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I. Introduction

Five years ago, a coalition of media organizations formed the Libel Defense Resource Center (LDRC) in recognition of the problematic turn that libel law had taken. Since its founding, LDRC has both monitored and chronicled the vertiable flood of recent developments, many of which have been adverse to defendants, in the libel field. Another active year for libel law is on the horizon. It is, therefore, an appropriate occasion to look back, and ahead, in order to put some of these recent and forthcoming events into perspective.

Before we commence, a caveat is in order. What follows necessarily represents only a tentative and incomplete effort to comprehend recent developments. Few organizations have so systematically monitored and conducted empirical studies of legal developments in this specialized field as has the LDRC. Yet even LDRC's numerous studies have only scratched the surface of a complete portrait of the "real-world" scope of libel litigation in this country. On numerous issues, much more remains to be learned before speculation and theorizing can be replaced with accurate and complete data.

That observation provides a useful transition into the underlying theme of this analysis of recent trends. For what has fueled the debate over libel law during the past several years is a growing awareness of the substantial gap between the legal theory of libel, on the one hand, and real-world litigation experience, on the other. To some extent, this new awareness has been stimulated by the kinds of studies undertaken and data produced by LDRC. LDRC's work has begun to make clear that one may assess the efficacy of a particular legal doctrine in the libel field only at the intersection of law and

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practice. When viewed in these terms, the now more than twenty-year-old promise of constitutional protection from the undue chilling effects of libel claims remains decidedly unfulfilled.

New York Times v. Sullivan[1] promised that by adopting substantive constitutional limits on libel actions brought on behalf of public officials (and, later, public figures[2]) "uninhibited, robust and wide-open" expression would be protected. The Court also promised that *Sullivan* would shield the press from "a succession of . . . judgments" so large that they might either threaten a publisher's very "survival," or else impose a "pall of fear and timidity . . . upon those who would give voice to public criticism."[3] *Gertz v. Robert Welch, Inc.*,[4] decided a decade after *Sullivan*, promised defendants that state libel law would be rewritten to strengthen protection from private libel plaintiffs' claims by at least precluding liability without fault; and in all cases *Gertz* purported to reduce the practical impact of libel claims in which plaintiffs successfully prove fault by raising the standard for and limiting the categories of compensable damages.

In reality, more than a generation after the adoption of *Sullivan's* lofty principals, the substantive limitations enunciated in *Gertz* have *not* prevented even the highest of current or former public officials, or the most celebrated of public figures, from seeking millions in damages against media defendants in libel actions. Moreover, in the more than ten years since *Gertz*, its lesser constitutional protections have, if anything, been less effective in aiding the media's defense of libel actions brought by private plaintiffs.[5] Neither *Sullivan* nor *Gertz* has prevented juries from awarding a growing succession of million and multi-million dollar damage awards. Indeed, today the *average*, actual libel damage award approaches the *total* of awards sought in the five related libel suits against The New York Times a generation ago in *Sullivan*.[6] Nor, finally, has any of the constitu-

1. 376 U.S. 254 (1964).

2. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Greenbelt Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 n.7 (1974).

3. Sullivan, 376 U.S. at 278.

4. Gertz, 418 U.S. 323 (1974).

5. For example, *Gertz* simply left the states free to promulgate any liability standard they chose as long as the standard required a finding of fault. While *Gertz* in theory would have permitted states to adopt standards as demanding as *Sullivan*, or at least standards more demanding than the minimal constitutional requirement, in fact, at last count only 5 states had adopted standards greater than mere negligence; 27 had adopted the negligence standard; and the remaining 22 had not clearly decided. *See* LDRC 50 State Survey 1984 as summarized in LDRC Bulletin No. 13, March 31, 1985, at 9.

