LDRC Libel Defense Resource Center

BULLETIN

1994 Issue No. 3
July 31, 1994
ISSN 0737-8130

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I. Supreme Court Report*

1993 Term: Summary of Libel, Privacy and Related Media Actions By the Court

This update contains a summary of the Supreme Court's actions in libel, editorial privacy, and related cases during the 1993 Term and covers all actions on petitions filed between the beginning of July 1993 and the end of June 1994, as recorded in 62 U.S.L.W., issues 1-49. Of the 18 petitions for *certiorari* filed and acted upon, 7 involved media defendants and 11 involved non-media defendants. One additional petition, filed in May 1994 and involving non-media parties, has not yet been acted upon.

MEDIA DEFENDANTS -- UNFAVORABLE DECISIONS LEFT STANDING (2)

Globe International Publishing Inc. v. Peoples Bank & Trust Company of Mountain Home, 978 F.2d 1065, 20 Med. L. Rptr. 1925 (8th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3287 (10/18/93, No. 93-172). The Eighth Circuit had held that the First Amendment had not been violated by a $1.5 million damage award for false light invasion of privacy against a tabloid newspaper that published photographs of an elderly woman (from Arkansas) to illustrate a fictionalized story about an Australian woman who quit her paper route at age 101 because an extramarital affair with a client on her route had left her pregnant. The newspaper advertised itself as a publication of "the weird, the strange and the outlandish news from around the globe" but failed to include an express disclaimer. Questions presented by the petition were: (1) Do the damage awards in this case violate the First and Fourteenth Amendments because they were imposed to punish an unpopular defendant for publishing materials that the jury and reviewing courts deemed to be distasteful and offensive? (2) Do the First and Fourteenth Amendments permit recovery of damages by an individual whose likeness is used to illustrate a fictional article manifestly not of and concerning the plaintiff? (3) Do the First and Fourteenth Amendments require independent review of damage awards imposed on publishers in civil cases to punish speech?

El Vocero de Puerto Rico v. Rodriguez, 22 Med. L. Rptr. 1495 (PR, 1993), *cert. denied*, 62 U.S.L.W. 3860 (6/27/94, No. 93-1813). The Puerto Rico Supreme Court had held that the doctrine "of and concerning the plaintiff" does not, under Puerto Rico law, bar damage claims by relatives of the person defamed and other third parties for damages suffered by reason of the alleged defamation, provided that the allegedly defamed individual is personally identified in the publication by statements which are demonstrably false, that the plaintiff suffered actual damages

*LDRC gratefully acknowledges the invaluable assistance of its three summer interns in the researching and preparation of this BULLETIN -- Robin Adelson, Esq. (member of New York and Ontario bars; LL.M. 1994, NYU, who will be joining DCS member Cowan, Liebowitz & Latman as an associate in September); Charles Glasser (NYU, class of 1996); and Kate Tapley (Columbia, class of 1996).

as a result of the statements, and, if the individual is a public figure or official, that the test for "actual malice" has been met. Questions presented by the petition were: (1) Does the First Amendment requirement that the publication, to be actionable, must be "of and concerning the plaintiff," allow the relatives of a public official named in a publication and other third parties to recover damages against the newspaper notwithstanding the trial court's finding of fact that such relatives or third parties are not referred to or mentioned in the publication? (2) Does the decision of the Puerto Rico Supreme Court permitting such parties to recover damages deprive the petitioner and other local and national newspapers and media of First Amendment protections?

MEDIA DEFENDANTS -- FAVORABLE DECISIONS LEFT STANDING (5)

Bakin v. Cox Enterprises Inc., 426 S.E.2d 651, 206 Ga. App. 813 (Ga. C.A., 1993), *cert. denied*, 62 U.S.L.W. 3249 (10/04/93, No. 93-195). The Georgia Court of Appeals had reversed the trial court's denial of the newspaper's motion for summary judgment in view of the fact that none of the articles published by the defendant's newspaper concerning a stab victim who bled to death in a hospital were defamatory with regard to the emergency room physician who treated the victim. Most of the articles did not refer to the physician. Those that did clearly stated that the victim died on the operating table during surgery rather than in the emergency room and that such surgery occurred after an unexplained lengthy delay. Moreover, what was written about the physician in question was true. Questions presented by the petition were: (1) Is the independent appellate review doctrine defined in *Bose Corp. v. Consumers Union of the United States Inc.* applicable to the *plaintiff* in a libel case in which First Amendment rights are asserted? (2) Did the Georgia Court of Appeals err in reversing the denial of summary judgment to the respondents on the facts established in this case?

Schwartz v. Worrall Publications Inc., 258 N.J. Super. 493, 610 A.2d 425, 20 Med. L. Rptr. 1661 (N.J. Super. Ct. App. Div., 1993), *cert. denied*, 62 U.S.L.W. 3551 (02/22/94, No. 93-1053). The Appellate Division of the New Jersey Superior Court had granted defendant summary judgment. The plaintiff had claimed that the allegedly defamatory publication of a newspaper story falsely charging plaintiff with being the target of a state investigation tortiously interfered with plaintiff's economic advantage. Questions presented by the petition were: (1) Is the New Jersey Appellate Division's decision in conflict with *New York Times v. Sullivan*, to the extent that "reckless disregard" is eliminated as a method of establishing actual malice? (2) What weight should be given to unreasonable delay in retracting a false and defamatory publication when evaluating proof of actual malice on summary judgment? (3) Was the petitioner Schwartz improperly found to be a public figure, based upon information unrelated to his involvement in the controversy that allegedly gave rise to the defamation?

Anonsen v. Donahue, 857 S.W.2d 700 (Texas C.A. 1st Dist., 1993), *cert. denied*, 62 U.S.L.W. 3792 (05/31/94, No. 93-1585). The Texas Court of Appeals had affirmed summary judgment in favor of the defendant in a privacy claim, holding that the First Amendment protects a person's right to tell her story on a nationally syndicated television talk-show, undisguised, even though intimate facts about other family members may be revealed. The question presented

by the plaintiff's petition was whether the First Amendment can confer absolute protection from civil liability as a matter of law for both the disclosure and the broadcast of painful, intimate information when that information was not publicly available or a matter of public record, the victim was not a public figure, the private discloser had pledged confidentiality and the information was acquired by the broadcaster without the victim's consent?

Brewer v. Rogers, 213 Ga. App. 343, 439 S.E.2d 77, 22 Med. L. Rptr. 1180 (Ga. C.A., 1993), *cert. denied*, 62 U.S.L.W. 3842 (06/20/94, No. 93-1858). The Georgia Court of Appeals had held that a high school football coach, a limited purpose public figure, could not recover for defamation in his suit against a television station which had reported on an investigation into alleged grade changes for one of his players and noted the coach's prior arrest for gambling, because of the absence of actual malice, which was also held to have prevented recovery for false light invasion of privacy. Questions presented by the petition were: (1) Has the existing constitutional malice standard for "reckless disregard" become an impossible standard to meet, given that the media has no liability for failing to investigate and will therefore, as a practical matter, never investigate, even with the intent and knowledge that the broadcast would destroy a career due to allegations of criminal conduct and moral turpitude, leaving the plaintiff with no remedy at law? (2) What is the distinction between public figure and limited purpose public figure when a local winning high school football coach is thrust into controversy, and what standard of malice should be applied in determining whether defendants acted with reckless disregard in publishing a defamatory telecast based only on 15-year-old sources? (3) Did the lower court err in failing to apply the "reckless disregard" standard set forth in *Barber v. Perdue*, *Curtis Publishing Co. v. Butts*, *Harte-Hanks Communications Inc. v. Connaughton*, and *Masson v. New Yorker Magazine*, to the facts in this situation? (4) Did defendants violate the plaintiff's right to privacy in telecasting court records that defendants knew had been sealed by order of the court fifteen years prior to the telecast, specifically by the use of said records to depict the plaintiff in a false light?

Meisler v. Gannett Co., 12 F.3d 1026, 22 Med. L. Rptr. 1214 (11th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3842 (06/20/94, No. 93-1859). The Eleventh Circuit had held that the evidence as presented by the limited purpose public figure plaintiff was not sufficiently "clear and convincing" to support a claim that the defendant's newspaper's erroneous report, naming plaintiff as among those ordered by the Wisconsin Racing Board to give up ownership in a greyhound park, was prompted by actual malice, because there was no evidence that the reporter knew of the subsequent wire service report clarifying the original report upon which the article was based or that the subsequent report had been ignored in "reckless disregard" for the truth or falsity of the information at issue. Questions presented by the petition were: (1) Should the actual malice rule of *New York Times v. Sullivan* be overruled or limited? (2) Does the decision of the Eleventh Circuit fail to follow the guidelines set forth in *Harte-Hanks v. Connaughton*?

NON-MEDIA DEFENDANTS -- UNFAVORABLE DECISIONS LEFT STANDING (1)

Snead v. Redland Aggregates Ltd., 998 F.2d 1325, 21 Med. L. Rptr. 1865 (5th Cir. 1993), dismissed pursuant to Rule 46, 62 U.S.L.W. 3724 (04/22/94, No. 93-1016). The Fifth

Circuit had concluded that the First Amendment imposed no minimum standard of fault in the libel action because the plaintiff corporations were held not to be "public figures" and the press release in question, concerning international theft with respect to the development of technology, did not constitute speech involving matters of public concern. Questions presented by the petition were: (1) Does the Fifth Circuit's holding that the press release is not "of interest to the general public" and therefore warrants no protection under the First Amendment conflict with the holdings in *Gertz* and *Dun & Bradstreet*? (2) Has the Fifth Circuit properly applied *Gertz* and *Dun & Bradstreet* in holding that the Supreme Court intended to "deconstitutionalize" libel law and leave states free to apply their common law of libel without restriction by the First Amendment whenever the court decides that the speech at issue is "of interest only to a particular industry"? (3) Does the Fifth Circuit's holding improperly require judges to make ad hoc subjective value judgments whether speech is sufficiently of interest to the public to warrant constitutional protection? (4) Is the standard for determining whether and when speech concerning private individuals is protected by the First Amendment an undecided and important question of federal constitutional law, particularly in light of a lack of a majority opinion in *Rosenbloom v. Metromedia* and *Dun & Bradstreet* and in light of subsequent changes in the membership of the Supreme Court since those decisions were rendered?

NON-MEDIA DEFENDANTS -- FAVORABLE DECISIONS LEFT STANDING (10)

Bougere v. Ferrara, cited below as *Dugas v. Harahan*, 978 F.2d 193 (5th Cir. 1992), *cert. denied*, 62 U.S.L.W. 3244 (10/04/93, No. 92-1743). The Fifth Circuit had concluded that comments by the defendant mayor on a questionnaire submitted to the city and in an interview by an investigator from the Florida board of bar examiners concerning the character and fitness of the plaintiff (a former mayor) to practice law were absolutely privileged. The questions presented by the plaintiff's petition involved whether a state executive official could claim any immunity for malicious slander whether committed outside or within the course and scope of his or her duty?

Edwards v. Arlington Hospital Association, unpublished (Va. Cir. Ct., Arlington Cty., 07/09/92), *cert. denied*, 62 U.S.L.W.3248 (10/04/93, No. 93-79). The Virginia Circuit Court had granted to defendants judgment n.o.v., concluding that statements in a notice in the hospital communications book for nurses, which were defamatory per se with respect to the plaintiff nurse, could not be objectively characterized as true or false and were thus nonactionable opinion. Questions presented by the petition were: (1) Did the statements made about the petitioner constitute protected opinion under the First Amendment or actionable defamation under the test enunciated by the U.S. Supreme Court in abolishing the separate opinion doctrine? (2) Was the state court decision based upon adequate, independent state grounds or did the state court rest its decision primarily on federal law so as to permit U.S. Supreme Court review?

Church of Scientology Int'l v. Daniels, 992 F.2d 1329, 21 Med. L. Rptr. 1426 (4th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3249 (10/04/93, No. 93-206). The Fourth Circuit had concluded that defendant's statements about the plaintiff were not made with actual malice in light of the speaker's having based his remarks on two judicial opinions and numerous published

articles. Questions presented by the petition were: (1) Are the First Amendment concerns recognized by *New York Times v. Sullivan* and its progeny applicable to a false and defamatory publication made by a declarant who has purposely avoided the truth in his investigation of the subject of the publication? (2) When a libel defendant has engaged in purposeful avoidance of the truth, does the reckless disregard prong of *Sullivan* require direct proof that the libel defendant acted with a high degree of awareness of probable falsity or may such awareness be inferred from purposeful avoidance of the truth as per *Masson v. New Yorker Magazine Inc.*? (3) Given that the actual malice test is subjective in nature, may the examination of the actual malice issue properly be restricted to an analysis of the reasonableness of the libel defendant's interpretation of the event and exclude any examination of the libel defendant's knowledge of falsity and ill will? (4) May evidence that is analyzed cumulatively support a finding of actual malice as defined in *Sullivan* when no single piece of evidence taken in isolation is sufficient to support a finding of actual malice?

Geske & Sons Inc. v. International Union of Operating Engineers, Local 150, unpublished (Ill. App. Ct. 2d Dist., 02/29/92), *cert. denied*, 62 U.S.L.W. 3375 (11/29/93, No. 93-528). The Illinois Appeals Court had upheld the determination of the trial court that "on strike" signs were not libelous since, under Illinois law, alleged defamation of a corporate plaintiff must assail the corporation's financial position or business methods or accuse it of fraud or mismanagement. Questions presented by the petition were: (1) Does federal law require Illinois courts to follow the *Linn v. Plant Guard Workers* defamation standard that protects speeches uttered during the course of "labor disputes"? (2) Does the *Linn* single standard of proof for libelous statements for labor disputes tolerate and not preempt continuing state use of per se libel law standards that act to deprive a party of the right to protect its reputation and business when libeled during the course of a labor dispute?

Kelly v. Ober, unpublished (Pa. Super. Ct., 06/18/92), *cert. denied*, 62 U.S.L.W. 3393 (12/06/93, No. 93-749). The Pennsylvania Superior Court, holding that the judicial pleading privilege does not violate the U.S. or Pennsylvania constitutions, had concluded that statements in a complaint were protected by absolute immunity. Questions presented by the petition were: (1) Does absolute judicial pleading privilege with respect to defamation of character violate the equal protection and due process provisions of the U.S. Constitution? (2) Will the Supreme Court recognize that one's reputation is one of a person's most important property rights, entitled to equal protection and due process? (3) Is justice served by allowing plaintiff's attorneys absolute privilege in their actions in civil proceedings?

Stockstill v. Shell Oil Co., 3 F.3d 868 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3623 (03/21/94, No. 93-1324). The Fifth Circuit had concluded that Louisiana's qualified privilege for statements made in good faith and pertaining to a matter of interest to the defendant, applies to allegedly defamatory statements made by a former co-worker to the EEOC in response to the employee's charge of age discrimination against the employer. The question presented by the plaintiff's petition was whether the qualified privilege extends to the employing entity and its other agents when they had relied upon a file put together in a manner showing careless disregard for the truth of the matter being disclosed?

Asam v. Harwood, unpublished (Ala., 10/08/93), *cert. denied*, 62 U.S.L.W. 3722 (05/02/94, No. 93-1480). The Alabama Supreme Court had affirmed, without opinion, the district court's grant of summary judgment for the defendant based on grounds that included lack of state action or deprivation of any protected interest and lack of evidence to support allegations in the § 42 USC 1983 action alleging unfair campaign practices and libel. The question presented by the plaintiff's petition was whether the candidate for judgeship libeled his opponent and violated her civil rights when he asserted in an advertisement that he was the "only" qualified candidate for the office?

Wheeler v. Nebraska State Bar Association, 244 Neb. 786, 508 N.W.2d 917 (Neb. 1993), *cert. denied*, 62 U.S.L.W. 3754 (05/16/94, No. 93-1499). The Nebraska Supreme Court had affirmed the lower court's dismissal of a former judge's claim that he suffered damage to his reputation, was defeated for reelection and prevented from gaining further employment as a result of the bar association's release of its survey in which members rated judges, upholding that the survey was based on subjective expression of opinion which cannot form the basis for a defamation action. The question presented by the petition was whether plaintiff had stated a cause of action for defamation, or for depravation of plaintiff's right to due process, or for deprivation of the constitutional right to a fair trial before a fair and impartial tribunal, or for an injunction against the bar association's future use of judicial performance evaluations?

Lamb v. Union Carbide Corp., unpublished (4th Cir., 12/08/93), *cert. denied*, 62 U.S.L.W. 3773 (05/23/94, No. 93-1557). The Fourth Circuit had dismissed the appeal from the district court's dismissal of a complaint alleging tortious interference with contract, libel and slander on the ground that the appeal lacked merit. Questions presented by the petition included: (1) When the defendant's employee denied that he said anything, when that fact was opposed by a third party recipient, may a subsequent claim of qualified privilege defeat petitioner's Seventh Amendment right to a jury trial on issues of malice, excess of privilege, and credibility? (2) When a published article contained material that was libelous toward persons who were terminated, and when that article was posted on the bulletin board of the floor where the petitioner, the only person there who had been terminated, had worked, may petitioner's right to a jury trial be violated by finding that the article did not refer to him?

De Maio v. Brown, unpublished (Md. Cir. Ct., Baltimore Cty., 08/10/92), *cert. denied*, 62 U.S.L.W. 3792 (05/31/94, No. 93-1196). The Maryland Circuit Court had granted summary judgment to the defendants who were sued for allegedly making false and malicious statements under oath with the express intent of injuring the plaintiff's reputation. Questions presented by the petition were: (1) Is it a denial of due process to deny a federal employee who is a Maryland resident the right to file a complaint of defamation in state court against residents of and organizations authorized to do business in Maryland? (2) Do respondents' acts of "calumny" constitute actual malice within the purview of *New York Times v. Sullivan*?

NON-MEDIA DEFENDANTS -- PETITIONS FILED BUT NOT YET ACTED UPON (1)

Breedlove v. Philips, unpublished (Va. Cir. Ct., Fairfax Cty, 1993), *cert. filed*, 62

U.S.L.W. 6827 (05/26/94, No. 93-1910). The Virginia Circuit Court of Fairfax County had sustained a demurrer to counts alleging defamation of title stemming from the filing of a mechanics' lien and denied the motion for sanctions, without prejudice. The court had also granted a protective order and the court had not required defendants to respond to discovery until further order of the court or until the parties are at issue, whichever comes first. Questions presented by the petition included whether Virginia judicial procedure for redress of libelous mechanics' liens is repugnant to the Fourteenth Amendment's Due Process and Equal Protection Clauses?

Analysis of Supreme Court Petitions for Certiorari -- 1985 to 1993 Terms: Key Findings and Statistical Tables

In his *Foreword* to the 1985-86 LDRC 50-STATE SURVEY, Professor Marc A. Franklin examined what he labeled the "quiet side" of Supreme Court practice, namely certiorari petitions before the Court.[1] Professor Franklin's article analyzed data from the 1980 through 1984 Supreme Court Terms, in which 127 paid certiorari petitions were filed in defamation cases and 10 were granted (7.8%). In our current report, relying on prior LDRC listings of certiorari petitions,[2] we bring Professor Franklin's data up to date for the 201 paid petitions filed from the 1985 through the 1993 Term.

THE FRANKLIN REPORT

Professor Franklin's key findings for the 1980 through 1984 Supreme Court Terms may be summarized as follows:

1. There were a higher percentage of grants in media than in nonmedia cases -- 8.7% versus 5.7%, with an average grant for all petitions in defamation cases of 7.8%.

2. In nonmedia cases, losing plaintiffs not only filed the great majority of petitions for certiorari (27 of 35, or 77.1%) but were also far less successful than were losing defendants in obtaining review (0 of 27 plaintiff petitions, versus 2 of 8 defendant petitions, were granted).

3. In media cases, defendants were slightly, but not significantly, more successful than plaintiffs in obtaining review (4 of 38, or 10.5%, versus 4 of 49, or 8.1%).

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[1] *See* Marc A. Franklin, *Five Years of Libel Cases at the Supreme Court Door*, in 1985-86 LDRC 50-STATE SURVEY, at xiv.

[2] *See* LDRC BULLETINS 1992-93, No. 2; No. 22 (Summer 1988); No. 20 (Summer 1987); No. 18 (Fall 1986); No. 17 (Spring 1986); No. 16 (Winter 1986); No. 15 (Fall 1985).

4. The Court was more likely to review cases coming from federal than from state courts (6 of 48, or 12.5%, in federal cases versus 4 of 79, or 5.1%, in state cases).

5. Perhaps counterintuitively, a higher percentage of grants were obtained from nonfinal judgments (5 of 36, or 13.8%) than final judgments (or 3 of 56, 5.4%).

THE CURRENT STUDY

1. In the 1985 through 1993 Terms there was a far greater disparity between grants in media and nonmedia cases than in the period studied by Professor Franklin -- petitions were granted in 8.4% of cases involving the media in the more recent period, versus only 1.4% of nonmedia cases (Table 1; the comparable figures were 8.7% and 5.7%, respectively, in the Franklin period).

2. Petitions filed by defendants were more than three times as likely to be granted in media cases than in nonmedia cases -- 12.8% versus 3.8% (Table 2).

3. In media cases, petitions filed by defendants were also more likely to be granted than were petitions filed by plaintiffs -- 12.8% versus 6.5% (Table 2).

4. There were also marked differences between plaintiffs' and defendants' petitions with respect both to frequency and success rate, with plaintiffs filing more than twice as many petitions but obtaining certiorari at less than half the rate of defendants (Table 2). Thus, during 1985-1993 plaintiffs filed 136 petitions for certiorari while defendants filed 65 petitions. Plaintiffs obtained review in only 4.4% of their cases (6 of 136) while defendants obtained review in 9.2% of their cases (6 of 65).

5. When full opinions were issued in libel/privacy cases, the Supreme Court reversed in 77.8% of the cases (7 of 9) heard during the study period. In Professor Franklin's study, only 16.7% (1 of 6) of the cases in which an opinion was issued were reversed. (This is in contrast to Supreme Court reversal rates ranging between 58% and 67% in all cases. According to the HARVARD LAW REVIEW, reversal rates for all full opinions issued in the 1990, 1991, and 1992 Terms were 62.7%, 62.0%, and 52.8%, respectively.)

6. Similar to the results of the Franklin study (see point 5 in the opening section above), the Court was more likely to review petitions from federal courts than from state courts, with 7.8% of all filings from federal courts accepted versus a grant rate of only 4.8% from state courts (Table 3).

7. In the current period, the finality of the judgment being appealed from had virtually no impact on the Court's likelihood of granting certiorari, with grants

obtained in 6.0% of cases that presented final judgments for review and a 5.6% grant rate as to nonfinal judgments (Table 3).

8. The legal issues that were most frequently presented for review during the study period were "actual malice" (53 petitions), "opinion" (35), "plaintiff status" (i.e., definition of public figure or official or private figure) (30), (common law) privilege (26), and "privacy" (22). Among these issues, certiorari was most likely to be granted in suits involving opinion (8.6%) and actual malice (7.5%). By contrast, in suits presenting issues of common law privilege and privacy, no petitions were granted (Table 4).

9. In terms of the likelihood of petitions being granted, according to the HARVARD LAW REVIEW, the percentage of petitions granted in *all* paid cases filed in the 1990, 1991, and 1992 Terms was 5.7%, 5.0%, and 4.0%, respectively.[3] Thus grants for media petitions have run slightly ahead of grants for all paid cases while grants for nonmedia petitions have run significantly behind. This is perhaps not surprising, as media petitions still potentially raise issues of constitutional dimension in an area of law created by the Court whereas nonmedia cases generally have not been perceived as raising issues on the constitutional track.

10. In light of the small number of libel/privacy petitions filed and granted, and the pronounced swings from Term to Term (e.g., of the nine Terms examined, four Terms had no grants while in the other five Terms the grant rate averaged 13.5%; see Table 1), it is difficult to draw broad conclusions from the data as to future Court actions on petitions for certiorari. Nevertheless, the last three Terms running have had no grants, and two of the cases decided in the 1990 Term were granted certiorari during the 1989 Term,[4] which reflects perhaps a lesser inclination to further refine constitutional doctrine, possibly coupled with the general trend toward fewer grants of certiorari overall.

[3]Comparable figures for the decade of the 1980s are not available. The percentages reported by the HARVARD LAW REVIEW for this period had been incorrectly computed (they double counted plenary decisions along with their petitions when a petition was not decided in the Term in which it was granted, and thus overstated the percentage of grants by an unknown factor each Term during that decade).

[4]In the accompanying tables, plenary decisions are counted in the Term of the decision and not the Term of their grant.

