and for additional copies on the same order).

LDRC will publish a completely revised edition of its 50-State Survey on November 15. The 1982 edition has already been recognized as an indispensible addition to the basic legal works in the libel field. The 1983 revised edition is a completely updated and expanded version of the 1982 Survey. More than 800 pages in length (the 1982 edition was 650 pages), the 1983 volume

will include a Foreword on Canadian defamation law by Stuart M. Robertson, one of the leading media attorneys in Canada, former in-house counsel to the CBC and author of two leading texts on Canadian media law. Updated state survey reports, indexes and charts will highlight new developments for easy identification. New topics covered include: definitions of actual malice; printer, distributer and bookseller liability; special rules for motions to dismiss; more detailed coverage of discovery; pleading; burden of proof; jury instructions; appellate review standards; invasion of privacy; related tort claims; survivability and descendability of libel and privacy claims; libel insurance and bibliographies of relevant books and articles on state libel law and practice.

Readers of the LDRC Bulletin and purchasers of last year's Survey will be receiving ordering information for the 1983 50-State Survey in the very near future. **To assure fastest possible delivery, order your 1983 survey promptly.**

(2) **LDRC Litigation Formbook, 1983**

In connection with the recent LDRC/ANPA/NAB Libel Defense Workshop in Chicago, LDRC prepared a 914-page set of Workshop materials. This "LDRC Litigation Formbook" is comprised mainly of pre-existing litigation forms and related litigation materials organized by legal topic and/or phase of the litigation. The Formbook will be repackaged in a somewhat revised version for sale to persons unable to attend the Workshop. The revised 1983 Formbook will include materials covering topics such as pre-publication review, procedures and guidelines; claims, retractions and corrections; libel insurance; settlements; complaints, answers, affirmative defenses, counterclaims and counteractions; motions; discovery; interrogatories; document requests, requests for admissions; protective orders; motions in limine; evidentiary problems; trial briefs; witness outlines; expert witnesses; jury selection and instructions, verdict forms; opening and closing statements; post-trial motions and appellate practice. Other LDRC Formbooks with new and pertinent materials may be published periodically if sufficient interest is evidenced. Details regarding purchase of the 1983 Formbook will be distributed in the near future with invoices and order forms for the 1983 50-State Survey.

LDRC DAMAGES WATCH, 9/1/83

Because of the continuing interest in data gathered by the Damages Watch project, a new compilation of Damages Watch reports was published by LDRC on September 1. The new publication, excerpted from LDRC Bulletins No. 4 through No. 8, describes the results of LDRC's efforts to monitor libel and privacy awards against media defendants entered or appealed from during the period 1980 through July, 1983. It is believed the 90 separate cases listed, when combined with data previously gathered by Professor Marc Franklin of the Stanford Law School covering 37 cases during the period 1976 through 1980 (See Bulletin No. 4 at 2-6), present as complete a picture of recent damage awards and appeals from such awards in libel and privacy trials as is currently available. Updated LDRC Damages Watch compilations will be published periodically until a completely new consolidated damages study and analysis is prepared and published.