6. In the five related suits constituting the *New York Times* cases, damages in the amount of $3,000,000 were sought. Sullivan, 376 U.S. at 278, n.18. According to LDRC data, the *average* award for one recent period, involving eleven trials and eight jury awards, March through July 1983, was actually in excess of $7,000,000! LDRC Bulletin No. 7, July 15, 1983,

tional defenses effectively limited the increasingly intolerable costs of defending libel actions. These costs and burdens can "chill" free expression just as surely as any judgment actually imposed and collected.[7]

In a variety of areas, LDRC studies and data have highlighted the growing gap between constitutional libel theory and reality at all stages of libel litigation. Before claims are even filed, constitutional protections should in theory serve as a deterrent to the commencement of libel litigation. There is growing evidence, however, that self-restraint among potential libel plaintiffs, once perhaps the media's greatest protection in this field, has in reality all but evaporated.[8] Prior to trial, LDRC studies demonstrate that summary judgment remains a crucial weapon in the media's arsenal. In reality, however, the increasing difficulties defendants have encountered in enforcing constitutional protections at the pre-trial stage threatens to emasculate this weapon.[9] At trial, the reality of frequent media losses and staggering damage awards[10] belies the theory of high barriers and heavy constitutional burdens. LDRC studies are beginning to document how the theory of constitutional protection provides inadequate protection from real-world courtroom factors and jurors' attitudes toward libel and the media.[11] Even at the appellate level, where media libel defendants generally continue to fare well, *Sullivan*'s promise for meticulous and "independent" appellate review in constitutional libel actions, reaffirmed only recently in *Bose v. Consumers Union*,[12] could in practice be significantly undermined if the D.C. Circuit reinstates[13] its decision in *Tavoulareas v. Washington*

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at 58. Overall, over the past four or five years, the average libel award has exceeded $2 million. LDRC Bulletin No. 11, November 15, 1984, at 14.

7. Despite widely publicized million dollar damage awards, it is clear that settlement and defense costs — and not the payment of final judgments — remain the most serious financial burdens of the current American libel system. Indeed, it has been acknowledged that payment of defense costs by insurance companies represents as much as 80% of their payouts to insureds. Massing, *Libel Insurance: Scrambling for Coverage*, Jan-Feb 1986 COLUM. JOURNALISM REV., 36. Moreover, LDRC has found that although initial libel jury awards averaged in excess of $2 million, the average of those few awards that were finally affirmed was, in the most recent period, only $60,416. *See* LDRC Bulletin No. 11, *supra* note 6, at 23. This is not to say, however, that huge initial awards do not have their effects on the libel system. It is obvious that the threat of large awards, the costs of avoiding or appealing them, and the risk that larger awards will ultimately be upheld, has raised the ante across the board in American libel litigation, both in terms of the costs of defense and in terms of the value of settlements — either the "nuisance value" of meritless claims, or the real value of claims with serious potential for liability, however infrequent they may be.

8. *See infra* notes 15-26 and accompanying text.

9. *See infra* notes 29-36 and accompanying text.

10. *See infra* notes 49-54 and accompanying text.

11. *See infra* notes 42-46 and accompanying text.

12. 466 U.S. 485 (1984).

13. *See infra* note 60 and accompanying text.

Post.[14]

II. Increasingly Litigious Libel Plaintiffs

Commentators have noted that during an extended period following *Sullivan*, relatively few public plaintiffs seriously contemplated libel litigation, fearing that pursuing such claims would inevitably be fruitless if not counterproductive.[15] Although it is now clear that this self-restraint probably protected the media more than the legal protections provided by *Sullivan* itself, it is apparent that the era of self-restraint has come to an end. This change has led almost certainly to either a greater number of claims actually filed, or at least to a greater number of seriously pursued claims and, consequently, greater defense costs, or both.

The factors that have led to this increasing litigation are probably many. The seeming shift in the Supreme Court's attitude beginning with *Gertz*, while probably not as significant substantively as psychologically, has apparently renewed hope in some potential libel claimants.[16] The legal pendulum swing has paralleled an apparent socio-political swing in public attitudes toward the media.[17] The tremendous publicity generated by recent libel trials — from *Burnett v. National Enquirer, Inc.*[18] to *Westmoreland v. CBS, Inc.*[19] and *Sharon v. Time, Inc.*[20] — and the ultimately illusory, but nonetheless potent, lure of multi-million dollar damage awards have also encouraged libel plaintiffs.