TABLE 1
CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES: 1985-93 TERMS

Term	Media Cases			Nonmedia Cases			All Cases		
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	3[a]	16	15.8%	0	0	----	3	16	15.8%
1986	0	21	0.0%	0	3	0.0%	0	24	0.0%
1987	1[b]	11	8.3%	0	11	0.0%	1	22	4.3%
1988	2[c]	22	8.3%	0	13	0.0%	2	35	5.4%
1989	2[d]	10	16.7%	0	9	0.0%	2	19	9.5%
1990	3[e]	11	21.4%	1[f]	5	16.7%	4	16	20.0%
1991	0	11	0.0%	0	11	0.0%	0	22	0.0%
1992	0	11	0.0%	0	6	0.0%	0	17	0.0%
1993	0	7	0.0%	0	11	0.0%	0	18	0.0%
TOTAL	11	120	8.4%	1	69	1.4%	12	189	6.0%

[a]Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Schiavone Construction Co. v. Time Inc., 477 U.S. 21 (1986).
[b]Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[c]Florida Star v. B.J.F., 491 U.S. 524 (1989); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).
[d]Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Immuno A.G. v. Moor-Jankowski, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760).
[e]Cohen v. Cowles Media, 111 S.Ct. 2513 (1991); Jones v. American Broadcasting Companies, Inc., 59 U.S.L.W. 275 (10/9/90, No. 89-1952); Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991).
[f]International Society for Krishna Consciousness v. George, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399).

TABLE 2
CERTIORARI PETITIONS IN LIBEL/PRIVACY CASES BY PETITIONER

Petition Filed by Defendants

Term	Media Action			Nonmedia Action			Total Defendants' Petitions		
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	2[a]	4	33.3%	0	0	-----	2	4	33.3%
1986	0	6	0.0%	0	2	0.0%	0	8	0.0%
1987	1[b]	6	14.3%	0	6	0.0%	1	12	7.7%
1988	2[c]	8	20.0%	0	4	0.0%	2	12	14.3%
1989	0	2	0.0%	0	3	0.0%	0	5	0.0%
1990	0	2	0.0%	1[d]	2	33.3%	1	4	20.0%
1991	0	2	0.0%	0	5	0.0%	0	7	0.0%
1992	0	2	0.0%	0	2	0.0%	0	4	0.0%
1993	0	2	0.0%	0	1	0.0%	0	3	0.0%
TOTAL	5	34	12.8%	1	25	3.8%	6	59	9.2%

Petition Filed by Plaintiffs

Term	Media Action			Nonmedia Action			Total Plaintiffs' Petitions		
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	1[e]	12	7.7%	0	0	-----	1	12	7.7%
1986	0	15	0.0%	0	1	0.0%	0	16	0.0%
1987	0	5	0.0%	0	5	0.0%	0	10	0.0%
1988	0	14	0.0%	0	9	0.0%	0	23	0.0%
1989	2[f]	8	20.0%	0	6	0.0%	2	14	12.5%
1990	3[g]	9	25.0%	0	3	0.0%	3	12	20.0%
1991	0	9	0.0%	0	6	0.0%	0	15	0.0%
1992	0	9	0.0%	0	4	0.0%	0	13	0.0%
1993	0	5	0.0%	0	10	0.0%	0	15	0.0%
TOTAL	6	86	6.5%	0	44	0.0%	6	130	4.4%

TABLE 2
CERTIORARI PETITIONS IN LIBEL/PRIVACY CASES BY PETITIONER

All Petitions

Term	Media Action			Nonmedia Action			Total All Petitions		
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	3	16	15.8%	0	0	-----	3	16	15.8%
1986	0	21	0.0%	0	3	0.0%	0	24	0.0%
1987	1	11	8.3%	0	11	0.0%	1	22	4.3%
1988	2	22	8.3%	0	13	0.0%	2	35	5.4%
1989	2	10	16.7%	0	9	0.0%	2	19	9.5%
1990	3	11	21.4%	1	5	16.7%	4	16	20.0%
1991	0	11	0.0%	0	11	0.0%	0	22	0.0%
1992	0	11	0.0%	0	6	0.0%	0	17	0.0%
1993	0	7	0.0%	0	11	0.0%	0	18	0.0%
TOTAL	11	120	8.4%	1	69	1.4%	12	189	6.0%

[a]Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).
[b]Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[c]Florida Star v. B.J.F., 491 U.S. 524 (1989); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).
[d]International Society for Krishna Consciousness v. George, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399).
[e]Schiavone Construction Co. v. Time Inc., 477 U.S. 21 (1986).
[f]Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Immuno A.G. v. Moor-Jankowski, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760).
[g]Cohen v. Cowles Media, 111 S.Ct. 2513 (1991); Jones v. American Broadcasting Companies, Inc., 59 U.S.L.W. 275 (10/9/90, No. 89-1952); Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991).

TABLE 3
CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT

Final Judgments

Term	Federal Courts			State Courts			All Cases		
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	1[a]	9	10.0%	1[b]	4	20.0%	2	13	13.3%
1986	0	8	0.0%	0	15	0.0%	0	23	0.0%
1987	1[c]	9	10.0%	0	11	0.0%	1	20	4.8%
1988	1[d]	15	6.3%	1[e]	18	5.3%	2	33	5.7%
1989	0	7	0.0%	2[f]	12	14.3%	2	19	9.5%
1990	2[g]	4	33.3%	2[h]	10	16.7%	4	14	22.2%
1991	0	6	0.0%	0	10	0.0%	0	16	0.0%
1992	0	4	0.0%	0	12	0.0%	0	16	0.0%
1993	0	6	0.0%	0	12	0.0%	0	18	0.0%
TOTAL	5	68	6.8%	6	104	5.5%	11	172	6.0%

Nonfinal Judgments

Term	Federal Courts			State Courts					
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	1[i]	0	100.0%	0	3	0.0%	1	3	25.0%
1986	0	1	0.0%	0	0	----	0	1	0.0%
1987	0	0	----	0	2	0.0%	0	2	0.0%
1988	0	0	----	0	2	0.0%	0	2	0.0%
1989	0	0	----	0	0	----	0	0	----
1990	0	0	----	0	2	0.0%	0	2	0.0%
1991	0	2	0.0%	0	4	0.0%	0	6	0.0%
1992	0	0	----	0	1	0.0%	0	1	0.0%
1993	0	0	----	0	0	----	0	0	----
TOTAL	1	3	25.0%	0	14	0.0%	1	17	5.6%

TABLE 3
CERTIORARI GRANTS IN LIBEL/PRIVACY CASES BY COURT SYSTEM AND FINALITY OF JUDGMENT

All Judgments

Term	Federal Courts			State Courts			All Cases		
	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted	Grants	Denials	Percent Granted
1985	2	9	18.2%	1	7	12.5%	3	16	15.8%
1986	0	9	0.0%	0	15	0.0%	0	24	0.0%
1987	1	9	10.0%	0	13	0.0%	1	22	4.3%
1988	1	15	6.3%	1	20	4.8%	2	35	5.4%
1989	0	7	0.0%	2	12	14.3%	2	19	9.5%
1990	2	4	33.3%	2	12	14.3%	4	16	20.0%
1991	0	8	0.0%	0	14	0.0%	0	22	0.0%
1992	0	4	0.0%	0	13	0.0%	0	17	0.0%
1993	0	6	0.0%	0	12	0.0%	0	18	0.0%
TOTAL	6	71	7.8%	6	118	4.8%	12	189	6.0%

[a]Schiavone Construction Co. v. Time Inc., 477 U.S. 21 (1986).
[b]Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).
[c]Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[d]Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).
[e]Florida Star v. B.J.F., 491 U.S. 524 (1989).
[f]Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Immuno A.G. v. Moor-Jankowski, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760).
[g]Jones v. American Broadcasting Companies, Inc., 59 U.S.L.W. 275 (10/9/90, No. 89-1952); Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991).
[h]Cohen v. Cowles Media, 111 S.Ct. 2513 (1991); International Society for Krishna Consciousness v. George, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399).
[i]Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

TABLE 4
CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES BY ISSUE: 1985-93 TERMS

Issue	Grants	Denials	Percent Granted
Actual malice	4[a]	49	7.5%
Attorneys' fees	0	2	0.0%
Breach of contract	1[b]	0	100.0%
Commercial appropriation	0	1	0.0%
Commercial speech	0	2	0.0%
Damages	1[c]	15	6.3%
Defamatory meaning	0	1	0.0%
Discovery refusal	0	1	0.0%
Due process/equal protection	0	4	0.0%
Employment	0	6	0.0%
Emotional distress/outrage	1[d]	1	50.0%
Falsity	1[e]	10	9.1%
Gross irresponsibility	0	4	0.0%
Hyperbole	0	4	0.0%
Independent appellate review	1[f]	11	8.3%
Implication/innuendo	0	2	0.0%
Intentional interference	0	1	0.0%
Incremental harm	1[g]	0	100.0%
Jurisdiction	0	1	0.0%
Jury instructions	0	4	0.0%
Labor/preemption	0	6	0.0%
Of/concerning	0	4	0.0%
Opinion	3[h]	32	8.6%
Plaintiff status	0	30	0.0%
Privacy	1[i]	21	4.5%
Privilege (common law)	0	26	0.0%
Procedure	1[j]	2	33.3%

TABLE 4
CERTIORARI GRANTS AND DENIALS IN LIBEL/PRIVACY CASES BY ISSUE: 1985-93 TERMS

Public interest	0	10	0.0%
Publication/republication	0	3	0.0%
Section 1983	0	4	0.0%
Shield law	0	1	0.0%
Slander of title	0	1	0.0%
Substantial truth	1[k]	5	16.7%
Summary judgment	1[l]	7	12.5%
TOTAL	17	271	5.9%

[a]Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991).
[b]Cohen v. Cowles Media, 111 S.Ct. 2513 (1991)
[c]International Society for Krishna Consciousness v. George, 59 U.S.L.W. 3635 (3/18/91, No. 89-1399).
[d]Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[e]Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986).
[f]Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989).
[g]Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991).
[h]Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); Immuno A.G. v. Moor-Jankowski, 58 U.S.L.W. 3834 (6/28/90, No. 89-1760); Jones v. American Broadcasting Companies, Inc., 59 U.S.L.W. 275 (10/9/90, No. 89-1952);
[i]Florida Star v. B.J.F., 491 U.S. 524 (1989).
[j]Schiavone Construction Co. v. Time Inc., 477 U.S. 21 (1986).
[k]Masson v. New Yorker Magazine, 111 S.Ct. 2419 (1991).
[l]Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

Judge Breyer as Replacement for Justice Blackmun: Evaluating Their Respective Libel, Privacy, and Related Media Opinions

Although confident predictions of this kind are never possible, in order to assess the potential impact on media libel/privacy law of Justice Harry Blackmun's replacement by Judge Stephen Breyer, LDRC has undertaken to review Justice Blackmun's legacy in key areas of concern and to compare them to the record of Judge Breyer on similar issues. A consideration of media libel and related privacy cases decided during his tenure on the bench suggests that Justice Blackmun, while not an extraordinarily vocal advocate of First Amendment rights as they relate to these issues, was nonetheless a reasonably consistent supporter, one who -- more often than not -- joined the "correct" side of the Court's decisions from the media's point of view. Justice Blackmun served on the Court over a 24-year period of great significance in the development of the Court's approach to libel and related issues in the aftermath of *New York Times v. Sullivan*. In contrast, during Judge Breyer's shorter tenure on the First Circuit, he was called upon to decide only a relatively small number of cases in this area -- cases which, in all but a handful of instances, merely required him to apply settled law established by the Supreme Court.

Media-Related Libel Cases

After joining unanimous or near unanimous opinions in the trilogy of cases consisting of *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), *Ocala Star Banner v. Damron*, 401 U.S. 295 (1971), and *Time Inc. v. Pape*, 401 U.S. 279 (1971), in which the Court applied the *New York Times* "actual malice" standard to public figure plaintiffs, Justice Blackmun's first real occasion to set forth his views on still open issues in the law of libel was *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). In *Rosenbloom*, Justice Blackmun joined Justice Brennan's plurality opinion which held that the *New York Times* standard of "actual malice" should be applied to publications about *all* public issues and events, irrespective of the public or private status of the plaintiff.

In 1974, Justice Blackmun seemed to reverse himself by joining in the 5-4 majority opinion of Justice Powell in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), defining the applicable standard of fault based on the libel plaintiff's public or private figure status. Interestingly, Justice Powell fashioned his approach around the principles contained in a dissenting opinion in *Rosenbloom* written by Justice Harlan. Accepting the argument specifically rejected by Justice Brennan (and also Justice Blackmun) in *Rosenbloom*, Justice Powell concluded that only public figures and public officials need to be treated specially under the Constitution based on the premise that they likely have greater access to means of communication to rebut false charges. He noted further that those who seek public official status assume the risk of closer public scrutiny and, moreover, that public figures generally assume roles of significance in society. By contrast, Justice Powell reasoned that private figures who lack media access and do not submit themselves to public scrutiny should be governed by a lesser standard. Justice Blackmun filed a separate concurring opinion in *Gertz*, clearly in an

effort to account for his change of position from *Rosenbloom*. Blackmun explained that he had joined the Court's opinion in the interest of assuring a majority in the case and of thereby ending the "unsureness engendered by *Rosenbloom's* diversity." While acknowledging that Justice Powell's *Gertz* opinion seemed somewhat illogical to him, he asserted his belief in the importance of establishing a definitive rule to govern future cases and settle this area of the law. Justice Blackmun said he was also reassured that by removing the specter of presumed and punitive damages, the Court had sufficiently protected against self-censorship.

Reversing himself by joining the *Gertz* 5-4 majority was one of the few times during his tenure that Justice Blackmun demonstrated inconsistency in the positions adopted with respect to media-related libel cases during his tenure on the Court. Indeed, following *Gertz*, Justice Blackmun displayed a notable consistency in adhering to the centrist position he had staked out in *Gertz*, nearly always siding with the majority in subsequent libel cases and generally adhering to a position intended to solidify the *Gertz* majority opinion and its implications.[1]

However, there were a few notable instances in which Justice Blackmun took a more expansive, or at least more idiosyncratic, approach on specific issues of concern to libel defendants. For example, Justice Blackmun joined Justice Brennan's dissenting opinion in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985). Ironically, it was the 3-2-4 plurality opinion written by Justice Powell in *Dun & Bradstreet* which seemed to be inconsistent with Justice Powell's prior position in *Gertz*, rejecting application of the *Gertz* standard based on *Rosenbloom*'s supposedly discredited dichotomy between issues of public or private concern. Justice Brennan, joined by Justice Blackmun, demonstrated solid allegiance to *New York Times v. Sullivan* and refused to cut away the protective mantle of *Gertz*. While this was not considered a media case, it is interesting to note that the Brennan dissent also criticized the suggestion of a media-nonmedia distinction which seemed to be suggested by the Court, noting that the protection of the First Amendment should not depend upon the identity of the speaker. The Brennan dissent also criticized the constricting of speech about commercial matters, the latter being an issue of great interest to Justice Blackmun.[2] In sum, *Dun & Bradstreet* was another linedrawing case in which Justice Blackmun again showed his inclination toward an expansive application of constitutional doctrine that had initially surfaced in *Rosenbloom*. Curiously, Blackmun, having suppressed his expansive instincts in the name of doctrinal

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[1]*See* Time v. Firestone, 429 U.S. 448 (1976); Herbert v. Lando, 441 U.S. 153 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Bose Corporation v. Consumers Union, 466 U.S. 485 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler, 465 U.S. 770 (1984); Seattle Times v. Rhinehart, 467 U.S. 20 (1984); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986); Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989); Milkovich v. Lorain Journal, 497 U.S. 1 (1990); Masson v. New Yorker Magazine, 18 Med. L. Rptr. 2241 (1991). In each of these cases Justice Blackmun joined in the opinion of the Court, but did not author the Court's opinion. Of these cases, in only *Hepps* and *Connaughton* did he join in or record separate views in concurring opinions -- *see infra*.

[2]See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), where Justice Blackmun wrote the landmark decision according a degree of First Amendment protections to commercial speech.

solidarity in *Gertz* and later cases, was, in *Dun & Bradstreet*, able to claim the high ground of consistency to the principles of *Gertz* that Justice Powell had eschewed.

Justice Blackmun's general agreement with the majority view in post-*Gertz* cases was, however, supplemented by the separate concurring opinions he filed in a number of instances. In *Wolston v. Reader's Digest*, 443 U.S. 157 (1979), Justice Rehnquist wrote the majority opinion and Justice Blackmun filed a concurring opinion in which Justice Marshall joined. The case concerned a plaintiff whose status (public or private) the Court was deciding on the basis that he had pleaded guilty to criminal contempt for failure to respond to a subpoena sixteen years earlier. The Court concluded that the plaintiff was not a public figure and that the *New York Times* standard of actual malice would, therefore, not apply. Justice Blackmun agreed with the majority that the plaintiff was not a public figure for the purpose of the case at hand but he would have reached this conclusion based on a lag of time rather than the characterization of the plaintiff's initial status. Indeed, Justice Blackmun appeared prepared to assume, arguendo, that the plaintiff may have been a public figure at the time of the original events. However, Blackmun concluded that any public figure status had been dissipated after sixteen years. In sum, Justice Blackmun's opinion is notable for its refusal to join in the restrictive definition of "public figure" adopted by the majority.

In 1986, Justice Blackmun continued his role as a member of closely divided majority opinions in the Court's pivotal libel cases. In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), he joined both Justice O'Connor's 5-4 majority opinion and Justice Brennan's concurring opinion. It was wholly consistent with Justice Blackmun's prior positions to extrapolate from *Sullivan* and *Gertz* a rule that even private figures must bear the burden of proving falsity in defamation actions. Justice Blackmun also reaffirmed the position first evidenced in *Dun & Bradstreet* by joining Justice Brennan's concurring opinion reiterating disagreement with any suggestion of a media-nonmedia distinction.

Three years later, while Justice Blackmun joined the majority opinion in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989), he also filed a separate concurring opinion suggesting a rather different approach to the issues that case had presented. The majority holding sustained a public figure's libel judgment against a newspaper where the defendant had published a report on a candidate for public office in the face of denials as to its truth by six witnesses to the event, without interviewing a seventh key witness, without listening to what the majority considered crucial audiotapes, and in light of testimony that "may have given the jury the impression that the failure to conduct a complete investigation involved a deliberate effort to avoid the truth," *id.* at 684-85). In his concurrence, Justice Blackmun noted what he considered the "odd posture" of the case, in that the petitioner had abandoned the defenses of truth and neutral reportage, defenses which Justice Blackmun apparently believed had merit on the facts of the case. Moreover, Justice Blackmun noted the importance of the form and manner of the communication in assessing the issue of actual malice. Finally, he reaffirmed his agreement with the painstaking "independent" appellate review of the record by the Court, consistent with *Bose Corporation*, *supra*.

In sum, while not extraordinarily vocal, Justice Blackmun nonetheless had a significant impact on media-related libel law, particularly in view of the fact that his votes gave the Court a majority or plurality on several critical occasions. In *Gertz*, as noted above, and in *Philadelphia Newspapers v. Hepps*, Justice Blackmun ensured that 5-4 majority opinions were possible. In *Time v. Firestone* and *Bose Corporation*, two 5-1-3 decisions, Justice Blackmun's position again helped create important majorities.

The sole media libel opinion authored by Justice Blackmun was *Schiavone v. Fortune*, 477 U.S. 21 (1986), holding that an amendment substituting the name of the publisher for its publication after the limitations period had expired would not relate back and dismissing the case. It is a curiosity that both Justice Blackmun and Judge Breyer wrote only a single libel opinion for their respective courts and that neither of these opinions was decided on substantive grounds. *Schiavone* was decided in 1986 on the basis of limitations of actions and *Keeton v. Hustler*, 682 F.2d 33 (1st Cir. 1982), discussed below, was decided two years later by Judge Breyer on the basis of a jurisdictional question.

Judge Breyer, in contrast to Justice Blackmun, has not had the opportunity to participate in the resolution of many media-related libel cases and has never been in a position to authoritatively create new law in this area. Interestingly, Judge Breyer's only written libel opinion, in the *Keeton* case, was ultimately reversed by the Supreme Court. In *Keeton*, a New York resident attempted to sue the nationally distributed *Hustler* magazine for libel in New Hampshire. Circulation in New Hampshire amounted to less than one percent of *Hustler's* total distribution but New Hampshire had the only libel statute of limitations in the nation that, at six years, had not yet run. Plaintiff claimed that, because she was associated with other magazines which were also circulated in New Hampshire, both she and *Hustler* had sufficient contacts to give the state jurisdiction over her suit. Judge Breyer authored the unanimous First Circuit opinion, ruling that the small amount of New Hampshire activity involved in the case was not sufficient to justify a "multistate" defamation suit there. The Supreme Court, by an 8-1 majority which included Justice Blackmun, subsequently reversed this decision, holding that the publication had sufficiently substantial circulation in New Hampshire, some of the plaintiff's harm was suffered there, and the state had an interest in redressing such injury and assuring the truthfulness of publications there.

Apart from his written opinion in *Keeton*, Judge Breyer participated in a total of four media libel cases, in each joining the opinion of the court.

In 1983, Judge Breyer joined a panel decision written by Judge Coffin in *Geiger v. Dell Publishing*, 719 F.2d 515 (1st Cir. 1983), holding that a book publisher is a "media defendant" in a libel case. The court found in favor of the defendant book publisher, holding that an essay by Federico Fellini about the beginnings of the neo-realist film movement was a matter of public concern under New York law and that plaintiff had failed to demonstrate "gross irresponsibility" under the New York private figure standard.

Judge Breyer, in 1987, joined a unanimous opinion, also written by Judge Coffin, in a

product disparagement case, *Flotech Inc. v. du Pont de Nemours & Co.*, 814 F.2d 775 (1st Cir. 1987). The case found in favor of the libel defendant, du Pont, which had issued a press release announcing it would no longer supply Teflon to companies for use in the particular motor oil additives manufactured by plaintiff because "these resins are not useful in such products." The case was decided on the basis of "business interest" and "public protection" privileges and failure on the part of the plaintiff to prove actual malice.

In *Hugel v. McNell*, 886 F.2d 1 (1st Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990), a panel that included Judge Breyer affirmed a default judgment entered against the McNells, the defendant business associates of the plaintiff who had gone into hiding, thereby evading service of a complaint, after providing information about allegedly illegal securities transactions to *The Washington Post*. The court held that the McNells should have foreseen that their allegations would have an impact upon Hugel's reputation in New Hampshire, and that therefore New Hampshire had jurisdiction over them. The court also held that service upon the defendants had been adequate.

In *Phantom Touring Inc. v. Affiliated Publications*, 953 F.2d 724 (1st Cir.), *cert. denied*, 112 S.Ct. 2942 (1992), Judge Breyer again joined a panel opinion by Judge Coffin, holding that a series of opinionated articles about a musical version of "Phantom of the Opera" were nonactionable, despite the Supreme Court's then-recent decision in *Milkovich* that rejected the application of a wholesale exemption from defamation actions for expressions of "opinion." *Phantom Touring* concluded, however, that the Supreme Court had not disavowed the importance of *context* in determining whether the publication in question could reasonably be perceived as stating facts about the plaintiff. Most recently, the D.C. Circuit, in *Moldea v. New York Times Company*, relied upon *Phantom Touring* in reversing its prior holding that *Milkovich* had entirely eliminated consideration of context.

While the selection of cases noted above is too small to permit one to draw any significant conclusions, it is interesting to note that in all but *Hugel v. McNell*, Judge Breyer and the First Circuit decided in favor of the media libel defendant.[3]

MEDIA-RELATED PRIVACY (AND RELATED) CASES

Justice Blackmun's record with respect to media-related privacy cases reflects the same consistency noted above with respect to libel. Again, his views in non-libel cases were typically

[3]In the few non-media cases in which Judge Breyer participated, the court found in favor of libel defendants in *Aponte v. Puerto Rico Marine Management Inc. II*, 1993 U.S. App. LEXIS 4873 (1st Cir. 1993); *Barss v. Tosches*, 785 F.2d 20 (1st Cir. 1986); and *Jimenez-Nieves v. United States*, 682 F.2d 1 (1st Cir. 1982). The court ruled in favor of libel plaintiffs in *Emery-Waterhouse Co. v. Rhode Island Hospital Trust National Bank*, 757 F.2d 399 (1st Cir. 1985); *Laureano-Agosto v. Garcia-Caraballo*, 731 F.2d 101 (1st Cir. 1984); and *Stepanischen v. Merchants Dispatch Transportation Corp.*, 722 F.2d 922 (1st Cir. 1983).

not separately stated and he generally joined the Court's opinion in those cases.[4]

In both *Zacchini v. Scripps-Howard* and *The Florida Star v. B.J.F.*, Justice Blackmun's vote helped create a majority. Only in *Zacchini* was Justice Blackmun's position adverse to the interests of the media on these issues.

In only one pertinent non-libel case, *Cohen v. Cowles Media*, 111 S.Ct. 2513 (1991), did Justice Blackmun dissent. In *Cohen*, Justice White's majority opinion upheld the propriety of imposing liability on a media defendant, in the face of a claim of constitutional immunity, by a source who, having been promised confidentiality, was identified in a news article. The Court held that the First Amendment does not override ordinary tort or breach of contract principles imposed on a newsgatherer. Justice Blackmun wrote a dissent which was joined by Justices Marshall and Souter. He also joined the dissent written by Justice Souter. In his dissenting opinion, Justice Blackmun argued that, as in *Hustler v. Falwell*, a case he considered directly on point, "the law may not be enforced to punish the expression of truthful information or opinion."

Judge Breyer's record in non-libel privacy and related cases is quite limited. He joined the panel opinions in the two cases touching upon privacy issues on which he sat during his tenure on the First Circuit.

Gashai v. Leibowitz, 703 F.2d 10 (1st Cir. 1983), involved a federal civil rights action against a professional disciplinary board which the physician-plaintiff claimed had failed to follow its own procedural rules, thereby adversely affecting the plaintiff's reputation and ability to practice medicine. The trial court, noting that the federal civil rights law has no statute of limitations, analogized the situation to a defamation action and applied Maine's two-year statute of limitations for defamation actions. The complaint, as a result, was dismissed as out of time. The First Circuit affirmed the trial court's order, rejecting argument that false light invasion of privacy was more analogous to his claim than defamation. Maine's statutes of limitations were enacted before the state's highest court recognized false light. As such, the panel expressed its doubt that the state would impose a different statute of limitations for false light than for defamation.

In *Bratt v. IBM Corporation*, 785 F.2d 352 (1st Cir. 1986), the panel ruled that dissemination to other management employees of the fact that the plaintiff employee used the grievance procedure was not an intrusion upon privacy but that disclosure of his medical condition to management staff without his permission by an independent physician under contract to IBM might give rise to an invasion of privacy claim. The case was therefore remanded to

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[4]See *Cantrell v. Forest City Publishing*, 419 U.S. 245 (1974); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Zacchini v. Scripps-Howard*, 433 U.S. 562 (1977); *Smith v. Daily Mail Publishing*, 443 U.S. 97 (1979); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *The Florida Star v. B.J.F.*, 16 Med. L. Rptr. 1801 (1989). In each of these cases Justice Blackmun joined in the opinion of the Court, but did not author any of the opinions.

the trial court.

CONCLUSION

Ultimately, the problem encountered in attempting to predict the effect of substituting Judge Breyer for Justice Blackmun is essentially that we know so little about Judge Breyer's views on these issues. While Justice Blackmun did not write extensively in this area, the complete body of his views expressed and positions recorded over more than two decades leaves us with a reasonably comprehensive picture of where he stood on First Amendment issues affecting the media. One cannot necessarily predict exactly how Justice Blackmun would come out in the application of the various doctrines in any particular case. Nor could one be absolutely certain how he would decide new issues which came along, particularly as he was generally consistent but was never doctrinaire with regard to media-related issues.

With respect to Judge Breyer, there is no obvious reason to believe that he is inclined to depart from the major libel and privacy doctrines established during Justice Blackmun's tenure on the Court. Indeed, he has occasionally been farsighted in the application of existing doctrine (as in the *Phantom Touring* opinion which he joined) and in at least one case he would have gone further in advancing the media's interests than the Supreme Court was inclined to go (in the *Keeton* case). But beyond that only sketchy outline, Breyer is a relatively blank slate -- at least from what we actually know based on his First Circuit decisions.

II. Practitioners' Roundtable: Damages

LDRC Overview on Damages: The Issues Are Pivotal, but Remain Intractable, Thirty Years After *Sullivan*

EMPIRICAL TRENDS

The Libel Defense Resource Center may be best known, to the world at large, as the herald of troubling tidings regarding the incidence and proliferation of "mega-damage" awards in media defamation litigation. The most recent of LDRC's empirical damages studies was released in January 1994, when the LDRC BULLETIN reported that damages awarded in libel cases against media defendants during 1992-93 had actually dropped rather dramatically from the horrendous figures LDRC had previously reported for 1990-91 and were lower than they had been at any point during the previous five years.[1] The LDRC BULLETIN also reported that the percentage of cases media defendants won in 1992-93 was significantly higher than the percentage of media defendant wins in the previous few years.[2] However, as that same *Bulletin* made clear, the recent ameliorating turn by no means represented a solution to the endemic problem of mega-damage awards in libel actions, nor an assurance that the immediate trend toward lower and fewer awards necessarily suggested the likelihood of a longer-term solution to the problem of excessive damages in defamation actions.

In assessing the current state of libel damages as of the summer of 1994, for the purposes of this practitioner's guide to the subject, it is noteworthy that, subsequent to LDRC's recent report, a parallel downturn in damage awards generally was reported in the June 17, 1994, *New York Times*, based on data developed by an independent monitoring organization, Jury Verdict Research (JVR).[3] According to JVR, the mean and median jury award in all *personal injury* cases has decreased since the late 1980s.[4] The probability of plaintiff recovery of a damage

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[1]*See* Trial Results, Damage Awards, and Appeals, 1992-93, LDRC BULLETIN 1994, No. 1 [hereinafter LDRC Damages Survey]. The actual figures were an average award of $1,061,136 (median $159,000), down from $8,283,305 (median $1,500,000) in 1990-91 and $1,467,525 (median $200,000) for the decade 1980-89. *Id.* at 8 (Table II-A-1).

[2]Defendants won 45.5% of cases tried by a jury in 1992-93, versus 25.8% in 1990-91 and 26.3% in the 1980s. *Id.* at 5 (Table I-A).

[3]*Id.* at A2, col. 2, reporting on *Current Award Trends in Personal Injury*, JURY VERDICT RESEARCH SERIES, 1994 edition.

[4]The average and median awards for all personal injury verdicts dropped from $516,203 and $70,000, respectively, in 1989 to $497,723 and $60,000, respectively, in 1992. *Id.* at 4.

award in all such cases has also dropped to its lowest level since 1961.[5]

A comparison of LDRC's latest damages findings with the very recent JVR data underlines the disturbing problems faced by media defamation defendants. For example, whereas the percentage of million-dollar awards found by JVR remained constant, at between 11% and 12% of all personal injury awards since 1989,[6] such mega-verdicts were entered in fully 52% of the defamation cases documented in LDRC's 1990-91, 18.2% of the defamation verdicts in 1992-93, and 41% of the defamation cases in the 1990s (versus 23% of the defamation cases in the 1980s).[7] *Thus, even though LDRC's most recent data showed a drop in the percentage of mega-verdicts in defamation cases, this drop still left defamation defendants at a level significantly higher than that most recently reported for all personal injury verdicts.*

Similarly, where JVR reported a probability of a verdict being entered in favor of the personal injury plaintiff that for thirty years had ranged between 57% and 63% but fell to 52% in 1992,[8] LDRC's studies have reported probabilities of damage verdicts relatively constant from 1980 to 1991 (73.7% during the 1980s and 74.2% in 1990-91), falling to "only" 54.5% in 1992-93. *Thus, although the likelihood of a damage award being entered against a defamation defendant declined more steeply than the likelihood of a damage award being entered against a personal injury defendant in the most recent two-year period, the overall percentage of damage awards in media defamation cases has again remained consistently higher than for all personal injury cases.*

In sum, although aspects of the empirical trends in damage awards, as between media defamation damages on the one hand, and personal injury actions on the other, are running on a parallel track, the media's experience in libel cases is if anything worse than the general experience of all personal injury defendants.

LEGAL ISSUES

Apart from the empirical trends that LDRC has systematically monitored, libel damages also present a series of legal issues unique to centuries of defamation law, with the additional complication of a set of First Amendment constraints of uncertain scope and definition relatively recently superimposed upon the general availability of damages in the field. In order to understand the unique legal issues that have been confronted in defamation cases and to place those issues into the practical perspective essential to deal with them, it is necessary briefly to

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[5]Between 1961 and 1991, the plaintiff's recovery probability ranged between 57% and 63%; in 1992, however, the recovery probability dropped to 52%. *Id.* at 65.

[6]*Id.* at 3.

[7]*See* LDRC Damages Survey, *supra*, note 1, at 8 (Table II-A-1).

[8]*See supra*, note 5.

rehearse some background regarding libel damages under the common law and the more recent limitations on such damages suggested under the constitutional law of defamation.

In introducing the intractable theoretical and practical problems associated with many of these damages issues we can begin with no better warning than that suggested by authors Bob Sack and Sandy Baron:

> Damages issues in tort law provide knotty problems. In the law of defamation, the knots are Gordian.[9]

Untying the Gordian knot of libel damages should have begun with *New York Times v. Sullivan*, since the Supreme Court's landmark ruling in that case was centrally motivated by a concern that unrestrained damages imposed by hostile juries against unpopular defendants could chill -- and might ultimately destroy -- the exercise of robust freedom of expression. However, *Sullivan* focused almost exclusively on substantive standards, leaving damages issues for another day. And the implicit promise of *Sullivan* -- to constrain runaway damages -- has over the ensuing three decades not been realized. The Supreme Court, for its part, has handed down only a handful of cases even touching upon the question of libel damages.

SUPREME COURT DEVELOPMENTS

Since *Times v. Sullivan*, the Supreme Court has recognized the potential chilling effect of large damage awards on the exercise of rights protected under the First Amendment. However, in the 10 years between the decisions in *Sullivan* and *Gertz*, the Court did not have occasion even to differentiate among the various categories of damages recognized in defamation actions at common law -- broadly divided into the dual realms of compensatory damages and punitive damages, but with numerous subdivisions of the compensatory component (e.g., nominal, special, and general damages -- presumed or actual). In these early defamation decisions, the issue before the Supreme Court was whether the First Amendment operated as a complete bar to *any* recovery, absent a showing of "actual malice," and not whether particular categories of damages should be approved, limited, or abolished altogether.

Thus, in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the Court extended the actual malice bar from public-official to public-figure plaintiffs, and in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), a plurality of the Court would have required proof of actual malice in all cases involving speech of public concern, regardless of the status of the plaintiff. In neither case, however, did the Court suggest a need for different treatment of the varying components of the damage awards therein under review. Indeed, in *Curtis*, the Court considered but rejected the argument "that an award of punitive damages cannot be justified constitutionally by the same degree of misconduct required to support a compensatory award." 388 U.S. at 160.

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[9]*See* ROBERT D. SACK AND SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 481 (2d ed. 1994) [hereinafter SACK-BARON].

Nevertheless, the Court cautioned that its holding was "subject of course to the limitation that such award is not demonstrated to be founded on the mere prejudice of the jury," *id.* at 161, and Justice Harlan also appeared to assume that state courts would additionally require common law malice as a prerequisite to any award of punitive damages. *Id.* at 160.[10]

Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), was the first decision in which the Court examined -- if only perfunctorily -- the various components of the damages available in common law defamation actions. This was necessitated by the Court's retreat from the plurality's conclusion in *Rosenbloom* that so long as the challenged speech was on a matter of public concern, even private-figure plaintiffs would be required to establish actual malice in order to recover any damages. Thus, although *Gertz* held that there was no constitutional bar to a private-figure plaintiff recovering on a less demanding standard than actual malice, provided some level of fault was demonstrated, the Court moderated its holding by confining such recovery to compensation for "actual injury." 418 U.S. at 349. Although declining to define the term "actual injury," the Court for better or worse made clear that this category of damages was not to be narrowly confined solely to provable "out-of-pocket" economic loss, but could be extended to "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."

Although the precise dimensions of actual injury were neither articulated as clearly nor drawn nearly as narrowly as defendants might have wished in *Gertz*, the Court squarely recognized the dangers of permitting juries to award damages not grounded in actual injury. Thus the Court went on to caution that "juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury." *Id.* at 350. Indeed, in the absence of such limitations, the Court noted that "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349.

Beyond compensation for provable actual injury, the *Gertz* Court also recognized that the old common law doctrine of presumed damages, unique to defamation and available as a means of compensating plaintiffs in cases where actual damage would be difficult to prove, must be stringently confined. The Court therefore limited recovery of presumed damages by private as well as public figures to instances in which the plaintiff was able to demonstrate actual malice -- the same standard it held must apply to the award of punitive damages. As the Court recognized, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349.

[10]Indeed, subsequently in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 251-52 (1974), the Court recognized a clear distinction between the common law malice required to uphold an award of punitive damages and the concept of constitutional actual malice relevant to liability under *New York Times v. Sullivan*.

Unfortunately, this eloquent call to limit unsubstantiated damages in the name of free expression was undermined by other, less theoretical language in *Gertz*. Thus, the Court's express recognition that actual injury included recovery for such intangible interests as "reputation" or "mental anguish or suffering," *id.* at 350, and its holding that "an actual dollar value [need not be assigned]] to the injury," *id.* at 350, ensured that juries would retain considerable discretion to enter uncontrolled awards based on highly speculative claims of loss.

Fourteen years of LDRC empirical studies has powerfully documented the failure of the Gertz "limitations" on damage awards in defamation actions.

In *Firestone v. Time*, 424 U.S. 448 (1976), the Court immediately undermined the asserted goal of *Gertz* to control damages by affirming a sizable damage award based on recovery for mental anguish in the absence of any claim of harm to reputation. The Court in *Firestone*, continuing its movement away from the constitutionalization of all aspects of defamation law, simply held that such principles of damage recovery are matters of state law. Yet, as Professor Smolla has observed, allowance of recovery on this basis would as a practical matter "permit the principle of presumed harm to sneak back into the defamation cases governed by *Gertz* through the back door."[11]

In *Dun & Bradstreet*, 472 U.S. 749 (1985), the Court further chipped away at the damage protections promised by *Gertz*, holding that they applied to private plaintiffs only when the challenged speech was on a public matter. Although the Court concluded that the state interest in protecting reputation outweighed the danger that the threat of large libel verdicts would result in self-censorship -- at least as to the kind of "private" speech there at issue -- concern that unfettered discretion by juries to award damages could "chill" speech was not entirely absent in *Dun & Bradstreet*. First of all, in a concurring opinion in which he reviewed the path the Court had begun with *New York Times*, Justice White suggested that an outright prohibition on punitive damages might have been preferable to the actual malice rule. Moreover, four Justices dissented in *Dun & Bradstreet*; they would have extended *Gertz*'s limitations on presumed and punitive damages to *all* plaintiffs. Indeed, as noted in a 1988 LDRC damages report,[12] a majority of Justices on the Court since *Sullivan* had expressed grave and general discomfort with the imposition of punitive damages in libel actions.

Dun & Bradstreet was the last case in which the Supreme Court dealt specifically with defamation damages issues. However, in a series of nondefamation cases, the Court has since considered challenges to punitive damages under both the Due Process Clause and the Excessive

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[11]*See* RODNEY A. SMOLLA, LAW OF DEFAMATION § 9.06[6], at 9-14 (1994). *See also* David Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV 747, 757 (1984) ("Any plaintiff who can persuade a jury that a defamation caused him anguish apparently can satisfy the [*Gertz*] standard.")

[12]*See* LDRC BULLETIN No. 24 (Winter 1988) at 3-5. *See also* SMOLLA, *supra*, note 11, § 9.08[2][d], at 9-20.

Fines Clause of the Eighth Amendment,[13] and has also continued to advert to its special concern over punitive damages under the First Amendment. In *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc*, 492 U.S. 257 (1989), the Court held that the Excessive Fines Clause did not apply in civil cases between private parties and did not consider the due process challenge because it was not properly before the Court. In *Bankers Life v. Crenshaw*, 486 U.S. 71 (1988), the majority did not address whether the punitive award violated the Due Process Clause because the claim had not been raised in the court below. However, concern over punitive damages was not entirely absent -- Justice O'Connor, joined in a concurrence by Justice Scalia, urged the Court, under the Due Process Clause, to "scrutinize carefully the procedures under which punitive damages are awarded in [all] civil lawsuits." Indeed, Justice O'Connor cited *Gertz* as an example of the Court's previously stated concern over the constitutional dangers of punitive awards.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), an insurance case in which the ratio of punitive damages to compensatory damages was more than four to one, the Court expressed concern about allowing "unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages." Nevertheless it declined to establish a "mathematical bright line" ratio above which a punitive award might be unconstitutional, and despite acknowledging that the "monetary comparisons" between the compensatory and punitive damages were "close to the line ... of constitutional impropriety," it upheld the award. Justice O'Connor dissented, arguing that the lack of clarity and absence of procedural safeguards in the jury instructions were violative of due process. Justice Scalia, who would have squarely rejected the due process challenge on the grounds that historically anchored practices cannot violate due process (a position rejected by both the majority and Justice O'Connor), nevertheless recognized that his analysis "does not call into question the proposition that punitive damages, despite their historical sanction, can violate the First Amendment." *Id.* at 38.

TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993), seemingly presented the Court with an ideal fact pattern on which to hold a punitive award violative of due process, for the ratio of punitive ($10 million) to actual ($19,000) damages was more than 526 to 1. However, the Court measured the punitive award against the plaintiff's *potential* loss had the defendant "succeeded in its illicit scheme" (in *TXO* estimated to be between $5 million and $8.3 million). As noted by Sack and Baron, however, *TXO*'s reliance on potential loss would clearly be suspect if applied in the First Amendment arena, where inhibitions on speech must be narrowly tailored.[14]

In summary, then, although 30 years have now passed since *Sullivan* decried the chilling

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[13]For a more complete discussion of the status of the Supreme Court's consideration of punitive damages -- both generally and in relation to defamation, see *infra*, An Update on Punitive Damages in Defamation Cases (DeVore et al.).

[14]See SACK-BARON, *supra*, note 1, at 498.

effects of unrestrained damage awards in libel actions, the Supreme Court has still left resolution of any number of critical damages, and especially defamation damages, issues either to future consideration or to resolution in the states and the lower courts.[15]

STATE AND LOWER COURT DEVELOPMENTS

Although *Gertz* constitutionalized some of the categories of damages available in a action, it did not alter the basic architecture of the defamation damages system. The traditional categories available at common law, and still available following *Gertz*, permit recovery for (1) nominal damages, (2) compensatory damages, and (3) punitive damages. Compensatory damages have been further subdivided into special damages and general damages, with special damages providing compensation for all pecuniary losses flowing from the defamation and general damages including all other forms of loss.

Nominal Damages

Nominal damages were available at common law in two instances: (1) when sought by a plaintiff solely interested in vindication of reputation; and (2) when awarded by juries who find the defendant legally culpable but the resultant damages insignificant. Because nominal damages are not awarded for any proven actual injury, it technically remains an open issue whether, following *Gertz*, they are available absent proof of actual malice.[16] Because nominal damages in and of themselves involve only *de minimis* awards, they theoretically represent no threat to free speech. Some jurisdictions, however, permit nominal damages to support significant punitive awards. For example, a New Jersey court recently upheld a punitive award of $37,000 on the basis of a $1 award,[17] and ratios of punitive to nominal damages in defamation cases as high as $25,000 to $1 and $175,000 to $2 have been upheld in defamation actions in Delaware[18] and Missouri,[19] respectively. These striking ratios are troubling, and, following *Haslip*, may be constitutionally suspect -- even apart from any further constitutional limitations that may be imposed on First Amendment grounds in defamation cases.

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[15]In preparing the summary of state and lower court cases that follows, primary reliance has been placed on current reports compiled in connection with LDRC's forthcoming 1994-95 50-STATE SURVEY.

[16]*See* SACK-BARON, *supra*, note 1, at 487-88; SMOLLA, *supra*, note 9, § 9.02[2], at 9-6.

[17]*See* Ward v. Zelikovsky, 263 N.J. Super. 497, 623 A.2d 285 (N.J. App. Div. 1993), *rev'd on other grounds*, --- N.J. ---, 1994 N.J. Lexis 503 (N.J. 1994).

[18]*See* Marcus v. Funk, C.A. No. 87CC-SE-26-CV, 1993 WL 141864 (Del. Super. 1993).

[19]*See* Snodgrass v. Headco Industries, Inc., 640 S.W.2d 147 (Ct. App. Mo. 1982).

Special Damages

The primary function of special damages is to compensate plaintiffs for economic loss. Special damages most often flow from business losses, such as loss of a contract, customers, earnings, or employment, and in most jurisdictions such losses must be pleaded and proven with specificity. Special damages are not available for loss of social contacts, absent pecuniary harm, or for psychological damage.[20] In practical terms, the principal role of special damages is in the defamation per se/defamation per quod distinction, with most jurisdictions requiring proof of special damages in instances of defamation per quod.[21] In addition to their availability in defamation cases, proof of special damages is often required in such related causes of action as product disparagement, trade libel, slander of title, and injurious falsehood.

General Damages

At common law, "general damages" included both injury to reputation and emotional distress either (1) presumed to flow from the defamation ("presumed damages") or (2) proven to flow from the defamation ("actual damages"). Although, as previously noted, *Gertz* greatly restricted the availability of presumed damages -- at least when the claim involves publication on an issue of public concern -- and purported to restrict the recoverability of nonpresumed damages to provable "actual injury," it allowed that actual injury need not be confined to "out-of-pocket loss" (special damages). *Gertz* thus appears to have had no significant limiting effect on the various broad and inchoate types of noneconomic recovery previously available under the rubric of general damages, including loss of reputation and emotional distress.[22]

Presumed Damages. Presumed damages are now constitutionally permitted only in cases in which the plaintiff proves actual malice or in cases involving "private-private" defamation, however defined. Although barring presumed damages absent a showing of actual malice in cases involving private plaintiffs and speech of public concern, *Gertz* continues to allow recovery for loss of reputation and emotional distress on a showing of mere negligence, thus effectively undermining any effort to restrict awards of nonconcrete forms of damages. Several state courts have gone beyond *Gertz*, however, by barring recovery of presumed damages in all instances, including in the private-private context and in cases involving nonmedia defendants,[23] or as to

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[20]*See* SMOLLA, *supra* note 11, § 9.07, at 9-16; PROSSER AND KEETON, THE LAW OF TORTS § 112, at 794 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 575 (1977).

[21]*See* SMOLLA, *id.*; SACK-BARON, *supra*, note 9, at 489.

[22]*See, e.g.*, Ross v. Santa Barbara News Press, 22 Media L.Rptr. 1733 (1994), discussed *infra* in Damage Awards: Post-Trial and Appellate Challenges (Heinke et al.) (jury award of $5 million for damage to reputation and $2.5 million for emotional distress).

[23]*See* Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (Ark. 1983) (damage to reputation cannot be presumed in any case); Zoeller v. American Family Mutual Insurance Co., 17 Kan. App. 2d 223, 834 P.2d 391 (Ct. App. Kan. 1992) (damages for defamation can no longer be presumed, even in private-private context

certain categories of plaintiffs.[24] Other states, however, continue to allow presumed damages in any instance of defamation per se.[25]

Actual Damages. As noted above, under the umbrella of actual damages, *Gertz* did not address the issue of whether reputational loss is a prerequisite to recovery of damages for emotional distress, and *Firestone*, holding that it was not unconstitutional to permit such recovery, left the question to state law. The traditional American view had been that because the gravamen of an action for defamation is loss of reputation, recovery for emotional distress should only be available parasitically, that is, when the plaintiff suffers emotional distress as a result of, or otherwise attendant upon, compensable loss of reputation.[26] Currently, however, several states allow recovery for nonattendant emotional distress.[27] Others require proof of reputational damages,[28] while some potentially limit compensatory recovery to special damages (i.e., economic loss) when a defamatory publication has been retracted under the applicable

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and even in per se defamation); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (Mass. 1975) (presumed damages unavailable even on showing of negligence); Emerson v. Garner, 732 S.W.2d 613 (Tenn. App.), *permission to appeal denied* (Tenn. 1987). According to the LDRC 50-STATE SURVEY, Montana does not recognize presumed damages in a defamation case, and although there is no Delaware case specifically on the subject of presumed damages, they are by implication ruled out by language in *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

[24]According to the LDRC 50-STATE SURVEY, presumed damages are probably not recoverable in Colorado -- even where actual malice is proved -- in any action by a public figure or by a private individual when the publication involves a matter of public concern.

[25]*See e.g.*, Alaska State Bank v. Fairco, 674 P.2d 288 (Alaska 1983); Dail v. Adamson, 212 Ill.App.3d 66, 570 N.E.2d 1167 (1991); Henrichs v. Pivarnik, 588 N.E.2d 537 (Ind. App. 1992); Rees v. O'Malley, 461 N.W.2d 833 (Iowa 1990); *see also* Saunders v. VanPelt, 497 A.2d 1121 (Me. 1985); Becker v. Alloy Hardfacing & Engineering Co., 390 N.W.2d 374 (Minn. Ct. App. 1986), *aff'd in part, rev'd in part*, 401 N.W.2d 655 (Minn. 1987); Baugh v. Baugh, 512 So.2d 1283 (Miss. 1987); Branda v. Sanford, 97 Nev. 643, 637 P.2d 76 (1987); Prince v. Peterson, 538 P.2d 1325 (Utah 1975) (nonmedia).

[26]*See* SMOLLA, *supra*, note 11, § 9.06[4][b], at 9-12.

[27]*See* Hayes v. Smith, 832 P.2d 1022 (Colo. App. 1991); Time Inc. v. Firestone, 305 So.2d 172 (Fla. 1974), *vacated and remanded*, 424 U.S. 448 (1976); Freeman v. Cooper, 390 So.2d 1355 (Ct. App. La 1980), *aff'd* 414 So.2d 355 (La. 1982); Hearst Corporation v. Hughes, 297 Md. 112, 466 A.2d 486 (Ct. App. Md. 1983); Ross v. Bricker, 770 F. Supp. 1038 (App. Div. D. V.I. 1991). *See also* Becker v. Alloy Hardfacing & Engineering Co., 390 N.W.2d 374 (Minn. Ct. App. 1986), *aff'd in part, rev'd in part*, 401 N.W.2d 655 (Minn. 1987) (in case of defamation per se, general damages recoverable without proof of actual injury to reputation).