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14. 759 F.2d 90, *rev'd*, 763 F.2d 1472 (D.C. Cir. 1985), (en banc) *reh'g granted.*

15. *See generally* Smolla, *Let The Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983) (theorizing on the forces behind a resurgence in libel litigation only a decade after the law of defamation had appeared to be headed for "obsolesence").

16. Some commentators have seen the recent drift of the Supreme Court as distinctively favoring libel plaintiffs and reflecting or portending major substantive changes by the Supreme Court in the constitutional law of libel. *See, e.g.*, Smolla, *supra* note 15, at 50-63. Others have concluded that whatever diminution may exist in the Supreme Court's first amendment activism does not necessarily portend serious substantive retrenchment by the Court in the libel field. *See, e.g.*, Franklin, *Five Years of Libel Cases at the Supreme Court Door: A Look at the Quiet Side*, LDRC 50 State Survey 1985-86: Current Developments in Media Law and Invasion of Privacy Law (Foreword at XIV) (to be published Spring, 1986) ("[A]lthough some see portents of retrenchment by the Supreme Court, I do not think that major change is on the horizon — at least for the kinds of stories that media have traditionally run. Nor do I see much likelihood of retreat from *New York Times v. Sullivan.*").

17. While it may well be an oversimplification, the observation that ten years ago the journalists in the post-Watergate movie, "All the President's Men," wore the white hats and were played by such stars as Robert Redford and Dustin Hoffman, while less than ten years later it was the media "victim" who was played by the star, Paul Newman, in the movie "Absence of Malice," is not without some force in this regard.

18. 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), *appeal dism'd*, 104 S. Ct. 1260 (1984).

19. 596 F. Supp. 1170, (S.D.N.Y. 1984) (denying summary judgment for defendant television station). This case was subsequently settled out of court. *See infra* note 24.

20. No. 83-4660, slip op. (S.D.N.Y. Jan. 31, 1985).

Two other related phenomena have distinguished the reality of recent libel litigation from the early promise of meaningful constraints under the first amendment. First, certain litigious groups have come forward to prosecute or support libel claims. Whereas the litigiousness of certain cult-like groups such as the Church of Scientology[21] and Synanon[22] has been known for some time, the politicization of libel by non-cult organizations such as the Capitol Legal Foundation in *Westmoreland v. CBS* is a relatively new phenomenon. The *Sharon* case also reportedly generated organized funding, as has Senator Laxalt's pending suit against the *Sacramento Bee*.[23] Perhaps the costly failure of General Westmoreland and his supporters, manifested by the sudden settlement of the case, will dissuade others from investing in the pursuit of such claims in the future.[24] However, the American Legal Foundation's recent formation of a Libel *Prosecution* Resource Center may indicate that such groups will continue to pursue political ends through the device of libel litigation.[25]

Westmoreland, Sharon, Laxalt and like cases highlight the ultimate failure of the promise of *Sullivan*. The very public officials whose libel claims *Sullivan* purported to preclude in all but the most exceptional of circumstances, are increasingly using libel law against their perceived critics in the media. LDRC recently completed a comprehensive study of libel actions by public officials between 1979 and 1984; the results were then compared to data covering the period 1976 to 1979.[26] Even taking into account the different time periods, the data gathered for that study indicate that both the number and the frequency of libel actions by public officials have been increasing. Moreover, although a substantial portion of public official libel actions during both periods involved lower level personnel, more cases in the recent period involved highly-placed officials in significant policymaking and decisionmaking positions, including more fed-

21. LDRC Bulletin No. 2, November 15, 1981, at 28.

22. LDRC Bulletin No. 3, March 15, 1982, at 27.

23. Pursuant to Senate Resolution 508 and the "Regulations Governing Trust Funds to Defray Legal Expenses Incurred by Members, Officers, and Employees of the United States Senate," promulgated on Sept. 30, 1980 by the Select Committee on Ethics of the United States Senate, Senator Laxalt was apparently required to establish a Legal Expense Trust Fund associated with efforts to raise funds to defray costs related to his libel suit against the *Sacramento Bee*. This Fund was established on Sept. 21, 1984 and in the Trustees' Interim Report for the period Jan. 1, 1985 through June 20, 1985, 57 contributions were reported as having been received, including monies from such well-known figures as Roger Milliken, Joseph Coors, Roy Cohn, Donald Trump, Ivan Boesky and numerous others. A more recent report reveals that Senator Laxalt has raised in excess of $325,000 over the past year and a quarter to support his libel suit. Recent contributors include former Secretary of State Alexander Haig and six United States Senators. *See Editor & Publisher*, April 5, 1986, at 14, 20.