[28]*See* Little Rock Newspapers, Inc. v. Dodrill, 281 Ark. 25, 660 S.W.2d 933 (Ark. 1983); Gobin v. Globe Publishing Co., 232 Kan. 1, 649 P.2d 1239 (1982). In New York, the Appellate Divisions are divided, with the First Department requiring reputational loss, *see* Salomone v. Macmillan Publishing Co., 77 A.D.2d 501, 429 N.Y.S.2d 441 (1st Dep't 1980), and the Second Department allowing nonattendant emotional distress, *see* Matherson v. Marchello, 100 A.D.2d 233, 473 N.Y.S.2d 998 (2d Dep't 1984).

statute.[29]

Doubtless *Gertz*, by limiting the availability of presumed damages, did have a significant impact on the number of cases in which actual damages had to be proven. However, by signaling its comprehensive deference to state law on all definitional aspects of "actual injury," including the important issue of recovery for nonparasitic emotional distress, the Court effectively abdicated responsibility both for the development of the law of actual damages and for defining necessary limitations on their recoverability. The proof that *Gertz* did not create a mechanism for effectively limiting actual damages is that in the almost 20 years since *Gertz* no state or lower federal court case, has, to our knowledge, relied upon the *Gertz* "actual injury" concept to narrow or reverse an award of actual damages for loss of reputation or emotional distress. Although actual damage awards have not always been upheld, or have been restricted in some cases, this has always been achieved on the basis of common law principles.

Punitive Damages

On the issue of punitive damages, the Supreme Court has consistently expressed misgivings that juries would use punitive damages to punish unpopular views. As noted above, however, it has yet to reverse a punitive award on the ground that it is unconstitutional, and for almost 20 years it has failed to expand upon the negative pregnant -- "*at least* when liability is *not* based on a showing of falsity or reckless disregard for the truth" (emphasis added) -- of *Gertz* in defamation cases. On the state level, however, a variety of means have been used either to restrict or eliminate entirely the imposition of punitive damages.

Under their case law, some states judicially proscribe the award of punitive damages. Thus, Massachusetts and Oregon prohibit punitive damages in First Amendment cases and Louisiana, Nebraska, Puerto Rico, and Washington do not recognize punitive damages in any action.[30]

In a number of other states, statutory provisions either place a generally applicable monetary cap on punitive damages or ban them in certain circumstances. Thus in Colorado, Georgia, Kansas, North Dakota, and Virginia, plaintiffs are limited in the amount of punitive

[29]Arizona, California, Minnesota, Nebraska, and Nevada. *See also infra*, Potential Impact of the Uniform Correction or Clarification of Defamation Act on Damages (Kaufman and Cantwell).

[30]*See* Miller v. Kingsley, 194 Neb. 123, 230 N.W.2d 472 (Neb. 1975); Ciecierski v. Avondale Shipyards, Inc., 572 So.2d 834 (La. App.), *writ denied*, 574 So.2d 1256 (La. 1991); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (Mass. 1975); Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (Ore. 1979); Cooperativa de Seguros Multiples de Puerto Rico v. San Juan, 289 F. Supp. 858 (D.C. P.R. 1968); Farrar v. Tribune Publishing Co., 57 Wash.2d 549, 358 P.2d 792 (Wash. 1961).

damages they may recover.[31]

Retraction statutes in 25 states provide that a properly issued retraction can entirely prevent recovery of punitive damages, although only in seven jurisdictions is this bar absolute (that is, operative regardless of the publisher's fault).[32]

Another means by which the states restrict punitive damages is to link them to proof of actual injury. In Texas, for example, an award of compensatory damages is a prerequisite to recovery of punitive damages.[33] Other courts have held that the First Amendment prevents recovery of punitive damages absent actual injury.[34] The majority of courts that have considered the issue have declined to impose any fixed relation between the amount of actual or nominal damages and the punitive award, particularly in instances of defamation per se.[35]

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[31]*See* C.R.S. § 13-21-102 (not to exceed actual damages absent aggravated circumstances, in which case court has discretion to set punitive damages as three times the punitive award); O.C.G.A § 51-12-5.1(f)(g) ($250,000 in non-products liability cases in which no intent to do harm); Kan. Stat. Ann. § 60-3702 (lesser of defendant's annual gross income or $5 million of if profit to defendant is greater, then 1.5 times profit gained); N.D. Session Laws, Chap. 324 (double the compensatory damages or $250,000, whichever is larger); Va. Code Ann. § 8.01-38.1 ($350,000).

[32]*See infra*, Potential Impact of the Uniform Correction or Clarification of Defamation Act on Damages (Kaufman and Cantwell). When the publisher has made an adequate correction, the retraction statutes in Alabama, California, Idaho, Kentucky, Michigan, Nebraska, Nevada, and Wisconsin proscribe recovery of punitive damages regardless of publisher's fault. In other states, punitive damages may be awarded despite a retraction if the original publication was made with malice. *See generally* 1993 LDRC BULLETIN NO. 3, at 7.

[33]*See* Doubleday v. Rogers, 674 S.W.2d 751 (Tex. 1984) (award of nominal damages cannot support punitive damages); Brown v. Petrolite Corporation, 965 F.2d 38 (5th Cir. 1992) ("compensatory" award of $1 insufficient to sustain a punitive award of $300,000). *But see* Snead v. Redland Aggregates Lt., 998 F.2d 1325 (5th Cir. 1993) (*citing Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1985)) (presumed damages, available in private-private defamation per se, can support punitive damages).

[34]*See* Sciavone Construction Co. v. Time Inc., 646 F. Supp. 1511 (D.N.J. 1986) (actual damage a prerequisite to recovery in all defamation actions).

[35]*See* Marcus v. Funk, C.A. No. 87CC-SE-26-CV, 1993 WL 141864 (Del. Super. 1993) ($37,000 punitive award upheld on the basis of $1 nominal award); Moore v. Streit, 181 Ill.App.3d 587, 130 Ill.Dec. 341, 537 N.E.2d 408 (Ill. Ct. App. 1989) (actual injury not required to support punitive damages in defamation per se made with actual malice); Henrichs v. Pivarnik, 588 N.E.2d 537 (Ind. App. 1992) (actual injury not required to support punitive award in defamation per se); National Recruiters, Inc. v. Cashman, 323 N.W.2d 736 (Minn. 1982) (in cases of defamation per se, punitive damages recoverable absent proof of actual damages); Snodgrass v. Headco Industries, Inc., 640 S.W.2d 147 (Mo. Ct. App. 1982) (punitive award of $175,000 upheld on the basis of $2 nominal award); Ward v. Zelikovsky, 263 N.J. Super. 497, 623 A.2d 285 (N.J. App. Div. 1993), *rev'd on other grounds*, --- N.J. ---, 1994 N.J. Lexis 503 (N.J. 1994) ($25,000 punitive damage award upheld on the basis of an award of general and compensatory damages of $1); Snead v. Redland Aggregates Lt., 998 F.2d 1325 (5th Cir. 1993) (*citing Leyendecker & Associates, Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1985)) (presumed damages, available in private-private defamation per se, can support punitive damages).

Finally, some states impose additional thresholds of fault before awarding punitive damages in defamation cases. Florida, New York, and Ohio require common law malice as well as actual malice before allowing the entry of a punitive damage award.[36] And a trial court in Pennsylvania has gone beyond *Dun & Bradstreet* by requiring proof of actual malice to sustain a punitive award even in cases involving speech of private concern.[37]

* * * *

Given all of these often intractable legal and doctrinal issues, the question for the practitioner remains -- how does one deal with damages in the real world of claims and litigation? We asked several LDRC members to provide some hints for readers of the LDRC BULLETIN.

Initial Evaluation of Damage Claims - the Insurer's Perspective

Julie Carter Foth*

INTRODUCTION

The libel claim presents a unique, and often difficult, method of evaluation to an insurer. Unlike most claims that pass across a claims professional's desk, the libel claim is alleging damage that is intangible -- the loss of one's reputation and good standing within the community. Although many libel plaintiffs also allege some economic damage in a complaint for libel, it is the exposure for the loss of reputation that is the crux of the litigation. This is the allegation that precedes all others -- both in the mind of the plaintiff, and eventually, that of the jury. It is the allegation that may be valued at zero by the insured and the insurer, yet may be valued in the millions by a jury. The difficulty in evaluating a libel claim for an insurer is that it is impossible to entirely separate the apparent liability from the potential exposure for damages when attempting to determine from an overall perspective - "What is this claim *worth*?"

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[36]*See* Brown v. Fawcett Publications, Inc., 196 So.2d 465 (Fla. App.), *cert. denied*, 201 So.2d 557 (Fla. 1967); Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 466, 605 N.Y.S.2d 218, 626 N.E.2d 34 (New York 1993); Preston v. Murty, 32 Ohio St.3d 334, 512 N.E.2d 1174 (Ohio 1987). According to the LDRC 50-STATE SURVEY, dicta in *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (Mont. 1978), may also be read as entirely precluding recovery of punitive damages in public figure libel actions.

[37]*See* Geyer v. Steinbronn, 351 Pa.Super. 536, 506 A.2d 901 (Pa. Super. 1985).

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Because of the volatile nature of the libel claim from an insurer's perspective, it is imperative that the insurer know what can be known about the potential damage exposure that is out there as soon as possible. The insurer relies on its insured and defense counsel to communicate as early as possible the various aspects of a claim that will eventually determine the strategy of the defense of the claim and the pace of the litigation that may follow. Among the generalities that must be considered in the early evaluation of a claim: assessing the known factual elements of the claim -- the insured's business, the status of the plaintiff, what damage allegations he is making, what was published, venue, and the background of the birth of the story. The insured assesses the legal merits of the insured's claim, the evidence of alleged damages by the plaintiff, the prospect of early dismissal, and the insured's feelings regarding whether or not to attempt early settlement or prepare to litigate. The timing in determining these elements of a claim are crucial from the perspective of the insurer to ensure that the claim is handled as effectively as possible. Attaining as many facts as possible, comparing them with other factors in the claim, and then relating them to the various paths a claim may take, is the objective in making an initial damage evaluation of a claim.

ASSESSING LIABILITY

To begin the process of assessing liability in a particular claim, it is of utmost importance to know the insured and the type of business it operates in order to determine the extent of the exposure that is present. Is the insured a large broadcasting conglomerate or a small-town newspaper? A large broadcaster may be seen by the plaintiff or a jury as a "deep pocket," or the media giant bullying up on the "little guy," especially if the plaintiff is a private rather than a public figure. A small newspaper may get some kudos from a jury for going after a "big" story involving a public official even though the reporting could have been a bit more thorough, yet the jury might not be so forgiving of a story critical of a local business causing pollution in the community but run by a neighbor of the readers in the community. Will it make any difference if the jury learns the small publication is owned by a larger company? What is the insured's market? Is the publication targeted at older persons? Younger people? How will a news piece in a "music" magazine be viewed by a 64-year old juror? What is the circulation of the product? This may or may not be an issue as far as exposure to damages is concerned but some plaintiffs hammer on the circulation issue. Has the plaintiff made reference in his complaint as to how many "readers" or "viewers" have seen the alleged libel and how this figures into his damages? Is the product news-oriented or entertainment-oriented? Will one have more credibility than the other with a judge deciding a summary judgment motion? With a jury at trial? Is the insured's product considered "mainstream" or is it more controversial in nature? A claim against a teen magazine will likely not have near the damage exposure as a magazine discussing extremist politics.

Who is the plaintiff? Because of the various privileges afforded the media defendant under the law and the different standards of care that particular plaintiffs must prove, such as negligence or actual malice, the insurer wants to find out as much information as possible about the plaintiff from the very beginning of a claim. Is he a public official, public figure, private figure, possible limited-purpose public figure? Of course, this may not be evident at first glance

and may only be decided through the course of litigation, if not by stipulation, then by summary judgment or trial.

Determining the likely status of the plaintiff can effect the insured's chances of success in different stages of the litigation. If the insured is sued by a public figure alleging actual malice, the case may be seen as a likely candidate for dismissal in the dispositive motion stage if no evidence of actual malice has been presented by the plaintiff, yet take on a more grim outlook if the case goes to a jury which may make a morality play out of the case rather than apply the appropriate legal standards. A jury may know of or like the public figure plaintiff better than they understand or are willing to apply the standard of actual malice. The insured and/or defense counsel should determine if the plaintiff is well-known, well-liked, successful, a business person, an inmate, a political candidate, a police officer, the parent of a minor, etc. What impression does the plaintiff put forth regarding his claim? Does he appear aggressive, abrasive, sympathetic, persecuted? How might a jury react to this particular person or organization? Will a corporate plaintiff be less appealing to a jury than John Doe, a hard-working family man? Probably. If the trial is before the bench, a judge may be more objective in his view of the plaintiff.

Factoring in the plaintiff profile in assessing liability and damages is a continual guessing game. As the players in each claim change, so does the assessment of damage. Surprisingly, in recent years, many of the largest jury verdicts have gone to wealthy, controversial or high-profile plaintiffs; not at all the type of plaintiffs that one might initially consider to be sympathetic to a jury. Well-to-do plaintiffs making claims of large dollar damages will many times receive substantial awards from juries. On the other hand, the average Joe's claim may have more merit but lacks the drama of a high-profile case and any award of damages may be significantly lower.

What was published about the plaintiff? This is not always as straightforward as one might hope. Most plaintiffs are fairly clear in setting out the words that they consider to be defamatory but many plaintiffs make overly broad and vague allegations stating that an entire news story, broadcast or book is defamatory or intrusive. The alleged tortious "publication" may be in the form of a photograph that the plaintiff regards as defamatory, such as a misidentification. Others claim that although they cannot point to specific language in a publication, nevertheless as a result of the alleged "slant" of the story, they were libeled "by implication." The precise libelous content may not be made clear until the plaintiff is ordered to reply to a motion for a more definite statement. The allegation of other torts such as invasion of privacy, false light, outrageous conduct and infliction of emotional distress may serve to complicate what would otherwise be a dismissible claim.

Pinpointing potential problems with the publication at this early stage of the claim is essential in evaluating the length of future litigation, the likelihood of success in that litigation and assessing any potential damage exposure. In assessing liability, the claims professional must look for any obvious defamatory statements, the lack of such statements, ambiguous language, and the context of the statements and then communicate with the insured and counsel regarding

the defenses that will be argued such as truth, opinion, fair comment, neutral reportage, etc. An evaluation must also be made as to how the publication may be perceived in the context of a summary judgment motion by a judge, trial by a jury and by an appellate court.

When was the alleged libel published? If published recently, the information may be fresh in the minds of readers or viewers but any resulting damages may not have yet occurred and are totally speculative at this point. Also, with a recent publication, if an insured chooses to publish a clarification or correction, this can serve to mitigate damages should the case proceed to trial. A publication that is several months, or even years, old presents difficulty in an initial evaluation as to damage. On the positive side, because of the length of time that has passed, it can be assumed that the plaintiff has been unaffected by any alleged libel and will have weak damages -- simply choosing to file suit before the statute of limitations expires in the hopes of receiving some settlement dollars or success in front of a jury that may find him and his claim appealing. On the negative side, time can lend graphic illustration to any alleged actual damages that may have accumulated to the plaintiff, regardless of the root cause, such as a drop in business, a lost campaign, lost employment opportunities or even degenerating health. Although the plaintiff's misfortunes may have absolutely no connection with the complained-of publication, it can require extensive discovery and the retention of experts to analyze the extent of any relationship that may or may not exist, and jurors could award the plaintiff with some money simply because they have empathy for his situation.

If the claim is in litigation, where is the lawsuit filed? Ideally, each suit should be evaluated on nothing but the merits of the claim. However, it is common knowledge among First Amendment lawyers that venue can unfortunately play a major role in the outcome of a libel claim. Many jurisdictions are referred to as "media-friendly" or "anti-media." For example, a jurisdiction can be predictable for its slow docket, fondness of celebrity plaintiffs, or previous large jury verdicts. If unfamiliar with a particular jurisdiction, it is important for the claims professional to communicate with the insured and local counsel as to the characteristics of the potential jury pool in the area. Is the community considered to be liberal? Conservative? Pro-plaintiff? Will a large newspaper fare better in front of a rural jury or an urban jury? Will a major network fare better in a large East Coast metropolis or a Midwestern city? Is the community culturally and ethnically diverse? If not, is the plaintiff of the same ethnic or cultural background as the jury pool? Is there a presence of a strong religious culture? What kind of "mega-verdicts" have come out of the jurisdiction lately and what type of case was involved? Are judges adverse to granting summary judgment motions? What attitude do the higher courts of the state have regarding media defendants? Have any media cases been heard by the state appellate courts recently? Of course, venue is a factor to consider but not to rely on too heavily. Jurisdictions do not always live up to their reputations if the "right" or "wrong" judge or jury is hearing your case.

How or why did the story come about? Are you dealing with a news item? If so, is it "hot news"? An investigative reporting piece? An entertainment piece? An opinion column or review? It is important to discuss with the insured the reporter's or author's conviction in the truth of the publication. The reporter's credibility is crucial in limiting damage exposure in a

libel claim. If the reporter is vague about sources of information, is not convincing in his assertion that he believed what he published to be true, or is extremely irritable and defensive about being sued, it can mean trouble in front of a jury regardless of actual truth or proof of damages. Juries commonly get angry at reporters who have not "followed the rules" and will not hesitate to punish their employers or principals with hefty punitive damages as a result. Inquiry should be made as to the sources of the reporter's or author's information -- be they people, documents or independent observations. Consideration should be given to what legal privileges may apply and if they might support an early dispositive motion. Inquiry should also be made as to any possible problems that a confidential source may present to a judge or jury. Will the sources be available to substantiate the reporter's testimony? If not, how will these "missing links" be interpreted by the claimant? The jury?

DAMAGES

Obviously, it is important to look for any apparent damages upon an initial evaluation of a claim. As a claims professional, I evaluate a claim primarily on the merits of the insured's case, looking to the defense of truth or one of the other legal privileges afforded the press to eventually allow us to prevail in a court of law. However, if there is evidence of obvious error, that actual damages are a real threat or that punitive damages are a concern, this must be taken to heart for purposes of discussing with the insured whether the case is one in which a clarification, correction or settlement should be considered. The insured is consulted regarding its feelings about the story and whether or not the case is one to fight or not. Early evidence of actual damages can also assist in the evaluation of the length of any discovery that may ensue and the prospects of success with a judge or a jury if settlement is not an option desired by the insured at this point.

It is difficult to make an initial assessment as to alleged damage to reputation. In a few cases, damages can be presumed, for instance, where dealing with a statement that is libelous per se. However, the actual extent of damage to reputation usually requires some discovery and consequently some cost on behalf of the insured and/or the insurer. Oddly, a common scenario is a plaintiff that alleges his reputation has been "irreparably harmed," who then fails to produce one witness who will testify that they think any less of the plaintiff, but nonetheless receives an award from a jury. In evaluating exposure for damage to reputation, it is always wise to consider that no matter the evidence presented at trial, a juror will inevitably ask himself -- "What if that was said about me?" Mock jury deliberations consistently confirm this tendency in many jurors. It is, therefore, important to always relate the offending damages to the everyday person and what that person's views might be of the plaintiff. Alleged damages arising out of any secondary claims such as the "infliction of emotional distress," also usually require some investigation or discovery to determine the validity and extent of any real damages.

Alleged economic damages arising out of a libel claim always present interesting and difficult issues to analyze, especially in an initial evaluation of a claim. The plaintiff's damages may be a total mystery in the early stages of a claim or the plaintiff may have economic damages that are well known in the community. The press, such as in the case of a high-profile

plaintiff or corporate plaintiff, may be reporting on the economic status of the plaintiff on a fairly regular basis. The plaintiff's economic status or difficulties may be the very reason the insured decided to investigate the plaintiff in the first place.

Unfortunately, the true evaluation stage of economic damages may not occur until several months after a claim has developed. The insurer needs to know as early as possible if the retention of damage experts will be needed. Subsequent to initial discovery efforts, defense counsel, the insured and the insurer must evaluate what has been gleaned from this information that could link the alleged damages directly to the publication of the alleged libel. When did the plaintiff begin to have economic difficulties? Prior to the printing of the article? What is the plaintiff's current economic status? What is the nature of the plaintiff's livelihood? Have any witnesses been deposed that stated the publication was the reason they quit doing business with the plaintiff? Has a former employer been deposed, stating the publication was the reason the plaintiff was terminated? What do our experts say? What does the analysis of the plaintiff's experts indicate? How credible and effective will these witnesses be to a jury? Is it apparent the plaintiff is looking for a windfall by initiating a lawsuit against the insured? Can we convince a jury of this? Do we feel strongly that our defenses of truth, fair comment, etc., will sustain us even though the plaintiff's economic woes clearly appear to be tied to the publication? The sooner the insurer has this information in hand, the better it can prepare for the exposure that is out there and the future course of the claim.

The prospect of punitive damages in a claim is one of the most worrisome to an insurer and one of the most difficult to evaluate. Typically, they will only be a concern if there is a substantial likelihood that the claimant will be able to prove actual malice. The purpose of punitive damages is supposedly to deter an insured, or those like the insured, from committing similar acts in the future. If there is even a possibility that the plaintiff will be able to prove that punitive damages are called for, the plaintiff will usually raise this issue early in order to perhaps enhance the settlement value of the claim. Even in a negligence case, the plaintiff may decide to amend his complaint to include a demand for punitive damages.

Probably the most important factor in assessing these claims is knowing the jurisdiction the case is in. Different states have different standards and procedures under which these damages may be assessed. The most important difference is to know whether or not the jury, rather than the judge, will assess the damages. Popular wisdom is that juries are much more likely to grant large or even extreme punitive awards if the plaintiff presents a sympathetic figure. Judges, as a whole, will be more analytical. The second procedural point to be aware of is whether or not evidence regarding the amount of punitive damages that will have a deterrent effect (such as the defendant's assets and insurance) will be allowed in evidence during the liability trial or will be reserved for a separate proceeding after liability and a need for punitives is found. If evidence of the insured's economic status is allowed in the trial it will often affect a jury's evaluation of actual damages even if punitive damages are not allowed. Thus, the insurer's evaluation of the whole claim could be different.

Aside from these two procedural points, the insurer must evaluate potential punitive

damages on a case-by-case basis. Are the facts against the insured so egregious that a jury's anger or sense of moral indignation will be aroused? Does the insured have any sympathetic facts on its side to mitigate against the anger? Experience and advice of good counsel are the most help here. Even with these, punitive damages are highly unpredictable. If a case truly contains exposure to punitive damages for the insured and insurer, serious consideration to settlement may be warranted at that point.

PROSPECT OF EARLY DISMISSAL

Whether or not a claim is a prime candidate for early dismissal by motion is often apparent in the initial evaluation stage but usually from a liability point of view rather than a perspective on damages. Although not usually evident from an initial evaluation, it is sometimes apparent that the insured and the insurer are in for the long haul on a particular claim. Obviously, there is no clear formula for this determination but simply a gut instinct that a certain claim is going to be lengthy, troublesome, expensive and probably see its way through the appellate courts, regardless of the outcome at trial. A defense verdict may be on the horizon but it may take months or years to get there. For instance, a libel case brought in New York may be a case on the law, where the same case in Texas may be a case on the facts. A "law case" will not receive the same initial damage evaluation as a "fact case." A "law case" will likely disappear more quickly in these courts and even if it goes to trial, will likely not carry the same exposure for damages. Evaluations from the insured's counsel are crucial. A second opinion from another attorney may also be helpful to the insured.

CONCLUSION

Anticipating litigation costs are certainly much more predictable than assessing what damages may be awarded in a particular claim. Too many plaintiffs are seeking seven-and eight-figure damage awards. Juries are so unpredictable in their awarding of damages in libel cases that it is next to impossible to anticipate how six or twelve people will view any one case. It is not uncommon to present a case to two mock jury groups and have them return two completely different verdicts. As stated earlier, in observation of these groups during their "deliberations," it is apparent that many jurors award damages based on nothing but their emotional reaction to the case, not on evidence that is presented. Issues such as "actual malice" and First Amendment privileges are, unfortunately, lost on all but a few jurors. There are only a few claims that I see where I do not believe we would ultimately be successful at the appellate level. However, in evaluating claims from an insurer's perspective, I am compelled to contemplate how a real judge or jury might react to a case, not how I would react if I were in the jury box.

Developing the Early Approach to Damage Claims: The Litigator's Perspective

Thomas S. Leatherbury*

When defending a libel or other tort suit, often a great deal of useful information about the damage claims can and should be obtained before formal discovery begins.[1] Information obtained in the pre-discovery stage may save money, assist in formulating a discovery plan, and aid in developing the case themes. Conducting a pre-discovery damage investigation is relatively inexpensive, and in most cases, the likelihood of discovering useful information about the damage claim makes the time and monetary investment worthwhile. As is true with formal discovery, there is no one plan to be followed inexorably in every suit. Depending on the nature of the suit -- the type of plaintiff, the type of defendant, and the circumstances surrounding the alleged defamatory speech -- different methods of pre-discovery investigation of the damage claim should be undertaken. This article presents a variety of options for litigators to consider when conducting a pre-discovery damages investigation.

As our media clients know, a lot of useful information is publicly available and can be obtained without leaving a trail. A logical place to begin the pre-discovery investigation is at the courthouse. The plaintiff may have been party to other lawsuits, and some of the publicly available information in these suits may assist you in analyzing the damage claim. In today's world of electronic information exchange, "the courthouse" no longer means only the local state and federal courts. Many larger cities, and an increasing number of smaller cites and towns, now have computer databases from which the public can easily retrieve information about lawsuits by simply inputting the name of one of the parties. Accordingly, one of the first things the pre-discovery investigation should include is a determination of any suits to which the plaintiff has been a party, regardless of whether the plaintiff in the suit you are defending was a plaintiff or a defendant in the other suits.[2] The geographic scope of the courthouse search will vary from case to case.

Obviously, if a plaintiff suing your client has made previous defamation claims relating to an earlier publication (no doubt claiming in the earlier suit that his or her reputation was

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[1]The recent changes to the FEDERAL RULES OF CIVIL PROCEDURE relating to discovery should increase media defendants' reliance on informal discovery.

[2]In order to discover all relevant suits, you should attempt to locate not only those suits in which the plaintiff in the suit you are defending was a named party but also any suits in which the plaintiff was "involved." If the plaintiff in your suit is an individual, you should also attempt to find suits involving the businesses in which the individual is a principal or has an interest and vice versa.

destroyed by the prior publication), that allegation alone may go a long way in helping you attack the damage claim in your suit. Also, you should not ignore suits filed after the suit in which your client is a defendant. This firm recently handled a case in which the plaintiff filed a subsequent libel suit against completely unrelated defendants, and, in the later suit, the plaintiff alleged that, before the later publication, his reputation was flawless. The later complaint was a very powerful piece of evidence used to attack the plaintiff's damage claim in the first suit.

When checking courthouse records for relevant suits, carefully review any pleadings that state or describe the claims and defenses because defamation claims or other information useful to you may be "buried" in pleadings. For example, I have seen defamation claims included in, among others, breach of contract cases, employment cases, tortious interference cases, declaratory judgment actions, and domestic relations suits. In reviewing courthouse records, do not forget to check for criminal cases against the plaintiff. If the plaintiff has been convicted of a crime, the conviction may be admissible in your suit. A creative trial lawyer may even figure out a way to get criminal charges or even arrests admitted into evidence even if there was no conviction.

Of course, not all libel plaintiffs have made other defamation claims, but even if the courthouse search does not lead to other defamation claims, you may discover other information valuable to you in developing your approach to the damage claim. If you discover that the plaintiff in your suit has filed bankruptcy, the publicly available information will most likely prove useful to the damage claim in your suit. In addition to the fact that the bankruptcy filing alone probably had a negative impact on the plaintiff's reputation and financial situation, depending on how old the bankruptcy is and whether it is still ongoing, you may be able to obtain a great deal of useful financial information about the plaintiff before formal discovery begins in your suit. You may even find that the plaintiff (the debtor in bankruptcy) has not scheduled his multimillion dollar damage claim as an asset of the estate or that the plaintiff has not properly sought a trustee's permission to file the libel claim.

Bankruptcies are not the only type of suits that may provide a "free look" at the plaintiff's financial situation. Some of the publicly available discovery in other lawsuits may relate to the parties' financial situations. Divorce cases may include pleadings and or affidavits relating to temporary support or permanent support of the spouse or children. These filings often include detailed financial information. Partnership disputes and other business suits also may include financial information in the pleadings or discovery. In addition to financial information, when reviewing other lawsuits, you may discover additional facts or factors that negatively impacted the plaintiff's reputation.

There is also a great wealth of information other than court records that is now available from computer databases and information services. Companies such as Dun & Bradstreet and other credit reporting services provide financial information on a large number of business and certain individuals.

In addition to gathering financial information about the plaintiff in the pre-discovery

investigation, you should also gather any media coverage involving the plaintiff before and after the publication you are defending. This type of information may be useful in analyzing the plaintiff's past financial situation, reputation, and status as a public or a private figure. Once again, computer databases are an excellent and relatively inexpensive method to gather the relevant media coverage of the plaintiff. Although computer databases are a good way to begin this part of you investigation, if your client is a media defendant, your investigation should also necessarily include information from your client's own newsroom or research department. Your client's files may include information that is not otherwise available, such as the reporter's documentation and source files. These materials may include information that was not included in the publication, but that does bear on the damage claim in the lawsuit.

Finally, you may also be able to discover information related to the damage claim from friendly or at least neutral third parties. If the alleged libel arises out of an article or broadcast, you should review the source materials with your clients to get the names of people and companies that may have information about the damage claim. Although your clients may be reluctant to embroil their sources in the early stages of litigation, our experience has shown that, after an appropriate introduction by the client, the lawyer can best debrief the reporter's sources on both damages and liability issues. You should not limit your contact with third parties to the reporter's sources. If the damage claim includes a claim for lost income, you should consider contacting the persons or entities from whom the alleged income was supposed to been received.

When considering whether to contact third parties, and if so which ones, you should not limit yourself to face-to-face meetings. Often a telephone call or a letter will provide the information you need at this stage. I know of one lawyer who has successfully utilized a written questionnaire sent to key third parties asking whether they were aware of any of the losses the plaintiff claimed to have suffered and, if so, to explain them and provide copies of supporting documentation. Although the questionnaire was just the first step in the discovery process, the simple, inexpensive process provided a great deal of useful information. Before you begin your pre-discovery investigation and throughout the investigation, you should always consider that information you send to or exchange with third parties may be discoverable by plaintiff and plan your investigation accordingly.

Depending on the nature of the plaintiff's alleged damages, you should maximize the amount of information you learn about the damage claim before formal discovery begins. In planning and conducting your pre-discovery investigation, you should use courthouse records, computer databases, your client's own sources, and other third parties creatively and effectively. In this way, you can mount the best defense possible on the most cost-effective basis.

Forage Without Fear: Damages Discovery in Defamation Cases

Thomas R. Julin*

The weakest part of a libel plaintiff's case often is her damage claim. It should be exploited as such instead of ignored or examined superficially. Expose all or most of the claim as an apparent fraud, and the plaintiff's credibility will be undermined generally and the size of any verdict will be limited.

Thorough pre-trial discovery on each element of damage claimed is the sole method to achieve this result.

Historically, the libel plaintiff has had a serious problem finding a witness who would testify that he thought well or not at all of the plaintiff, was exposed to the offending publication, and thereafter thought ill of her. Opinions of known friends generally are unshaken by defamatory falsehoods. Opinions of foes are confirmed. Only the views of the unknown and unknowable multitudes are believed to have been altered.

So daunting and unfair a task has finding proof of injury been regarded, that the common law allowed the plaintiff a presumption that injury must have been done even where no proof of it existed. This presumption so greatly lightened the plaintiff's burden of proof that in many early American trials plaintiffs were forbidden from offering evidence of injury even if it was available, defendants were precluded from negating a claim of injury, and juries were advised to calculate the size of awards solely on the malice of the defendant.

This "oddity of tort law," which provided many plaintiffs with their only hope of winning, lost most of its punch when the Supreme Court held in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that the First Amendment requires proof of "actual injury," at least where the speech at issue is about a matter of public concern and the defendant published without actual malice. This left most plaintiffs to solve for themselves the problem the injury presumption had been designed to overcome -- finding the elusive evidence that publication had blackened their names.

The problem pervades most libel cases, baffles most plaintiffs, and helps those defendants who exploit it most fully.

Very early in the case, ask the plaintiff through interrogatories the names of her ten closest friends, all family members, employers, psychotherapists, doctors, clergymen, attorneys, accountants, counselors, social clubs, professional groups, and religious organizations.

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An aggressive deposition campaign thereafter generally will confirm the common law theory that it is virtually impossible to find a witness who can support the plaintiff's damage claim. It also will produce a host of witnesses who will support your argument that the plaintiff's damage claim is not supportable.

Family members will testify that they read or saw the publication and did not believe it because they love and respect the dear defamed. Friends also will sing this song. Employers, a lot that generally fears for its own welfare, also tend to swear they have been unfazed by ill publicity. "Why else," they will offer, "would we continue to employ this woman?" Even ex-employers can be helpful. "Yes," they may testify, "we terminated her, but for our own well-documented and carefully considered 'good cause.' We never would simply take the word of a (spoken with disdain) newspaper."

Evidence that the plaintiff's reputation has not been harmed will also help to unravel any claim of emotional distress. If none of many witnesses thinks less of her, then isn't her distress unreasonable or, perhaps, fabricated?

But much more can be done to attack a claim of emotional distress. Go especially after the testimony of the professional healers. This strategy has two benefits. First, the plaintiff may refuse to waive privileges for her communications with these folks. If so, you should be entitled in many instances to an outright dismissal (most states include an evidentiary rule requiring dismissal when the plaintiff uses a privilege to block discovery of evidence bearing on matters which she has put in issue such as her emotional or medical condition). Second, if the privilege is dropped, you probably will find the plaintiff either never has mentioned the publication at issue, that she is beset with problems unrelated to the publication, or both.

Discovery regarding the plaintiff's contacts with attorneys may help you to infer, even if you cannot force a waiver of the attorney-client privilege, that the plaintiff shopped her meritless case around to many different lawyers before she persuaded the utterly unprincipled counselor sitting with her in the courtroom to abet her cause. Plaintiff's libel lawyers typically are hard to find, so it is not unusual for a plaintiff to have visited a half dozen prospects or more irrespective of the merits of the claim. This evidence can be very damaging to the plaintiff who sought neither medical nor psychological counseling before she exhausted her local Martindale-Hubbell listings.

Accountants can yield up evidence that the plaintiff was experiencing grave financial problems *before* publication of the article and will lend credence to a closing argument that this lawsuit is nothing but a desperate grab for cash.

Extensive damage discovery also may also show that many of the plaintiff's friends and relatives were unaware of the publication until the plaintiff herself called it to their attention. Why, ladies and gentleman of the jury, would the plaintiff herself place this supposedly odious publication right under the noses of those who are the closest to her and who would not have seen it otherwise?

When taking the plaintiff's deposition, it is essential to force her to identify every person whom she believes thinks less of her as a consequence of the publication sued upon. If the universe of persons whose opinions supposedly have been changed is not defined at this point, you can expect to hear at trial about a long list of acquaintances who "just haven't treated me the same ever since" and you will have no way to show why that is not so at all.

When the plaintiff is a corporation, a somewhat different tack is in order.

Consider this hypothetical. The American Box Company has enjoyed a profit margin of 15 percent for five years. Television station WMUK reports in 1993 that ABC boxes have been used to ship cocaine from Colombia. ABC's profit margin drops to 10 percent in the following year. ABC claims the WMUK report is false and that its profit decline was caused entirely by the WMUK report.

The libel defense lawyer's best friends in this hypothetical case may be a forensic accountant, an industrial psychologist, or an investment analyst, rather than the First Amendment. These professionals not only can help keep a damage recovery down, in some cases they can win the case outright.

Here is how to proceed.

If the complaint does not spell out the damage claim specifically, try to get that done through interrogatories or requests for admissions at the outset of the case. Many plaintiff companies are anxious to maximize damage claims and will overstate them early on. If asked, "Do you contend that WMUK's report caused your profit margin to decline from 15 to 10 percent?" the temptation to answer simply "Yes" is great.

If asked to admit that the profit decline was not caused by events other than the WMUK broadcast, most plaintiffs readily will make this ostensibly harmless concession.

Such answers, while consistent with the claim, will place ABC far out on a limb.

Next, request ABC's *monthly* financial statements for 5 years (or more) preceding the broadcast to date. These documents may be voluminous and the fight to get at them may be costly, but nothing will substitute to reveal the true cause of the company's woes. Supply these documents to your accountant, have her load them into a computer, and then ask for chronological trend charts for each line item.

From this analysis, you will uncover compelling lines of cross-examination to be used either upon deposition or at trial. Accountants and financial analysts are ingenious at creating 101 theories to explain why any set of statistics behaved the way they did and usually at least half of those theories will be as persuasive as the plaintiff's.

The numbers may show, for example, that although profits dropped in 1994, the months

preceding the broadcast were less profitable than those following the broadcast; that the cost of paper increased dramatically in 1994; that labor costs took a violent turn up; or that prices dropped.

But numbers alone are not enough. Depose not only the president of the company and the chief financial officer (to tie them down to as extreme a theory about their company's problems as they will give you), but also the lower-level employees who are likely to think they know best why the company's financial performance has changed. Many will have pet theories such as the lazy boss, the stupid staff, the failing economy, and the aggressive competition that they will find hard to keep from you.

Well-coached employees who try to adhere to the company line of attributing every expense increase and revenue decline to WMUK's broadcast will look foolish when trying to explain such things as why the cost of paper went up because of a broadcast about ABC's narcotics trafficking.

The old common law presumption of damage existed because evidence of defamation damage is hard to find. That should give every defamation defendant confidence that bold foraging through the plaintiff's damage claim is likely to do the defense a lot of good.

Early Damages Motion Practice

Luther T. Munford and Mary Ellen Roy*

In some cases, the plaintiff's inability to prove certain types of damage can be fatal to all or part of the plaintiff's claim. Initial discovery to establish that the plaintiff cannot prove those damages can lay the ground work for an early summary judgment motion. Situations where failure to prove certain damages may be fatal include the following.

The Libel Proof Plaintiff

Some plaintiffs can show no damage to their reputations because their reputations have already been damaged beyond repair by their own misconduct. These plaintiffs may be barred from suing even though the defendant has published a false accusation that would normally be considered to be defamatory. This defense is conceptually distinct from the substantial truth

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defense, because the reputation-damaging activities may not have anything to do with the particular conduct at issue in the lawsuit.

Plaintiffs with criminal records, for example, have had libel cases dismissed because the acts of which they were falsely accused pale in comparison to the ones they had actually committed. A plaintiff with numerous federal felony convictions could not sue for being accused of fixing a horse race. Similarly James Earl Ray, the convicted assassin of Dr. Martin Luther King, Jr., could not sue for articles which accused him of also being a narcotics peddler and a robber.[1]

The doctrine is not limited to criminals, and can justify some interesting discovery. When a pornographer on the Mississippi Gulf Coast sued a newspaper for alleging that he had hired a member of the "Dixie mafia" as a driver, discovery established the authenticity of sample girlie magazines he sold in his store. The newspaper successfully argued that, because the plaintiff was known in the community for selling pornographic and obscene magazines, an allegation that he had hired a driver with an unsavory background could not possibly have hurt his reputation.

LIBEL PER QUOD

The arcane world of libel per se and per quod is one many practitioners might prefer to ignore as being obsolete in the modern world of constitutional libel doctrine. This seemingly archaic distinction can, however, be used to a defendant's advantage. In many states, the plaintiff is not permitted to recover in cases of libel per quod except upon a showing of special damages (also known as "special harm").

Special damages are economic or pecuniary in nature, such as the loss of customers, business, a particular contract or employment. The loss of society of one's friends and the suffering of mental or emotional distress, even when resulting in physical illness, however, do not constitute special harm.[2]

One classic description of the demarcation between libel per se and per quod is that statements that are defamatory per se are those "which on their face and without the aid of extrinsic proof are recognized as injurious," while defamatory per quod statements are those "as to which the injurious character appears only in consequence of extrinsic facts."[3] Thus, a statement that the plaintiff has burned his own barn is not defamatory per se since he was free to do so; but when it is pleaded that the plaintiff's barn was insured and the innuendo is that the

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[1]*See* Ray v. Time, Inc., 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd*, 582 F.2d 1280 (6th Cir. 1978).

[2]*See* PROSSER AND KEETON, THE LAW OF TORTS § 112, at 794 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 575 (1977).

[3]*See* 53 C.J.S. *Libel and Slander* § 11, at 43 (1987).

plaintiff was defrauding the insurance company, the statement constitutes libel per quod.[4]

Yet another formulation may be useful because it limits the statements that are considered defamatory per se to four express categories. Under this analysis, only express imputations of the following constitute libel per se:[5]

a. the commission of a criminal offense;
b. conduct that would cause injury in one's business, trade, profession, or office;
c. the contraction of a loathsome disease; or
d. the unchastity (or serious sexual misconduct) of a woman (or another).

"All other slanderous words, no matter how grossly defamatory or insulting they may be, which cannot be fitted into the arbitrary categories listed above, are actionable only upon proof of 'special damages.'"[6]

Thus, if the alleged defamation does not fit within one of these four categories, or is only defamatory when extrinsic facts are known to the reader, or is susceptible of more than one meaning, only one of which is defamatory, then the plaintiff cannot prevail without pleading and proving special damages.

SINGLE INSTANCE RULE

A similar requirement of pleading and proving special damages can be tested by early motion, in appropriate cases, in states that recognize the so-called single instance rule. First articulated in New York in 1811, and now recognized in Colorado, Connecticut, Florida, Georgia, and Massachusetts, the single instance rule provides that allegations that a professional person had been careless or erred on a single occasion -- unlike accusations of general unfitness or skill in one's profession -- are not actionable unless the plaintiff pleads and proves special damages.[7] Special damages must be both pleaded and proved with specificity, in New York, for example, round figure ad damnum amounts are of insufficient particularity to satisfy special damages, and where business reverses, in the form of lost customers, are alleged, the plaintiff

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[4]*See* PROSSER AND KEETON, *supra*, note 2, § 111, at 782.

[5]*Id.* at § 112, at 788; RESTATEMENT (SECOND) OF TORTS §§ 571-74.

[6]*Id.* at § 112, at 793.

[7]*See* November v. Time, Inc., 13 N.Y.2d 175, 178, 194 N.E.2d 126, 128, 244 N.Y.S.2d 309, 311 (1963); Foot v. Brown, 8 Johns. 64, 68 (N.Y. 1811). *See generally* Annot., *Libel and Slander: Actionability of Defamatory Statements as to Business Conduct, Relating to a Single Transaction or Occurrence*, 51 A.L.R.3d 1300 (1973).

must state the names of persons who either ceased to be or refused to become customers.[8]

INJURIOUS FALSEHOOD

The tort of injurious falsehood, also known as trade libel or commercial disparagement, is closely related to the tort of defamation. Important distinctions exist with respect to damages, however. In all cases of trade libel, regardless of the nature of the alleged falsehood, the plaintiff must plead and prove special damages to recover. In addition, the plaintiff must plead and prove that these economic damages result "directly and immediately" from the disparagement.[9]

These burdens are difficult for most plaintiffs to sustain. Thus, if a plaintiff's complaint, allegedly for defamation, can be redefined by the defendant as being one for injurious falsehood instead, a dispositive motion demonstrating the lack of special damages or of direct and immediate causation is likely to succeed.

If the alleged defamation charges the plaintiff with dishonesty or the perpetration of a fraud, there may be no way around the defamation label. If the contested statements reflect only upon the quality of what the plaintiff has to sell or the character of the plaintiff's business as such, however, "it is merely disparagement."[10]

In some jurisdictions, the causation requirement is a stiff one, i.e., a general decline in business following the publication of the alleged falsehood is not sufficient; only the loss of specific sales to identified persons can be recovered.[11] Others, however, require only "proof that the loss has resulted from the conduct of a number of persons whom it is impossible to identify."[12]

If the plaintiff is a corporation or business person alleging damage to business reputation but cannot prove special damages, a dispositive motion seeking to convince the court that the plaintiff is attempting to conceal a nonactionable claim for commercial disparagement behind the mask of defamation would be worth pursuing. One caveat to consider is that it is not entirely

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[8]*See* Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 440, 199 N.Y.S.2d 33, 37, 166 N.E.2d 319, 322 (1960); Reporters' Ass'n of America v. Sun Printing and Publishing Ass'n, 186 N.Y. 437, 442, 79 N.E. 710, 711 (1906).

[9]Restatement § 633.

[10]*See* PROSSER AND KEETON, *supra*, note 2, § 128, at 964-65. *See also* U.S. Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 924 (3rd Cir.), *cert. denied*, 498 U.S. 816, 111 S.Ct. 58 (1990) (collecting cases regarding the distinction between defamation and disparagement).

[11]PROSSER AND KEETON, *supra* note 2, § 128, at 972.

[12]RESTATEMENT § 633(2)(b).

clear whether the First Amendment applies in all cases of commercial disparagement.[13] Thus, the value of the "disparagement" label in the damages arena must be weighed against the possible disadvantages in the constitutional privileges arena.

Retraction Statutes and Special Damages

Most states have retraction statutes. These statutes typically limit the plaintiff's recovery either by limiting damages recoverable by a plaintiff who does not demand a retraction or by limiting the damages recoverable by the plaintiff if the defendant publishes a retraction. Many of these statutes are archaic and would not provide the basis for an early summary judgment motion because they turn on the jury's assessment of whether a retraction was fair or not.[14]

In a few jurisdictions, however, these statutes can give rise to an early summary judgment motion based on the plaintiff's inability to prove the limited damages allowed by the statute. In California, for example, compliance with the statute has been treated as a question of law. The courts will dismiss the claims of a plaintiff who fails to give notice specifying the allegedly libelous statements and also fails to show special damages.[15]

Punitive Damages

The special requirements for punitive damages may create an opportunity to move for a partial summary judgment eliminating the plaintiff's punitive damage claim. Getting that claim out of the case reduces the stakes in the litigation and may promote settlement.

Generally, a plaintiff cannot collect punitive damages if (i) the publication is of public concern and the plaintiff cannot prove constitutional actual malice, (ii) the plaintiff cannot prove common law malice in states that require proof of both constitutional and common law malice as a prerequisite to punitive damages, or (iii) the plaintiff cannot prove that a corporate defendant is vicariously liable for the malicious misconduct of its employee.[16] Each of these requirements presents a possibility for a summary judgment motion.

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[13] *See* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 513, 104 S.Ct. 1949, 1966 (1984).

[14] *See* Bruce Sanford, Libel and Privacy § 12.3.1 (2d ed. 1993). The application of the new Uniform Correction or Clarification of Defamation Act is discussed *infra*, in Potential Impact of the Uniform Correction or Clarification of Defamation Act on Damages (Kaufman and Cantwell).

[15] *See* Gomes v. Fried, 136 Cal. App. 3d 924, 186 Cal. Rptr. 605 (Calif. Ct. App., 1st Dist. 1982).

[16] Restatement § 909. For a more extensive discussion of punitive damages, see *infra*, An Update on Punitive Damages in Defamation Actions (DeVore et al.).

Motions in Limine Involving Damages

Karl Olson*

Many practitioners in libel cases regard damages as a crazy aunt in the attic: something you'd rather not deal with and, happily, usually don't have to deal with. Most defamation actions are disposed of at the pre-trial stage without reaching damages, and an undue focus on that issue often seems to detract from the weightier issues of privilege and the First Amendment with which we like judges to concern themselves.

In those cases that do survive motions to dismiss or for summary judgment, however, damages are of course an important issue. They should enter into the practitioner's thinking in formulating a discovery plan, in questioning the plaintiff about his or her claim, and perhaps most importantly at the motion *in limine* stage. A successful motion or motions *in limine* on this subject can not only limit the plaintiff's damage claim but narrow the scope of the trial to prevent extraneous and prejudicial matters from muddying the water and generating undue sympathy for the plaintiff.

A few examples of fruitful motions *in limine* follow:

Exclude evidence of defendants' financial condition until and unless jury finds plaintiff entitled to punitive damages: Most states require a showing of the defendant's profits or financial condition before a punitive damage award (i.e., to ensure that the award is not disproportionate to defendant's financial condition and does not exceed amount necessary to deter).

In California, effective January 1, 1988, the court is required to preclude admission of evidence of a defendant's profits or financial condition, upon a defense motion, until after the trier of fact has found both actual damages and entitlement to punitive damages. Anyone representing a large media client would be remiss if they did not move to preclude this evidence until after a jury had found entitlement to punitive damages.

On the other hand, the publisher of a small newsletter or community paper, or an individual client being sued for protest speech in a "SLAPP" situation (Strategic Lawsuit Against Public Participation) might want to introduce evidence of his or her perilous financial situation to document the "chilling effect" of the lawsuit and the danger it might force the publication out of business.

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Aside from those instances, however, be sure not to let a jury be influenced by your client's "deep pockets." (Even the California Supreme Court has used the supposed wealth of the media as a reason why it should be entitled to no special protection, in the course of its near-diatribe against the press in *Brown v. Kelly Broadcasting*, 48 Cal.3d 711 (1989).)

Exclude reactions of others to article: A common tactic of the most skillful plaintiffs' lawyers (Charlie Morgan, for example), is to inflame the jury with evidence of the reaction of other people to an article or broadcast, and then to suggest that for each person who said something to the plaintiff, countless others saw the article or heard the broadcast, but didn't say anything to plaintiff about it.

As an antidote for this potent sympathy pill, I suggest a motion *in limine* to exclude the reaction of others to the article. There is venerable California authority in the form of *Turner v. Hearst*, 115 Cal. 394 (1896), to support this argument. As the *Turner* court held, the "filtered" reaction of third persons to what an article said is unreliable. The *Turner* court held that evidence of what plaintiff's clients and people on the street had said to him was inadmissible: "It would be pernicious to permit evidence of this kind for the purpose of showing increased suffering. The evidence itself could not be met. There would be no way of testing the sincerity of the remarks, or of determining whether they were prompted in fact by the publication, or sprang from secret hostility or malice toward the plaintiff, in which case the aggravation to plaintiff's feelings would in no sense be chargeable upon defendant." 115 Cal. at 400.

Besides, as a practical matter, any plaintiff can trot out five or six friends to testify how damaging they thought the article was (funny how they're still the plaintiff's friends, though). A successful motion *in limine* along these lines can both limit the plaintiff's damage claims and eliminate potentially prejudicial trial evidence.

Limit or exclude emotional distress testimony/damages: Emotional distress damages will often be one of the largest components of damages sought or awarded. They are, of course, inherently subjective and slippery.

In most jurisdictions, you will not be able to preclude testimony on this issue, but you may be able to do some "damage control" by limiting plaintiff's testimony about the reaction of others (see above) and establishing that the plaintiff did not seek psychological or psychiatric help (which is usually the case).

Obviously, defense counsel should delve extensively into the plaintiff's emotional distress claim during discovery. If worst comes to worst and the jury does award substantial damages for emotional distress, the absence of psychological treatment may make the jury's award vulnerable to a post-trial or appellate challenge. *See, e.g.*, Ross v. Santa Barbara News Press 22 Media L. Rptr. 1733 (1994) (new trial warranted where plaintiff was awarded $2.5 million for emotional distress damages despite his failure to present any evidence from health care professionals or himself that he suffered severe or permanent harm as a result of the article;

court calls award "clearly excessive" and cites "chilling effect" it would have on First Amendment rights).

Keep out bogus "lost profits" evidence: It is not at all uncommon for a plaintiff to claim "lost profits" from a new business or even a new profession. In *Masson v. New Yorker Magazine*, for example, the plaintiff wanted to show that *The New Yorker*'s articles had made it impossible for him to find a teaching job -- even though the tapes of his interviews with Janet Malcolm contained his admission, "I can't get a job. Not even in the university ... I can't get a job." Mr. Masson had freely admitted in the interviews that his pre-publication conduct -- including his controversial ideas and his bashing of the psychoanalytical establishment -- had made him a "*persona non grata*."

We were successfully able to exclude Masson's "lost profits" and ultimately any claim of special damages at all. (The timing of plaintiff's job applications gave rise to some suspicion that they were sent out solely for litigation advantage and, in any event, none of the employers cited the articles as a reason for their decision not to hire Masson. The market for California university teachers in the 1980s was very tight to begin with.)

We relied on some blackletter rules: In order to support a lost profits award, the evidence must show with reasonable certainty both their occurrence and the extent thereof. *Maggio v. United Farm Workers*, 227 Cal.App.3d 847, 869-70, *cert. denied*, 112 S.Ct. 187 (1991). In particular, a plaintiff in a libel suit seeking such special damages must allege and prove more than a general loss of prospective employment, but instead a loss of specific employment with a specific employer. *Pridonoff v. Balokovich*, 36 Cal.2d 788, 792 (1951).

Damages cannot be recovered if they are remote, speculative, or uncertain, as is often the case in this context. If the plaintiff's is a new business, damages for lost profits are generally not recoverable at all. *Maggio, supra*, 227 Cal.App.3d at 870. And, finally, a plaintiff should be required to show that there was a causal connection between the publication and the lost job or lost profits. Discovery and, if necessary at trial, cross-examination of both plaintiff and any relevant third parties can often knock this element of damages out entirely.

In conclusion, the best defamation case is one in which there is no liability, and therefore no damages to worry about. But in the hopefully rare cases where damages do become an issue, some thorough discovery and pre-trial "damage control" in the form of motions *in limine* can reduce, though not eliminate, the risk of a wayward jury and a runaway damage award.

Trying Damage Claims and Limiting Recovery at Trial

James E. Stewart*

Presumably there have been trials in which the plaintiff really wanted only to have his/her reputation restored. I haven't been involved in any of those. In my experience, the plaintiff wants one thing from the clients we represent -- money, and lots of it. In my efforts, sometimes successful and sometimes not, in trying to at least keep the plaintiffs from getting lots of our clients' money, some of the following observations come to mind regarding trial techniques to limit damages in defamation actions.

In a claim for business loss, a *good* accounting expert is literally worth his weight in gold. Jurors I have interviewed after business defamation cases have almost invariably told me they wanted as much information as possible and appreciated what they got from the defendant's accounting expert. Presentation is a large part of that success. Some accountants are too dry for anyone to be interested in their testimony and some appear a bit too slick to be completely trusted. Finding the right combination is essential. The right accounting expert for one case and one industry may not be the right accounting expert for a different case and a different industry. This work is all done long before you walk over to pick the jury.

Hand in glove with a good accounting expert in a business loss case is the need to show that the claimed business losses were caused by something besides your client's publication or broadcast. In some instances, an expert will be necessary to establish industry trends that may have affected this business. In other instances, investigation/discovery of past and present customers or suppliers and past or present employers or competitors may be the best source of this information.

Damage instructions in business defamation cases can also present some confusion. Everyone has their own view, but I think juries really try to listen to the judge's instructions and follow them. I don't think I have ever had a case in which the plaintiff didn't try to get a presumed damages instruction based on the argument that the statements were "per se" defamatory. I think this is a devastating instruction if given but in many jurisdictions there are probably decisions supporting that instruction.[1] The best success I have had in this regard is to explain that presumed damages were simply an exception to the old common law requirement

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[1]Here I am assuming that your business defamation claim cannot be put onto the constitutional track, but will instead fall under *Dun & Bradstreet v. Greenmoss*.

of pleading special damages, that a plaintiff can recover only what he proves (a notion that most trial judges seem to endorse readily), and that presumed damages are probably unconstitutional in any event. The other damage issue that I have been surprised to see recur deals with the measure of damages. The proper measure should be lost profits only. Loss of sales may be relevant evidence, but should not be confused with the measure of damages instruction.

In every case, the defense attorney has to decide what to say about plaintiff's damage number. This is especially so in business defamation cases in which the plaintiff's number is probably fairly concrete as opposed to a damage claim based upon emotional distress. Devoting your final argument to liability and saying nothing about damages is one approach but an awfully risky one. If the jury finds liability, they only have one number to work with the plaintiff's number. Certainly no defense lawyer wants to be in the position of suggesting a number to the jury. Having said that, however, there are certainly ways to argue against the plaintiff's specific dollar claim without suggesting your own number. Moreover, if liability is bad from the defense standpoint but you have a good damage theory, you might very well want to get your number in front of the jury. You'll like it a lot better than the one the plaintiff is suggesting.

Claims for non-business defamation are by their very nature less specific than business loss claims. The damages requested by the plaintiff in final argument will predictably be quite large, typically in the round barrels-full. Such damages will be said to be supported by testimony of "friends" assertedly shunning the plaintiff, the plaintiff's own reaction to the claimed defamation, and general mental anguish testimony. Psychiatric or medical testimony may be used to buttress these claims, but that has been rare in our experience. If the reporting involves a number of statements about the plaintiff, but only some of those statements are complained of, the damage witnesses may have to be handled carefully. If their testimony as to damages is based on a reaction to the article or broadcast as a whole rather than the specific statements complained of, there is a potential for a motion or at least a jury instruction that the plaintiff has not proven damages caused by the specific complained of statements.

While it has to be done carefully, cross-examination of the plaintiff to suggest that life has more or less gone on as it was before the article or broadcast can be helpful, i.e., that the plaintiff still does the same social activities, still has the same hobbies or friends, still bowls every Wednesday night, etc. Generally speaking, this is extremely dangerous to do on cross-examination at trial without a good record having been laid at the plaintiff's deposition. While the subject here is the trial of damage claims, it really can't be discussed without consideration of the pretrial phase. At least in my experience, every plaintiff who has ever brought a libel suit has something in their background that they would just as soon not have public. The time to find this out and use it to your advantage is not at trial but during pretrial discovery.

It should also be remembered that, in general, a libel plaintiff has the same obligation to mitigate his or her damages as any other plaintiff. It has been our experience that libel plaintiffs have often done little or nothing to attempt to mitigate the damages supposedly caused by the statement at issue. For example, discovery may reveal that a business plaintiff, who claims that the statement caused many of its customers to cease doing business with the

company, may have made little or not effort to contact those customers and explain their side of the story. Apart from its legal significant as a failure to mitigate damages, this may also persuade the jury that the plaintiff did not have very strong business relationships to begin with or was not interested in doing the amount of work necessary to preserve them. Again, though, solid foundation through thorough discovery is critical.

It is certainly worth keeping in mind that, on the one hand, a finding of liability does not necessarily equal a finding of heavy damages. I always try to remember that most jurors probably have a view of the media that is far different than ours. With that in mind, I have always found it helpful to have some responsible executive from the newspaper or broadcaster present during the trial as well as the reporter or editor who was directly involved in the matter. I have had jurors tell me that did a lot to suggest to them that our clients found what they were doing to be important and they appreciated that. On the other hand, it is probably worth noting that in some instances there is really no clear delineation between the liability proofs and the damage award. If your liability case is really bad, i.e., your reporters look more than just careless, this can have a bottom-line effect on the damage award. Everyone has their own war stories in this regard. One of mine involved a community activist who had published a community "newsletter" attacking other members of the community in extremely strident language. One of the final witnesses for the plaintiff was a Roman Catholic nun to impeach our client on a crucial matter. That testimony had nothing to do with damages, but it sure did have an effect on damages.

In another recent case, happily, I was able to use a similar technique, having little to do with damages, to a more successful end. I was trying a business defamation case in which there had been a mistake in the cut line to a photograph. The first correction, which had been written by the reader representative, somehow got changed in the composition process and ended up effectively repeating the claimed defamatory statement, if not making it worse. Someone at one of the fall 1992 LDRC seminar (my apologies for forgetting exactly who it was) mentioned that in his experience it was often helpful to explain to the jury how a newspaper is put together. While it probably doesn't help to do this in every libel case, it struck me that this was probably a very helpful thing to tell the jury in our case. It has been my experience that most plaintiffs' attorneys and probably more defense attorneys than we would imagine really don't understand how a daily newspaper is put together. I used our managing editor and we took a particular page of the newspaper for a day shortly before trial and literally walked the jury through the way that page of the newspaper is put together from the time the photographer is sent on assignment through the writing of the story, the selection of the photograph, the writing of the cut lines, the copy editing process, and the actual composition. As exhibits we used the actual dummies or makeup boards from that day. While that testimony probably went to liability more than to damages, this was an instance to me where the lines between the two blur. It is one thing to simply argue that honest mistakes can happen in any human endeavor, another thing to explain to the jury in concrete terms the remarkable feat that is the production of a daily newspaper.

In that same case, I had our journalism expert review examples of the corrections pages

from *The New York Times* over the past year to demonstrate the inevitability of mistakes in this daily process. Because a photo caption had been the basis for the lawsuit, I had our expert select examples from the *Columbia Journalism Review*'s "Lower Case" section, which is a compilation of humorously incorrect headlines and caption lines. The idea was to demonstrate with examples that these are the sorts of mistakes that can and do happen in every newspaper in the country, including those generally viewed as prominent. Again, while these proofs technically had a greater bearing on liability than damages, giving the jury a concrete (and hopefully logical) explanation of the process of producing a newspaper certainly cannot have an adverse effect on your damage case. And, in our case, the ultimate (four-figure) award was only a fraction of the plaintiff's ad damnum -- a result that I am confident was influenced, at least in part, by defusing the significance of the publisher's error, by establishing the publisher's "good faith" in attempting to be as accurate as possible and thus, at least by indirection, also defusing the jury's desire to take large sums of money out of my client's pocket for the benefit of the plaintiff.

Finally, in some cases the opportunity arises to bifurcate the trial and to litigate the issues of liability and damages separately. In many areas other than defamation, this is a distinct advantage to the defendant. In our view, however, libel defendants should consider the matter very carefully before agreeing to a separate trial on damages. After all, such an arrangement may not only prohibit the plaintiff from admitting damages evidence that may influence the jury on the issue of liability, but it may also prevent the defendant from offering evidence that is most directly related to damages but that also reflects poorly on the plaintiff's character or position.

Jury Instructions on Damages Issues

Robert L. Raskopf*

Ideally, jury instructions fairly present the relevant issues and legal standards in a case, and the jury impartially adheres to them in rendering its decision. Unfortunately, that is *not* always the way it works, especially in defamation actions, and frequently where the defamation jury considers damages. Jurors, after finding the defendant liable for publishing or broadcasting defamatory statements about the plaintiff, often have a natural tendency not only to want to rectify the situation presented but also to discourage similar future conduct by awarding the plaintiff large sums of money. In fact, according to LDRC juror attitude studies, jury members

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can't wait to "teach the [media] defendant a lesson" or "send a message."[1] Predictably, the resulting damage awards can be exorbitant. To combat this phenomenon, the media defense bar must recognize the crucial role that jury instructions can play in libel cases; even if the clearest instructions do not prevent a runaway damages award at trial, they may save the day on appeal.

THE PROBLEM: THE CONSEQUENCES OF POOR JURY INSTRUCTIONS

When she was sitting on the Circuit Court of Appeals for the District of Columbia, Justice Ginsburg recognized that in the "libel area particularly, it is not a large exaggeration to suggest that jurors 'can easily misunderstand more law in a minute than the judge can explain in an hour.'"[2] To help rectify the problem, then-Judge Ginsburg suggested that the trial court instruct the jury -- "in plain English"[3] -- *throughout* the trial, so that jurors are given the law in manageable portions. Indeed, jurors questioned in the LDRC studies almost unanimously yearned for increased guidance, particularly as to damages.[4] In the absence of adequate instructions from the bench, the jurors appeared to determine damage awards with little or no rational basis. Even when instructions were deemed appropriate, jurors sometimes seemed to disregard them altogether.

For example, in *Machleder v. Diaz*, the plaintiff, an elderly private citizen who owned a small chemical manufacturing plant located next to a controversial dumpsite, was awarded $250,000 in compensatory damages and $1 million in punitive damages after Diaz and his employer, CBS, were found liable on the plaintiff's false light claim and were found to have broadcast the report in question with actual malice.[5] The trial was bifurcated, but no new evidence was offered concerning damages, prompting most jurors to complain later that they had little information to draw upon in this regard.[6] As a result, without any testimony concerning the extent of the harm to the plaintiff's reputation, business and personal feelings, the jury merely decided that compensatory damages would be $250,000, the amount they calculated as

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[1]*See LDRC Jury Attitudes Study*, 14 LDRC BULLETIN 1, 24, 27 (Summer 1985); *see generally LDRC Juror Attitudes Study II*, prepared in conjunction with the ANPA/NAB/LDRC Libel Trial Symposium 1 (August 1985); *LDRC Juror Attitudes Study III*, 22 LDRC BULLETIN 1 (Summer 1988).

[2]*See* Tavoulareas v. Piro, 817 F.2d 762, 808 (D.C. Cir. 1987) (en banc) (concurring), quoting Sunderland, *Verdicts, Generals and Special*, 29 YALE L.J. 253, 259 (1920).

[3]*Id.* at 807.

[4]*See LDRC Jury Attitudes Study I, supra* note 1, at 8; *LDRC Juror Attitudes Study II, supra* note 1, at 12.

[5]618 F. Supp. 1367 (S.D.N.Y. 1985), *aff'd in part and rev'd in part*, 801 F.2d 46 (2d Cir. 1986) (reversing damage awards because no false light invasion of privacy claim could lie), *cert. denied sub nom.* Machleder v. CBS, Inc., 479 U.S. 1088 (1987).

[6]*See LDRC Juror Attitudes Study II, supra* note 1, at 12.

plaintiff's legal fees.[7]

The punitive damages calculation was even more attenuated. Despite the fact that Machleder engendered little sympathy with jury members -- the jury apparently joked about giving the punitive portion of the award to charity[8] -- the jurors were greatly influenced by the fact that the charge specifically allowed them to take the defendant's wealth into account.[9] In addition, jurors felt that a large damage award was necessary since they believed that it would inevitably be reduced on appeal or through a settlement. Finally, the jury was influenced by "peer pressure" -- jurors in the *Machleder* case admitted that they were aware that other juries routinely bestowed sizable damage awards to worthy plaintiffs, and they felt the need to follow suit![10]

In *Curran v. Philadelphia Newspapers, Inc.*, a similarly unbridled jury awarded $800,000 to a prominent former prosecuting attorney after the newspaper was found to have published defamatory articles regarding the plaintiff's job security and performance.[11] Only after arriving at that figure did jury members recall that the judge had instructed them that compensatory and punitive damages, if found, had to bear a reasonable relationship to each other. Their solution was to arbitrarily designate approximately 55% of the award as compensatory, and the remaining 45% as punitive, despite being presented with no evidence of actual damages at trial.[12]

Although the *Machleder* and *Curran* damage awards were ultimately reversed, the jury deliberations in those cases indicate that media defendants have an interest in reducing the jury's discretion to a minimum.

REDUCING COMPENSATORY DAMAGES: EMPHASIZE CAUSATION

Depending on the facts and circumstances of each case, proper jury instructions might need to be fashioned for actual, special, presumed, and nominal damages.[13] In each instance,

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[7]*Id.* at 13.

[8]*Id.*

[9]*Id.* at 12.

[10]*Id.* at 19.

[11]376 Pa. Super. 508, 546 A.2d 639 (Pa. Super. Ct., 1988) (reversing the trial court's order denying the newspaper's motion for judgment n.o.v., and consequently reversing damage award), *appeal denied by* 522 Pa. 576, 559 A.2d 37 (1989).

[12]*LDRC Jury Attitudes Study I, supra* note 1, at 8.

[13]For purposes of this article, all of these types of damages will be referred to collectively as "compensatory damages."

a key issue in charging the jury is causation. A critical element of the charge is that which explains to the jury the requisite relationship between the defendant's defamatory words and the plaintiff's alleged injury. An explicitly worded causation charge can pay dividends. A superb example is *Holding v. Muncie Newspapers*,[14] where the trial judge adopted defense counsel's proposed charge that the plaintiffs could not recover damages unless they "resulted as an *immediate consequence* of [the] defamatory falsehood."[15] The judge further charged that where there was evidence that damages might have resulted from one of many causes, the jury "must exclude the operation of those causes other than the defamatory falsehood."[16] In *Holding*, the plaintiffs had been subject to significant adverse publicity prior to the challenged publication, and defense counsel wisely recognized the need to separate in the minds of the jury members the injuries that the plaintiffs might have suffered due to these earlier articles from the injuries caused solely by defendant's publication.[17]

Many states have "model" jury instructions, designed by panels of esteemed impartials to cover basic causes of action in all areas of the law, including defamation.[18] In states that have adopted such model or pattern jury instructions, media defense counsel should be wary -- these instructions may not comport with established case law. In New York, for instance, *Macy v. New York World-Telegram Corp.*[19] is often cited for the proposition that, in order to recover, plaintiff must demonstrate that his or her alleged injuries "were *directly and actually* caused" by the defendant's actions.[20] While certain New York pattern jury instructions incorporate direct and actual causation language, the instruction for the single instance rule uses less specific "substantial factor" language to state the requisite causal link.[21]

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[14]Cause No. 78-C-417 (Ind. Cir. Ct, Henry County 1984).

[15]Defendant's Tender of Instructions, Instruction No. 10 (later adopted by the court) (on file with the clerk of the court) (emphasis supplied).

[16]*Id.*

[17]In the end, defendant Muncie won a jury verdict on liability, precluding a determination of damages, but the damages charge is a good model nonetheless.

[18]*See, e.g.*, 1 Cal. B.A.J.I. Civil, B.A.J.I. Nos. 7.09.1 - 7.12.2 (7th ed. 1992); 2 Conn. J.I. (Civil), §§ 460-71 (4th ed.); 2 N.Y. P.J.I. Civil, Nos. 3.23 - 3.34B (1993).

[19]161 N.Y.S.2d 55, 141 N.E.2d 566 (Ct. App. 1957) (holding that article published by defendant about plaintiff's allegedly reprehensible means of seeking public office was defamatory and actionable, but reversing judgment against defendant because of errors in the admission of evidence).

[20]*Id.* at 60, 141 N.E.2d at 570 (emphasis supplied).

[21]*See* 2 N.Y. P.J.I. Civil, No. 3:24.2 (single instance rule) (1993). When the Media Law Committee of the New York State Bar Association attempted to change the "substantial factor" language in the above-mentioned charge and certain commentaries to "direct, actual and proximate cause," the state's Committee on Pattern Jury Instructions rejected the proposal, stating that proximate cause was defined throughout New York's pattern jury (continued...)

It is worthwhile to note that New York has a specific pattern jury instruction to be read when evidence of the plaintiff's good or bad reputation has been offered.[22] On either end, it may be possible to reduce a compensatory damage award on the ground that the alleged defamatory statements did not cause significant harm to the plaintiff. Also, a verdict in favor of the plaintiff on liability may axiomatically reduce the reputational damage suffered by the plaintiff; indeed, such a finding serves to vindicate the plaintiff in the public forum of the courtroom, and a jury instruction to this effect might be effective.[23]

Lastly, although discussion of the First Amendment is most often invoked regarding punitive damages, freedom of speech concerns can come into play when juries debate compensatory awards, too. For example, a California court recently granted a new trial in a libel case that resulted in a compensatory damage award to the plaintiff of $2.5 million for infliction of emotional distress. The court called the verdict "excessive" and wrote that it was "mindful of the chilling effect that such an award would have on First Amendment rights."[24]

In general, plaintiffs will attempt to trace each of their injuries to the defendant's alleged defamatory activity. The defense must plan for this inevitable claim. In those states where helpful case law is on the books, efforts should be made to reiterate the specificity that the causation requirement calls for.[25] If this strategy does not succeed at trial, the media defense attorney will at least have preserved this possible avenue for appeal.

SOLUTIONS FOR PUNITIVE DAMAGES: LOOK TO THE FIRST AMENDMENT, A REASONABLE RELATIONSHIP, THE COMMON LAW AND RETRACTION

Several jurisdictions have judicially or statutorily banned punitive damages in defamation cases because of First Amendment concerns.[26] Such judicial and legislative activism is the only

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[21](...continued)
instructions by using "substantial factor." Apparently, the Committee felt that a less than comprehensive revision of causation language was inappropriate.

[22]2 N.Y. P.J.I. Civil, No. 3:29.1 (modified charge where evidence of plaintiff's good or bad reputation has been offered) (1993).

[23]*See* ROBERT D. SACK AND SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS, § 8.5.1 at 511 (2d ed., 1994).

[24]Ross v. Santa Barbara News Press, 22 Med. L. Rep. 1733, 1736 (Cal. App. Dep't Super. Ct. 1994).

[25]*See, e.g.*, Tosti v. Ayik, 394 Mass. 482, 497, 476 N.E.2d 928, 938 (1985), *cert. denied*, 484 U.S. 964 (1987) (plaintiff must show that inability to find comparable work was "actually caused" by defendant's tortious act).

[26]*See* Ciecierski v. Avondale Shipyards, Inc., 572 So.2d 834 (La. App. 4th Cir. 1990), *writ denied*, 574 So.2d 1256 (La. 1991); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 860, 330 N.E.2d 161 (1975) (codified in Mass. Gen. L. ch. 231, § 93 (1985)); Miller v. Kingsley, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (continued...)

certain way to prevent large punitive awards. Consider one juror's thoughtful rejection of First Amendment considerations in evaluating punitive damages in the *Machleder* case: when asked if the jury would have reduced its $1 million punitive damage award if the defense had raised First Amendment issues, the juror answered in the negative, explaining that the jury had already found for the plaintiff in the liability phase of the trial and that therefore a mitigation of damages on free speech grounds would have been akin to a reconsideration of the underlying guilt of the defendant.[27]

In jurisdictions that permit punitive damage awards in defamation cases, the key issue is the relationship between punitive damages and the compensatory damages that the jury has seen fit to grant. Unfortunately, the recent Supreme Court trilogy on this subject has done little to clarify this area. In *Pacific Mutual Life Ins. Co. v. Haslip*,[28] the jury awarded Haslip $200,000 in compensatory damages and $840,000 in punitive damages. Writing for the Court, Justice Blackmun found that this ratio between the types of damages "may be close to the line ... of constitutional impropriety."[29] Concurring in the judgment, Justice Scalia went further, proposing that the First Amendment may be construed as a bar against any punitive damages.[30] In *TXO Productions Corp. v. Alliance Resources Corp.*,[31] however, the Court affirmed a punitive damages award of $10 million where compensatory damages only totaled $19,000. Most recently, in *Honda Motor Co., Ltd. v. Oberg*,[32] the Court reversed a punitive damages award of $5 million that was over five times the compensatory damages awarded in the case. Justice Stevens, in holding that Oregon's denial of judicial review of the size of punitive damages awards violated the 14th Amendment's Due Process Clause, noted that one justification for the Court's decision was that jury instructions "typically leave the jury with wide discretion in choosing the amount...[creating] the potential that juries will use their verdicts to express

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[26](...continued)
(1975); N.H. Rev. Stat § 508:16 (1986); Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979); Farrar v. Tribune Publishing Co., 108 Wash.2d 162, 178 n.6, 736 P.2d 249 (1987); Cooperative de Seguros Múltiples de Puerto Rico v. San Juan, 289 F. Supp. 858 (D. P.R. 1968).

[27]*See LDRC Juror Attitudes Study II, supra* note 1, at 12.

[28]499 U.S. 1 (1991).

[29]*Id.* at 23-24.

[30]*Id.* at 38, citing *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974).

[31]113 S. Ct. 2711 (1993). Perhaps this unfortunate result can be attributed somewhat to a jury instruction in *TXO*, stating that "the wealth of the perpetrator" could be considered and that "the law recognizes that to in fact deter such conduct may require a larger fine upon one of large means than it would upon one of ordinary means under the same or similar circumstances." *See* Samuel E. Klein, et al., *Punitive Damages*, in LIBEL LITIGATION 1994, at 735, 873-74 (PLI, 1994).

[32]No. 93-644, 1994 WL 276687 (June 24, 1994).

biases against big businesses."[33]

Although the language used in *Honda* may give media defense attorneys a new opportunity to combat natural juror antipathy when attempting to reverse a damages award on appeal, it is still imperative at trial for media defense counsel in libel actions to strive for an instruction that clearly sets forth the law governing the relationship between the compensatory and punitive damages. Sometimes, a state's pattern jury instruction works against the defendant. In New York, for instance, Pattern Jury Instruction No. 3:30 states that punitive damages "need bear no relationship to ... compensatory damages" and that "there is no exact rule by which to determine the amount of punitive damages."[34] However, New York courts have held that a punitive damage award in a libel action cannot be "grossly excessive."[35] In such a scenario, media defense attorneys need to argue convincingly that the familiar pattern jury instruction should be replaced. This may be no small task, given that trial judges are inclined to look favorably upon pattern jury instructions or like charges having the patina of impartiality. Here, the chilling effect on a cherished freedom may be a special consideration sufficient to create a willingness in the trial judge to depart from the jurisdiction's pattern jury instructions.

Even in jurisdictions that permit the awarding of punitive damages generally, media defense counsel should request a charge that such damages may not be awarded upon a mere finding of actual malice, but rather also require a finding of common law malice. In *Prozeralik v. Capital Cities Communications, Inc.*,[36] New York's highest court rejected the trial court's instruction, which allowed an award of punitive damages solely upon a finding of actual malice, because the judge's instruction was inaccurate. The *Prozeralik* court noted that actual malice does not "measure up to the level of outrage or malice underlying the public policy which would allow an award of punitive damages" and indicated that only where a defendant's common law malice, i.e., hatred, ill will or spite toward the plaintiff personally, is also demonstrated, may punitive damages be awarded.[37]

The defense must also overcome a juror's natural but dangerous impulse arising from access to the defendant's financial resources. Although, at present, media defense lawyers can't

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[33]*Id.* at *9. This passage echoes the words of Justice Powell in the landmark libel case of *Gertz v. Robert Welch, Inc.*, in which he wrote that "juries must be limited by appropriate instructions" in order to prevent them from "assess[ing] punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused" and from "selectively...punish[ing] expressions of unpopular views." 418 U.S. 323, 350 (1974).

[34]2 N.Y. P.J.I. Civil No. 3:30 (punitive damages) (1993).

[35]Kern v. News Syndicate Co., Inc., 244 N.Y.S.2d 665, 667 (Sup. Ct. 1963) (punitive award of $50,000 found grossly excessive in comparison to compensatory award of $1,000).

[36]605 N.Y.S.2d 218 (Ct. App. 1993) (remanding case to trial court, which had improperly instructed jury that defendant's retraction was false as a matter of law), *rev'g*, 593 N.Y.S.2d 662 (N.Y. App. Div. 1993).

[37]*Id.* at 226.

do much about keeping such information away from the jury, they can insist upon rationality and clarity in the charge. The charge should clearly explain the purpose of punitive damages -- they are not intended to be a measure of the upper limit of what the defendant can afford; rather, they should reflect what is minimally necessary to accomplish the twin goals of deterrence and retribution. In addition, the jury should be instructed as to what might be considered excessive. In light of the First Amendment concerns discussed earlier, juries should be cautioned against awarding an amount large enough to potentially jeopardize the defendant's very existence. For instance, in *Newton v. National Broadcasting Co., Inc.*,[38] the jury was charged that an award of punitive damages "must not be of such magnitude that it would inhibit defendant NBC from freely reporting on matters of public concern."[39]

Another tactic that media defense counsel should bear in mind when trying to mitigate punitive damages is retraction.[40] At least 33 states have passed some version of a retraction statute. In some jurisdictions, like Florida, a defendant's retraction provides a complete defense against punitive damages.[41]

In sum, there are available strategies for attempting to inject rationality into the determination of punitive (or, for that matter, compensatory) damages awards in the jury charge phase of a trial. First, media defense attorneys should lobby for the passage of correction or retraction statutes (such as the recently approved Uniform Correction Act) in states without them, as well as statutes that maintain that First Amendment concerns should mitigate -- if not serve as an absolute ban on -- the awarding of punitive damages. In addition, media defense counsel should use applicable authority for the crucial proposition that a reasonable relationship must exist between compensatory damages and punitive damages.

CONCLUSION: BE AGGRESSIVE IN FORMULATING JURY INSTRUCTIONS

There's no question that defamation cases present complex and intractable issues. But if we, as media defense attorneys, sometimes feel overwhelmed by our plight, we ought to pause

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[38]677 F. Supp. 1066 (D. Nev. 1987), *rev'd*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 192 (1991).

[39]Reporter's Transcript of Proceedings before the Honorable M.D. Crocker at 7032, *Newton*, *id.* (No. CV-LV-81-180). This instruction was apparently to no avail, however, since the jury awarded the entertainer more than $19 million in compensatory and punitive damages ($5 million for damage to reputation, almost $8 million for loss of past income, over $1.1 million for loss of future income, $225,000 for physical and mental suffering, and $5 million in punitive damages). The trial judge then set aside the award for lost past and future income and damage to reputation, but upheld the damage award for pain and suffering and punitive damages. The Ninth Circuit Court of Appeals dismissed the verdict against NBC because it found no actual malice on the part of the broadcaster, thereby rendering the damages issue moot.

[40]*See generally* Robert Lloyd Raskopf, *Libel Claims: A Correction Statute for New York State*, N.Y.L.J., Jan. 9, 1991, at 1.

[41]*See* Fla. Stat. § 770.02 (1981).

to consider the jury! We are at least experienced in the knowledge that jury instructions can provide as many questions as they do answers. We need to work to eliminate as much ambiguity as possible to reduce the risk that even a well-intended jury will seek its own solutions.

Damage Awards: Post-Trial and Appellate Challenges

Rex S. Heinke, Karen N. Frederiksen and Daniel H. Baren*

The libel defendant hit with a multimillion dollar jury verdict may believe the end of the world has arrived, but in many instances this feeling can turn out to be short-lived. Though provided with limited guidance on the matter from the U.S. Supreme Court, courts in recent years have begun to scrutinize libel damage awards more closely. As a result, a large number of recent post-trial and appellate challenges to hefty libel judgments have succeeded as courts have demonstrated a willingness to reduce or even throw out these awards. Interestingly, a number of courts seem to have settled on the sum of $50,000 as the maximum recovery permitted for general damage awards in libel cases. Occasionally, though, substantial awards -- even in the low multimillion dollar range -- have been upheld.

Our firm has recent personal experience with this problem. In *Ross v. Santa Barbara News Press*, 22 Med. L. Rep. 1733 (BNA) (Cal. Super. Ct. 1994), the jury had awarded the plaintiff $5 million for damage to reputation and $2.5 million for emotional distress, although no punitive damages were awarded. We sought to overturn the jury's verdict on various grounds, including excessive damages. The trial court agreed that the emotional distress damages were not supportable and ordered a new trial for this and other reasons. That decision is on appeal. While we attacked the damages award in a number of ways, the one that worked was the claim that the damages were "excessive." Unfortunately, the law in this area is not as well developed as one might expect given the number of times that damages have been awarded in defamation cases and given the significance of megaverdicts as threats to the financial well being and First Amendment rights of the media. This creates serious problems for the practitioner faced with the task of challenging a jury award of damages.

The seminal U.S. Supreme Court holding on the issue of libel damage awards remains *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the Court held that states may allow private individuals to recover for defamation based on a negligence standard. However, the principles concerning judicial scrutiny of damage awards enunciated in *Gertz* are general and do

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not provide practitioners or courts with detailed standards to apply when determining how to challenge or whether to uphold these awards.

In *Gertz*, the Court recognized a strong state interest in compensating private individuals for injury to their reputations, but held that this interest extends no further than compensation for actual injury. *Id.* at 348-49. Accordingly, the Court held that compensation for a defamation plaintiff who establishes liability under a negligence standard should be limited to damages sufficient to compensate him for the *actual harm* he has suffered. The Court held that this rule will prevent plaintiffs from recovering "gratuitous awards of money damages far in excess of any actual injury." *Id.* at 349.

The Court, however, did not define the term "actual injury," stating only that actual injury is not limited to out-of-pocket loss. It then listed "the more customary types of actual harm" that are recoverable, including impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. *Id.* at 350. The Court then cautioned that "all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." *Id.* at 350.

The Court in *Gertz* also held that defamation plaintiffs seeking recovery based on a negligence standard cannot recover presumed or punitive damages. Presumed and punitive damages can only be awarded to plaintiffs who can, at least, prove the defendant acted with constitutional actual malice. Presumed damages, the Court wrote, invite "juries to punish unpopular opinions rather than to compensate individuals for injury sustained by the publication of a false fact," *id.* at 349, while punitive damages are "wholly irrelevant to the state interest that justifies a negligence standard for private individuals." *Id.* at 350.

A decade after *Gertz*, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Supreme Court held that the rules governing damage awards announced in *Gertz* applied only where the defamatory statement involved a matter of public concern. In *Greenmoss*, the defamatory statement concerned the plaintiff's credit report, a matter that the Court found did not warrant strong First Amendment protection because the speech was "solely in the interest of the speaker and its specific business audience." *Id.* at 762. Accordingly, the Court concluded that "permitting recovery of presumed and punitive damages absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Id.* at 763.

In our case, which clearly involved a matter of public concern, the jury found there was no constitutional actual malice, so it did not award any punitive or presumed damages. The trial court had also excluded the evidence the plaintiff sought to offer to prove alleged economic losses due to defendants' two articles. However, the jury did award very substantial compensatory damages for injury to reputation and emotional distress -- thus calling into question the practical value of eliminating presumed and punitive damages where a jury is bent on making a substantial award. It was these so-called "compensatory" awards that we attacked as, among other things, excessive.

Our research found that while a few large judgments have been upheld, courts generally take a very stringent view of damage awards in defamation cases. It is not uncommon for courts to slash the size of jury awards, and often $50,000 ends up as the going rate in these cases. For example, this $50,000 figure was reached in *Burnett v. National Enquirer*, 7 Media L. Rep. (BNA) 1321 (1981), *aff'd*, 144 Cal. App. 3d 991 (1983). A California jury awarded entertainer Carol Burnett $300,000 in actual damages and $1.3 million in punitive damages as a result of an article published in a national tabloid portraying Burnett as being drunk, rude, uncaring, and abusive in a fancy restaurant. Among other things, the article claimed that a boisterous Burnett "traipsed around the place offering everyone a bite of her dessert," and then spilled her wine over one diner. *Id.*

The trial court agreed with the jury that the plaintiff was "a highly credible witness who did not exaggerate her complaints." *Id.* at 1323. However, it held that the award of $300,000 in actual damages was clearly excessive and not supported by substantial evidence. The court reduced the award to $50,000, holding that sum "is a more realistic recompense for plaintiff's emotional distress and special damage." *Id.* at 1324. The trial court also trimmed the punitive damage award to $750,000, a sum "which should be sufficient to deter the defendant from further misconduct." *Id.* The appellate court reduced this amount to $150,000.

Similarly, in *Nevada Independent Broadcasting Corp. v. Allen*, 664 P.2d 337 (Nev. 1983), the plaintiff, a Republican candidate for governor, sued a television broadcasting company over statements made by a moderator in a question-and-answer program on the eve of a primary election. During the live broadcast, the moderator first accused the plaintiff of passing a check with insufficient funds, then suggested the plaintiff was not capable of handling state money, and finally implied that the plaintiff was not an honorable candidate. *Id.* at 340.

The jury awarded the plaintiff general damages of $675,000 and the trial court upheld the award. The Nevada Supreme Court agreed that the plaintiff was entitled to compensation despite the fact he was unable to prove special damages because he had suffered "shame, humiliation and hurt feelings." It concluded that the plaintiff had been "politically assassinated" by the broadcast and that his political future was "greatly diminished by the incident." *Id.* at 346.

Nonetheless, the court held that the damage award was grossly excessive and must have been given under the influence of passion or prejudice. Concluding that "[i]t is simply beyond the range of reason to conclude that Allen suffered $675,000 damage to his reputation and sensibilities, the court held that "the sum of $50,000 is the maximum amount that could be reasonably awarded under these circumstances." *Id.* at 347.

The $50,000 figure appeared once again in *Newton v. NBC*, 677 F. Supp. 1066 (D. Nev. 1987), *rev'd on other grounds*, 930 F.2d 662 (9th Cir. 1990). In this case, the plaintiff, a Las Vegas entertainer, brought a defamation action against a television network over a broadcast that accused him of having ties to organized crime. The broadcast alleged that he did not have enough money to buy the Aladdin Hotel, so he contacted a friend in organized crime to help him

raise the necessary funds. The broadcast claimed that his friend had thus obtained a hidden interest in the hotel and that he subsequently perjured himself by denying this interest to the state gaming board while under oath.

The jury awarded the plaintiff a whopping $5 million for damage to his reputation and another $5 million in punitive damages. The trial court, however, reduced the general damages award to $50,000, holding that a judgment of $5 million for harm to plaintiff's reputation "shocks the conscience of the court because the broadcasts did not tarnish his outstanding reputation." The court then cited a long list of honors bestowed upon plaintiff following the airing of the broadcast to support its conclusion that his reputation had not been harmed. *Id.* at 1068.

The court (upholding the jury's finding of actual malice) wrote that the jury is entitled to award presumed damages for harm to reputation without proof that harm actually occurred, but that the amount of those damages must be reasonable or else free speech will be inhibited. The court then cited the *Burnett* and *Allen* cases discussed above and held that "$50,000 is the maximum amount that can reasonably be presumed." *Id.* at 1069. Nonetheless, the court upheld the massive punitive damages award, finding that there was sufficient evidence of "ill will" and hatred on the part of the defendants to support an award of punitive damages under Nevada law. The court also upheld a $225,000 award for physical and mental suffering, largely because Newton was treated for an ulcer soon after the broadcast aired. (Subsequently, of course, the Ninth Circuit overturned the finding of actual malice in *Newton* without need to address the damage award.)

In closely scrutinizing these huge jury verdicts, some courts will go beyond just slashing these awards when they find the plaintiff failed to support his claim with ample evidence of injury to his reputation. On occasion, courts have been willing to *completely eliminate* large libel awards.

For example, in *A.H. Belo Corp. v. Rayzor*, 644 S.W.2d 71 (Tex. Ct. App. 1982), the plaintiff, a member of the board of trustees at a university, sued the publisher of the Dallas Morning News for libel based on two articles detailing the plaintiff's involvement in an investigation of fiscal wrongdoing at the school. Specifically, the articles accused the plaintiff of making threatening phone calls to two university officers who were cooperating with a state investigation of the school. The articles quoted a state official as saying the plaintiff told him "I'm going to get your ass. The worm has turned and I'm going to hire somebody to get you." *Id.* at 75-76.

The jury found that the newspaper had published the defamatory quotes with constitutional actual malice and awarded the plaintiff $1 million in actual damages and $1 million in punitive damages. The appellate court reversed, holding that a $2 million award was completely unjustified because the plaintiff offered no evidence of financial, physical or emotional injury. Further, the court noted, the plaintiff "offered no substantial evidence, other than his own testimony, of any loss because of embarrassment or humiliation." *Id.* at 86. The

court concluded that "this massive award of damages is the result of passion and prejudice against newspapers in general and this newspaper in particular" and ordered the plaintiff to "take nothing." *Id.*

This practice of closely scrutinizing libel damage awards represents a recognition by courts that the award of huge judgments -- even in extreme cases of media misconduct -- has a definite chilling effect on the exercise of free speech. Perhaps this concept was best enunciated in *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984), where the appellate court criticized the trial court for refusing to reduce a $7 million verdict for compensatory damages in an invasion of privacy case. "No doubt such an enormous verdict chills media First Amendment rights. But a verdict of this size does more than chill an individual defendant's rights, it deep-freezes that particular media defendant permanently. Putting aside First Amendment implications of 'megaverdicts' frequently imposed by juries in media cases, the compensatory damages awarded shock the conscience of this Court." *Id.* at 141.

Despite this strong trend to strike down huge damage awards in defamation cases, some courts occasionally do uphold even multi-million dollar jury verdicts. For example, in *Weller v. American Broadcasting Co.*, 232 Cal. App. 3d 991 (1991), the plaintiff, an antique silver dealer, brought a defamation action against a reporter, television station and its parent company over a series of broadcasts that alleged the plaintiff defrauded a museum by selling it a stolen candelabra at a grossly inflated price. The jury awarded damages totaling $2.3 million.

On appeal, the defendants contended that the evidence of actual injury to reputation and of emotional distress was not sufficient to support the amount of the verdicts and that the award was grossly excessive. But the appellate court affirmed the damage award, holding that "[o]ur review of the record, when viewed most favorably to the judgment, leads us to conclude that, although the damages were indeed high, they are not so out of proportion with the evidence that we should infer that the jury was influenced by passion or prejudice." *Id.* at 1014. The court supported this conclusion by pointing out that Weller had been besieged by telephone calls from dealers and collectors wondering why he had been on the air for six nights. The court also relied on evidence that Weller's reputation in the silver business had been permanently tarnished by the reports. Furthermore, the court noted, Weller was able to prove his business had dropped off tremendously following the broadcasts.

Another case in which the plaintiff ended up recovering a huge damage award was *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987). In this case, the plaintiff, a cigarette manufacturer, brought a libel action against a Chicago television news anchor and CBS over a report accusing the manufacturer of deliberately adopting an advertising campaign that encouraged children to smoke and that associated smoking with pleasurable illicit activity. The jury returned a verdict in favor of the manufacturer and awarded $3 million in compensatory damages. However, the district court reduced this award to $1, holding that the plaintiff failed to prove any actual injury, even though this was a case of libel per se and the jury had also found clear and convincing proof of actual malice, under which findings the plaintiff was entitled to presumed damages. The district court reasoned that media coverage of the libel

trial was "fair" and therefore this coverage ameliorated whatever injury the plaintiff may have suffered by the defamatory statement. *Id.* at 1139.

The appellate court reversed, holding that in setting aside the damage award, the district court impermissibly took into account the plaintiff's failure to show specific pecuniary harm. In addition, the appellate court held that the district court erroneously relied on the post-verdict publicity in setting aside the damages award. It concluded that "the jury was not carried away by passion and prejudice and that it fulfilled its duty in attempting to assess a reasonable amount of compensatory damages." *Id.* at 1142. Nevertheless, the court reduced the jury's $3 million compensatory figure to $1 million. The appellate court also upheld a punitive damages award of $2,050,000.

Despite these two cases where the libel plaintiff ended up recovering massive judgments, courts are generally scrutinizing large damage awards very closely. In many cases, this scrutiny has prompted courts to reduce significantly or even throw out these awards completely. Nevertheless, this is an area the Supreme Court needs to address, so that clear rules can be created and the threat of megaverdicts eliminated.

In the meantime, there are several keys to attacking such megaverdicts. Although the contours of "excessiveness" are inherently subjective and have not been adequately defined, many of the megaverdicts encountered in libel cases are so large as to speak for themselves in terms of the excessive passion or prejudice from which they arise.

To further place such excessive awards in context, it is important to emphasize, if possible in light of the evidence presented, the plaintiff's complete lack of evidence -- much less or proof -- of actual injury, e.g., that the plaintiff did not consult a doctor for her emotional distress, that there were no economic losses suffered, that the plaintiff lost no friends and was not forced out of nor kept from joining any social or business organizations, that the plaintiff knows of no one that thinks less of her as a result of the publications at issue, etc.

It is also important to emphasize the lack of causation evidence. This is an area that is largely unexplored in defamation litigation and one that needs more attention. Often, a plaintiff cannot tie the alleged injury to anything that has been found to be actionable, much less to proximate damages of megaverdict proportions.

Third, it is quite useful to provide the court with information on the comparative size of other libel verdicts that have been upheld after all appeals have been exhausted. The LDRC's statistics are particularly useful here.

Finally, emphasizing the results and reasoning in the cases already discussed will go a long way in persuading a judge to overturn an excessive damages award.

An Update on Punitive Damages in Defamation Cases

P. Cameron DeVore, Marshall J. Nelson
and Christopher Pesce*

Over the last decade, the Supreme Court has been relatively active in setting out the constitutional limitations applicable to awards of punitive damages in garden-variety civil cases. Those limitations flow from the constitutional guarantee of due process. When it comes to limitations on punitive damages flowing from the constitutional protection of free speech, however, the Supreme Court has been relatively silent.[1] The Court's most recent punitive damages case, *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), did not provide the Court with a vehicle to reexamine the border between free speech and punitive damages. Recent case law from state and federal courts, however, sheds some interesting light on the tension between the two doctrines.

BACKGROUND: FEDERAL CHALLENGES TO PUNITIVE DAMAGE AWARDS IN CIVIL LAWSUITS, FROM *Aetna* to *Oberg*

The United States Supreme Court, in a series of decisions between 1986 and 1994, has rebuffed various constitutional challenges to jury awards of punitive damages in civil lawsuits. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), for example, the Court considered for the first time, but refused to reach, the question of whether an award of punitive damages in a civil case could violate the Eighth Amendment's "excessive fines" clause. In *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989), an antitrust case, the Court answered the question in the negative, holding that the "excessive fines" clause does not apply to civil suits and therefore does not bar an award of punitive damages.

In *Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1 (1991), the jury awarded plaintiff

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[1]Justice Scalia, concurring in Pacific Mutual Life Ins. v. Haslip, 499 U.S. 1 (1991), while accepting the historic validation of punitive damages under the Due Process Clause, noted that, nevertheless:

> [P]rocedures demanded by the Bill of Rights . . . must be provided despite historical practice to the contrary. Thus, it [the principle of historic validation] does not call into question the proposition that punitive damages, despite their historical sanction, can violate the First Amendment.

Id. at 38 (Scalia, J., concurring). However, the Court has not had occasion to explore this further.

$200,000 in actual damages and $840,000 in punitive damages on her claim of insurance fraud. The Supreme Court held that Alabama's traditional common law method of awarding punitive damages, which vests considerable discretion in the finder of fact, does not work a per se violation of due process -- because Alabama law provides a "sufficiently definite and meaningful constraint" on the exercise of that discretion. 499 U.S. at 22. In addition, the Court held that an award of punitive damages four times larger than the award of compensatory damages was not so grossly disproportionate, under the circumstances of that case, as to violate the defendant's right to substantive due process.

In *TXO Prod. Corp. v. Alliance Resources, Inc.*, 125 L.Ed. 2d 366 (1993), the Court made it clear that in determining whether a punitive damage award is so "grossly excessive" as to be unconstitutional, it is not the ratio of punitive to actual damages that counts, but the nature of the party's conduct. In *TXO*, the jury awarded the defendant $10 million in punitive damages on its counterclaim for slander of title. Six Justices voted to affirm the punitive damage award against the plaintiff, which was 526 times as large as the defendant's $19,000 actual damages. In spite of the dramatic disparity between the two figures, the *TXO* Court rejected plaintiff's substantive due process challenge. The unusually large punitive damage award was justified in part because the plaintiff in that case was a wealthy corporation that had engaged in a widespread pattern of fraudulent business activity.

Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) is the Court's most recent pronouncement on the subject of punitive damages. *Oberg* arose out of a jury decision in an Oregon state court, awarding $5 million in punitive damages to a plaintiff who had been injured when his all-terrain vehicle overturned. The defendant-manufacturer challenged an unusual provision in the Oregon Constitution that entirely prohibited judicial review of a punitive damage award if there was any evidence in the record to support it. Justice Stevens, writing for a seven-member majority, began with the premise that "[j]udicial review of the size of punitive damage awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." Given that historical backdrop, the Court had little trouble concluding that Oregon's decision to remove the safeguard of appellate review was presumptively a violation of the Fourteenth Amendment's due process clause.

Plaintiff argued that other, pre-verdict, safeguards -- including a clear and convincing standard of proof and detailed jury instructions -- provided Oregon defendants with all the due process required under the Constitution. Although Justice Stevens agreed that the procedures pointed to by the plaintiff constitute "a well-established and . . . important check against excessive awards," his opinion held that those procedures could not guarantee that a jury would never return a "lawless, biased, or arbitrary verdict," and therefore were no substitute for meaningful appellate review.

PUNITIVE DAMAGE AWARDS IN DEFAMATION CASES: STILL AN OPEN ISSUE

The series of Supreme Court decisions from *Browning-Ferris* to *Oberg*, make up the modern legal landscape for those who would challenge an award of punitive damages in a civil lawsuit. That landscape changes dramatically, however, in cases involving defamation claims. *Oberg* and its predecessors involved fraud claims, antitrust claims or slander of title claims (all are based on non-expressive activity). Those decisions therefore provide little if any guidance to lower federal and state courts faced with the inherent conflict between the First Amendment, which limits official barriers to expressive activity, and a punitive damage award, which, in the context of a defamation case not only risks punishing speakers on the basis of the content of their speech, but also aims to deter future expression.

The conflict in defamation cases between free speech principles and punitive damages principles is at its most extreme when a case involves a public figure or a matter of public concern. In attempting to resolve this conflict, courts will rely on the standards announced in *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). *Sullivan, Gertz*, and *Dun & Bradstreet*, however, leave unresolved the question whether the First Amendment ever permits an award of punitive damages in public figure or public concern defamation cases, and if so, under what standard of fault.[2]

Punitive Damages in a "Public Figure" Case: The New York Court of Appeals Decision in *Prozeralik*

In a case involving a public figure claiming punitive damages for defamation, the New York Court of Appeals recently held that, as a matter of New York law, punitive damages "theoretically ... may be available" in a public figure plaintiff's defamation action, but only if, *in addition to* proving constitutional malice, the plaintiff proves "outrageous," "wanton" if not "criminal" common law malice. *See Prozeralik v. Capital Cities Commn's, Inc.*, 82 N.Y.2d 466, 626 N.E.2d 34 (1993).

In *Prozeralik*, the plaintiff was a well-known Niagara restaurateur. The defendant's news broadcast falsely reported that the plaintiff had been abducted and beaten under suspicious circumstances and that plaintiff was under investigation for his connections to organized crime figures. To make matters worse, the defendant issued a retraction that may have included further false statements. At trial, the plaintiff stipulated to being a public figure. After receiving instructions that the original report and later retraction were false as a matter of law, the jury awarded $5.5 million in actual damages and $10 million in punitive damages to the plaintiff.

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[2]For a more complete discussion of the impact of these cases and the First Amendment implications of punitive damage awards in defamation cases, *see* P. Cameron DeVore & Marshall J. Nelson, *Punitive Damages in Libel Cases after* Browning-Ferris, 12 HASTINGS COMM. & ENT. L.J. 153 (1989); *see also* P. Cameron DeVore & Marshall J. Nelson, *Punitive Damages in Libel Cases*, 1988 LDRC BULLETIN No. 24, at 26.

The trial included conflicting testimony as to whether the defendant's retraction was itself false. The New York Court of Appeals reversed the judgment below because of the trial judge's erroneous instruction that the retraction was false as a matter of law. Knowing that the issue of punitive damages would arise on retrial, the court went on to discuss the availability of punitive damages to public figure defamation plaintiffs.

The court first relied on Prosser & Keeton for the proposition that "[s]omething more than the mere commission of a tort is always required for punitive damages." *Id.* at 479, 626 N.E.2d at 42. The court then stated:

> Actual malice, as defined in *New York Times v. Sullivan* . . . is insufficient by itself to justify an award of punitive damages, because that malice focuses on the defendant's state of mind in relation to the truth or falsity of the published information . . . . This does not measure up to the level of outrage or malice underlying the public policy which would allow an award of punitive damages, i.e., "to punish a person for outrageous conduct which is malicious, wanton, reckless, or in willful disregard for another's rights" . . . . This kind of common law malice focuses on the defendant's mental state in relation to the plaintiff and the motive in publishing the falsity -- the pointed factors that punitive damages are intended to remedy.

Id. at 479-80, 626 N.E.2d at 42 (citations omitted). Because the New York Court of Appeals relied on New York law, *Prozeralik* leaves open the question whether the additional proof required from a public figure plaintiff in New York cases is required in every case by the First Amendment.

From the media's point of view, the ideal result in a case such as *Prozeralik* would have been outright abolition of punitive damages -- at least in all defamation actions involving commentary on public figures or public issues. The goals of punishment and deterrence have no place in cases involving such protected expression. Moreover, the state interest underlying a libel award in such cases "extends no further than compensation for actual injury." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

The case for abolition, based on both federal and state constitutional theories, was vigorously argued to the Court of Appeals in an *amicus* brief submitted on behalf of media groups. The media's brief cited, *inter alia*, LDRC data documenting that the constitutional malice rule has failed to prevent unduly large and frequent punitive damage awards in defamation cases. While it could thus be concluded that *Prozeralik* rejected the media's position, it is also possible to hypothesize a more optimistic scenario. Indeed, the Court of Appeals' approach can be seen as the next best thing to outright abolition of punitive damages.

In *Prozeralik*, for the first time to our knowledge, the New York Court of Appeals articulated a persuasive critique of constitutional malice alone as the basis for an award of punitive damages. While a small number of other courts have also imposed a dual standard of constitutional *and* common law malice, this result was reached simply by retaining a pre-existing

requirement of proof of ill will in the traditional sense. The Court of Appeals went beyond this in *Prozeralik*, reasoning that constitutional malice is a liability standard and that more than mere proof of liability has *always* been required to support an award of punitive damages. Moreover, since it does no more than focus on the truth or falsity of the publication, proof of constitutional malice has no meaningful bearing upon the far more demanding -- and altogether differently focused -- standard of outrageous, wanton, if not criminal disregard for the plaintiff's rights that has been the traditional mechanism for determining whether a defendant's behavior is of such an extreme character as to warrant a punitive award.

Because it so thoughtfully chose to adopt a standard different from, and more demanding than, constitutional malice it is not unreasonable to conclude that the Court of Appeals was attempting to respond to the data demonstrating failure of the constitutional malice rule as a screening device for punitive damages. The Court may well have concluded that its carefully articulated dual standard would leave responsible media organizations immune -- or nearly so -- from insupportable punitive awards. Indeed, there is more than a hint -- despite evidence of sloppy media practices to which the Court of Appeals gave credence -- that the Court did not believe its new dual standard could be met in the *Prozeralik* case upon retrial.

In sum, having taken an approach which it felt would solve the media's punitive damages problem, the Court of Appeals could adhere to settled principles by avoiding the ultimate constitutional issue. In that regard, it is notable that the Court was careful neither to advert to, nor to expressly to reject, the argument for outright abolition that had been presented in the media's *amicus curiae* brief. The Court of Appeals thus left open the possibility of revisiting the broader constitutional question.

Punitive Damages in "Private/Private" Cases; the Fifth Circuit Decision in *Snead* and the District of North Carolina Decision in *Sleem*

The Fifth Circuit recently held that Texas law requires a plaintiff to show common law malice to recover punitive damages, even when a private figure sues on a matter of private concern. *See Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325 (5th Cir. 1993). In *Snead*, the plaintiff tried to interest some English companies in licensing transportation technology he had invented. When negotiations fell apart and the companies developed their own technology, plaintiff sued for misappropriation of trade secrets and issued a press release accusing defendants of "international theft," "industrial espionage," and "international piracy." *Id.* at 1329. The defendants counterclaimed for defamation. After a bench trial, the court awarded each defendant $1 in compensatory damages and $500,000 in punitive damages.

The Fifth Circuit first decided that this was a "private/private" case: the foreign companies were private figures under the circumstances, and their dispute with the plaintiff was a matter of private concern, notwithstanding plaintiff's use of a press release. The court nevertheless reversed the award of punitive damages because it was not accompanied by an award of actual or presumed damages, as required by Texas law. Because the trial court may have confused punitive damages with presumed damages, the appellate court remanded for a

recalculation of the total award.[3]

The court also addressed the issue of what level of fault is constitutionally required in private/private cases after the Supreme Court's decision in *Dun & Bradstreet*. The Fifth Circuit in *Snead* concluded that *Dun & Bradstreet* requires no minimum standard of fault in private/private cases, leaving states free to impose presumed and punitive damages based on standards of strict liability. The court went on to hold that Texas law allows presumed damages without any showing of fault if the plaintiff publishes a statement that is libelous per se. For an award of punitive damages, however, Texas law requires that plaintiff show common law malice. *Snead*, 998 F.2d at 1332-35.

A similar case is *Sleem v. Yale University*, 843 F. Supp. 57 (M.D.N.C. 1993), involving North Carolina law. In *Sleem*, plaintiff was an alumnus of Yale who was approaching the date of his fifteenth reunion. In preparation for the reunion, the university distributed questionnaires to its alumni. The university received a completed questionnaire with plaintiff's name attached that stated, falsely, that plaintiff had "come to terms with [his] homosexuality and the reality of AIDS in [his] life." The university included the statement in a compiled directory, which it distributed to other alumni.

The court held that this was a private/private case involving publication of a statement either libelous per se, or reasonably susceptible to a defamatory interpretation. Under North Carolina law fault and damages are presumed in either case. 843 F. Supp. at 63. Although the court conceded that the university might be able to rely on a qualified privilege, the court denied its motion for summary judgment because, under North Carolina law, a qualified privilege can be defeated merely by showing that a defendant was negligent. 843 F. Supp. at 64-65. The court also denied defendant's motion for summary judgment on the unavailability of punitive damages. The parties assumed that an award of punitive damages would require plaintiff to show either common law malice by a preponderance of the evidence or actual malice by clear and convincing evidence, but the court refused to decide which type of malice had to be shown because the court concluded that the plaintiff had submitted sufficient evidence to get past summary judgment under either standard.

Punitive Damages for Conduct That Includes Expressive Activity; the Oregon Supreme Court's Decision in *Huffman*

A recent en banc decision by the Oregon Supreme Court affirmed an award of punitive damages for trespass even though the trespassers claimed that the award violated the First Amendment because their conduct included expressive activity. *See Huffman & Wright Logging*

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[3]If the court had affirmed the award of $1 in nominal damages and $500,000 in punitive damages, the case might have been a strong candidate for certiorari on the ground that the punitive award was so grossly disproportionate to the award of actual damages as to violate due process. *See* TXO Prod. Corp. v. Alliance Resources, Inc., 125 L.Ed. 2d 366 (1993) (in light of all circumstances, $10 million award of punitive damages not "grossly excessive" in relation to $19,000 award of actual damages).

Co. v. Wade, 317 Or. 445, 857 P.2d 101 (1993) (en banc).

In *Huffman*, the defendants were environmental activists who chained themselves to logging equipment, sang songs, recited slogans, and hung a banner reading "FROM HERITAGE TO SAWDUST--EARTH FIRST!" in protest against Forest Service logging policies. The defendants were arrested and convicted of criminal mischief under Oregon criminal law. They served two weeks in jail, paid a $250 fine, and made restitution for plaintiff's lost revenues. Plaintiffs then filed a civil suit in federal court for trespass.

In the civil trespass suit defendants conceded liability for compensatory damages, but raised state and federal constitutional defenses to the plaintiff's claim for punitive damages. The judge submitted plaintiff's compensatory and punitive damage claims to the jury, which awarded $5,700 in compensatory damages and $50,000 in punitive damages to the plaintiff.

The Oregon Supreme Court rejected defendants' free speech claims under state and federal law. The court cited *Wisconsin v. Mitchell*, 508 U.S. ___, 113 S. Ct. 2194, 2199 (1993) for the proposition that "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." 317 Or. at 460, 857 P.2d at 112. Defendants claimed that, because the jury received evidence of trespassory actions as well as controversial, protected speech, "it is extremely likely that the defendants were in fact punished by the jury for their politically unpopular views." 317 Or. at 458, 857 P.2d at 111. The court held that even if defendants' "speculative" First Amendment argument was accurate, it was foreclosed by the defendants' failure to request an instruction that would have limited the jury's consideration of punitive damages based on non-expressive conduct. As the Court put it, "the power to avoid being punished for any protected expression lay in their own hands." *Id.*

In dissent, two Justices of the Oregon Supreme Court believed that Article I, Section 8 of the Oregon Constitution should be interpreted to prohibit an award of punitive damages for tortious conduct when the amount of those punitive damages is determined "at least in part, because of the significant expressive conduct and political speech accompanying or intertwined with that conduct." 317 Or. at 120, 857 P.2d at 473. "If the tortious conduct itself is truly being deterred or punished, the non-incidental message accompanying the conduct cannot form the basis for distinguishing some conduct from other conduct." 857 P.2d at 474.

CONCLUSION

Does the First Amendment ever permit an award of punitive damages in public figure or public concern defamation cases? If so, under what standard of fault? As we have previously written,[4] we conclude that the First Amendment principles announced and applied by the Supreme Court in *Sullivan*, *Gertz*, and *Dun & Bradstreet* forbid punitive damages in any

[4] *See supra*, note 2.

defamation case that involves public figures or matters of public concern. Only the Supreme Court can provide definitive guidance on the breadth of this constitutional protection. In the meantime, media counsel should carefully assert constitutional limitations in all appropriate cases.

Potential Impact of the Uniform Correction or Clarification of Defamation Act on Damages

Henry R. Kaufman and Michael K. Cantwell*

INTRODUCTION

Although they offer a variety of valuable strategies to limiting damages claims, the foregoing articles also underline the many difficult practice problems that damages issues still pose. In light of this, it is perhaps appropriate to close out this "Practitioners' Roundtable" on damages by noting that there has appeared on the horizon, in the Uniform Correction or Clarification of Defamation Act (UCA), a potential cure for many if not all of the endemic ills in this area.

As most LDRC BULLETIN readers are aware, the UCA was formerly part of a more ambitious project, the Uniform Defamation Act (UDA), which had been intended to "reform the libel or defamation laws in the United States" but which was abandoned in the face of serious opposition by media groups.[1] As the demise of the UDA loomed, the UCA rose like a phoenix from its ashes. At first opposed or at least questioned by media interests, the favorable draft ultimately attracted support, or at least acquiescence, by many in the media. Following approval by the National Conference of Commissioners on Uniform State Laws in August 1993, the UCA was approved by the American Bar Association House of Delegates in February 1994.

The UCA is now available for consideration in various state legislatures. In order to maximize the chances of its widespread adoption, thus achieving the goal of creating a uniform retraction law, the UCA will at first be introduced in only a small number of states, perhaps a

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[1]For a more detailed history of the genesis of the UCA, see Henry R. Kaufman, *Special Report: The Potential Reform of State Retraction Law Under the Uniform Correction Act*, LDRC 50-STATE SURVEY 1993-94, at xvii.

half dozen or less, beginning during the 1995 legislative session. If successful in these states, the UCA can then be more confidently rolled out, over time, into many if not all the remaining states, in what would at best be a multiyear process.

CURRENT RETRACTION PRACTICE

Effect of Retraction Demand Requirement on Damage Award Under Existing Statutes

Current state retraction practice was examined in a survey published in the LDRC BULLETIN last year.[2] Not only were the statutes in the 33 jurisdictions found to vary widely in their terms and scope, but few were seen to provide either significant aid to plaintiffs seeking restoration of their reputations or meaningful incentives to defendants to issue retractions, particularly with respect to their impact upon available damages in any ensuing litigation.

In theory, under most extant retraction statutes, a plaintiff who fails to demand a retraction within the time period specified risks a reduction in the available damages, or, in extreme cases, the loss of a claim. In practice, however, under current statutes the demand requirement generally has no significant impact on damage awards.

First of all, it is extremely unlikely that the plaintiff will be unable to comply with the current demand requirements. In the 30 jurisdictions with full-blown statutory retraction schemes,[3] 6 statutes do not include a demand requirement[4] and another 18 nominally require a demand but either fail to specify the period within which the demand must be made[5] or simply require that it be made prior to initiating suit.[6] Because the demand periods range from 3 to 10 days, only plaintiffs who wait until the statute of limitations has all but expired will be unable to make a timely demand. Only in the six states that require the retraction be demanded within a specified period following publication of the alleged defamation is there any real danger of noncompliance.[7]

Moreover, even in the unlikely event that the plaintiff fails to comply with a retraction statute, substantial damages may nevertheless be recovered in most jurisdictions. Although 17

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[2]*See Current Retraction Practice -- An LDRC Survey*, LDRC BULLETIN, issue no. 3 (1992-93). *See also Kaufman, supra*, note 1, at xviii-xx.

[3]Texas, Washington, and Wyoming include cursory retraction language in civil procedure and other statutes and therefore are not included in this number.

[4]Connecticut, Maine, Massachusetts, Ohio, Virginia, and West Virginia.

[5]Iowa, Kentucky, Michigan, Minnesota, Montana, New Jersey, Oklahoma, Utah, and Wisconsin.

[6]Alabama, Florida, Georgia, Indiana, Mississippi, North Carolina, North Dakota, South Dakota, and Tennessee.

[7]Arizona, California, Idaho, Nebraska, Nevada, and Oregon. The period is 20 days from knowledge in all but Nevada, where it is 90 days.

of the 24 jurisdictions that impose a demand requirement[8] bar recovery of punitive damages in the absence of a retraction demand, in eight of these states the plaintiff may still recover punitive damages if the original publication was made with a sufficient degree of fault.[9] Finally, even those few plaintiffs who both fail to comply with the retraction statute and are precluded from recovery of punitive damages may still recover substantial "actual" damages in the form of loss of reputation and emotional distress.[10] Only five retraction statutes restrict plaintiffs to special damages or provable economic loss.[11]

It should be noted that seven jurisdictions treat the retraction demand as a condition precedent to suit. Nevertheless the demand period in all these states ranges from three days in Indiana, North Dakota, and South Dakota, to five days in Florida and North Carolina, to ten days in Mississippi, and to an unspecified period in Wisconsin. Courts in only two of these states (Indiana and North Carolina) have read the demand requirement as barring punitive damages, so that instances in which a plaintiff is totally foreclosed from recovery are extremely rare, although they do occur.[12]

Effect of Defendant's Retraction on Damage Award Under Existing Statutes

Where a retraction is demanded, a defendant's ability to meaningfully limit its damages by the publication of a timely and effective retraction is also severely curtailed under current retraction statutes. From the defendant's perspective, not only is there generally insufficient time within which to assess whether a retraction is warranted, but in most states there is little or no incentive to issue a retraction. For example, although a properly issued retraction can in theory preclude recovery of punitive damages in 25 states,[13] only in seven jurisdictions is the bar absolute.[14] The remaining statutes either impose a conjunctive requirement that the original publication have been made in good faith and with a reasonable belief in its truth,[15] or they separately provide for punitive damages, overriding the limitation, if the original publication was

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[8]*See supra*, notes 5-7.

[9]Arizona, Iowa, Nebraska, Nevada, New Jersey, Oklahoma, Tennessee, and Utah.

[10]Georgia, Idaho, Iowa, New Jersey, Oklahoma, Tennessee, and Utah.

[11]Arizona, California, Minnesota, Nebraska, and Nevada.

[12]*See* Westphal v. Lakeland Ledger Publishing Co., 2 Med. L. Rptr. 2262, *aff'd*, 4 Med. L. Rptr. 1336 (Fla. Ct. App. 1978) (plaintiff's suit dismissed for failure to serve retraction demand within statutorily mandated period).

[13]Alabama, Arizona, California, Connecticut, Florida, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, and Wisconsin.

[14]Alabama, California, Idaho, Kentucky, Michigan, Nevada, and Wisconsin.

[15]Florida, Georgia, Indiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, North Carolina, North Dakota, South Dakota, Tennessee, and Utah.

made with malice or an intent to injure.[16]

Moreover, regardless of its preclusive effect on punitive damages, publication of a retraction offers no protection from potentially large "compensatory" awards. For example, in thirteen states, publication of a retraction does not preclude plaintiffs from recovery of actual damages, including damages for loss of reputation and emotional distress.[17] Only in five states[18] does a retraction limit the plaintiff provable economic loss, and only in two states is this bar absolute.[19]

Limitations as to Coverage Under Existing Statutes

Self-evidently, retraction statutes can reduce damage awards only in suits in which they apply, but current retraction statutes leave many categories of defendants uncovered. Thus, only nine of the state retraction statutes apply to all media[20] and only one applies to all defendants.[21] Three apply only to newspapers,[22] five apply only to newspapers and periodicals,[23] six apply only to newspapers, radio, and television,[24] and seven apply to assorted other groupings of media.[25]

Retraction Practice Under the UCA

In contrast to the inadequate coverage and effect of current retraction statutes, if adopted as written the UCA would substantially reduce damage awards in many cases.

Effect of Retraction Demand Requirement on Damage Award Under the UCA

The UCA imposes a meaningful sanction on plaintiffs who fail to demand a retraction in a timely or adequate fashion. Under the UCA, plaintiffs are required to demand a retraction

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[16]Arizona, Connecticut, Nebraska, New Jersey, Oklahoma, and Oregon.

[17]Connecticut, Florida, Georgia, Idaho, Indiana, Massachusetts, Mississippi, New Jersey, North Carolina, North Dakota, Oklahoma, Utah, and Wisconsin.

[18]Arizona, California, Minnesota, Nebraska, and Nevada.

[19]California and Nevada. When the original publication is not in good faith the bar is inoperative in Arizona and Nebraska, and Minnesota will allow general as well as special damages.

[20]Alabama, Connecticut, Florida, Georgia, Maine, Massachusetts, Michigan, Nebraska, and West Virginia.

[21]West Virginia.

[22]Minnesota, North Dakota, and South Dakota.

[23]New Jersey, Oklahoma, Tennessee, Virginia, and Wisconsin.

[24]California, Idaho, Kentucky, Mississippi, Nevada, and Utah.

[25]Arizona, Indiana, Iowa, Montana, North Carolina, Ohio, and Oregon.

within 90 days of actual knowledge of the allegedly defamatory publication.[26] Failure to comply with the requirement of a timely or adequate retraction demand limits plaintiffs to "economic loss," defined narrowly as "special, pecuniary loss,"[27] thus "exclud[ing] all other forms of damage, including presumed, general, reputational, and punitive damages."[28] Obviously this provision would -- if enacted -- have a powerful and salutary effect on runaway damage awards.

Effect of Defendant's Retraction on Damage Awards Under the UCA

Under the UCA, issuance of a "timely and sufficient" retraction has a similarly dramatic effect on available damages. That is, publication of a timely correction, like the plaintiff's failure to demand a retraction, will limit recovery to special damages only. Unlike in many of the existing statutes, this limitation is absolute, and it applies regardless of any fault on the part of the defendant. With regard to "special damages," although such damages can also on occasion be substantial, depending upon the position of the plaintiff or its business and the provable impact of the defamation, in the great majority of cases the UCA's stringent confinement of any recoverable damages solely to "provable" loss of an "economic" nature should represent a powerful source of relief for the libel defendant. First of all, special damages will only be recoverable upon proof of the normal elements of the libel claim, including proof of the requisite degree of fault. Second, the narrow definition of special damages would be sufficient to prevent juries from punishing the defendant or from compensating the plaintiff for broader, more open-ended damage elements no longer considered recoverable. Finally, although it cannot resolve the problem in a blanket fashion, the UCA also at least attempts to limit even special damages by taking into account the "mitigating" effects of the correction of clarification.[29]

Coverage Under the UCA

Unlike existing retraction statutes, which vary widely as to the categories of defendants to whom they apply, the UCA applies to all types of defendants[30] -- media and nonmedia -- and even provides potentially workable alternatives to the issuance of corrections when the publisher could not otherwise comply with the normal requirements of timely publication in a subsequent edition or broadcast in the same publication or medium.[31] Moreover, the UCA is intended to apply, not only to claims denominated as defamation, but to any claim "however characterized,

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[26]UCA, § 3(b).

[27]UCA, § 1(2).

[28]UCA, *Comment* to § 1.

[29]UCA, *Comment* to § 5.

[30]UCA, § 2(b).

[31]UCA, *Comment* to § 6.

for damages arising out of harm to personal reputation caused by the false content of a publication."[32]

Practical Results of the UCA Procedure

It is possible that many plaintiffs whose request for correction results in a timely and adequate correction or clarification (or whose failure to request incurs the UCA's applicable sanctions) will not bring suit at all. Their remedy -- a good and fair one in our view -- will be the prompt, full, and fair correction or clarification of any false statements about them. Those that do bring suit notwithstanding a timely and sufficient correction will immediately be subject to a determination by the court under § 7 of the UCA as to the sufficiency of the correction or clarification. Under § 7, this ruling would be made at the earliest stages of litigation.

The benefits of such an early resolution are as a practical matter perhaps the most significant element of the UCA. Under most existing retraction statutes extended litigation -- or even trial -- may be required before the effects of a retraction are determined. The UCA proviso that these issues are to be determined promptly by the trial judge as a matter of law will radically affect the course of many libel actions. Once confronted with the prospect of litigating solely over the often limited value of economic damages, the prospects of claim abandonment, or at the least a realistic settlement posture, by the plaintiff should be greatly enhanced. Where once the open-ended risk of draconian damage liability often hardened the positions of both sides and required a scorched-earth defense in many cases -- even those cases with little chance of ultimate success -- under the UCA both parties to a libel claim will be enabled to take a more realistic -- and thus potentially far less expensive -- approach to all issues remaining in the litigation once the damage-limiting provisions of the UCA come into play.

In sum, if enacted the UCA would tend to resolve many of the intractable problems of open-ended damage exposure currently faced by libel defendants.

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[32]UCA, §2(a).