24. *See* N.Y. Times, Feb. 19, 1985, at A1, col. 6.

25. *See* Washington Journalism Review, July 1985, at 12-14.

26. LDRC Bulletin No. 16, March 15, 1986, at 1.

eral officials, more foreign officials, more candidates for office, and more judges. Again, whether this trend will continue after the unsuccessful conclusion of cases like *Westmoreland* and *Sharon* remains to be seen.

III. Increased Pre-Trial Burdens and Costs

Recognizing that even the pendency of libel litigation can have a chilling effect on the media, many lower courts prior to 1980 had adopted special rules for early and relatively inexpensive disposition of libel actions. In 1979, two decisions of the Supreme Court undermined the promise of those precedents and set in motion the continuing trend toward increased pre-trial burdens and costs. First, in *Herbert v. Lando*,[27] the Court refused to adopt special rules to limit discovery in libel actions, in particular regarding the editorial process. There is little question but that *Herbert* has substantially increased the extent, duration, and cost — not to mention the intrusiveness — of discovery in libel litigation.[28]

Second, in a footnote in *Hutchinson v. Proxmire*,[29] the Supreme Court questioned the appropriateness of any special rules favoring summary judgments, particularly in public plaintiff libel actions. Since 1979 LDRC has undertaken two major studies to track the effect of *Hutchinson*. In a study covering the first two years after *Hutchinson*, LDRC found that summary judgment still appeared to be "the rule rather than the exception" in libel litigation.[30] Courts granted seventy-five percent of the motions, a ratio consistent with available data from the pre-*Hutchinson* period.[31] Because *Hutchinson's* effects may not have been fully evidenced in the first two years following the decision, LDRC undertook another two-year study of summary judgment, covering the period 1982-1984.[32] Again, courts

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27. 441 U.S. 153 (1979). On remand from the Supreme Court, the district court granted defendants' motion for summary judgment in part, 596 F. Supp. 1178 (S.D.N.Y. 1984), *reh'g denied*, 603 F. Supp. 983, (S.D.N.Y. 1985). On appeal the Second Circuit ruled that summary judgment should have been granted as to all claims and dismissed the action, 12 Med. L. Rptr. 1593, ___ F.2d ___ (2d Cir. 1986).

28. *See* Cendali, *Of Things To Come — The Actual Impact of Herbert v. Lando and a Proposed National Correction Statute*, 22 HARV. J. ON LEGIS. 441, 465-72 (1985) (delineating the "rising costs" of discovery resulting from *Herbert* and the attendant chilling effect on investigative journalism).

29. 443 U.S. 111 (1979). In *Hutchinson*, the Court felt "constrained to express some doubt" with respect to the notion that summary judgment was the appropriate stage for deciding defamation cases involving public figures/actual malice. *Id.* at 120, n.9. This well-known footnote in *Hutchinson* was later elevated to text in *Calder v. Jones*, 465 U.S. 783 (1984).

30. LDRC Bulletin No. 4, Part II, Oct. 15, 1982, at 2 (study of 110 summary judgment motions following *Hutchinson* from October 1980 through August 1982).

31. *See* Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. B. F. RES. J., 795, 803 (Table 5) (finding a 78% summary judgment success rate for media defendants in the period 1977-1980).

32. LDRC Bulletin No. 12, Dec. 31, 1984, at 1-37 (study of 136 motions for summary

granted almost three out of four motions. The defendants' success rate in certain categories, however, had fallen somewhat.[33] Despite these excellent statistical results, there remains some concern that libel defendants are making fewer motions for summary judgment, or that they are filing the motions only after conducting much more costly discovery.

LDRC's summary judgment studies regarding the impact of *Hutchinson* have also demonstrated that most courts, post-*Hutchinson*, have eschewed reliance on any special rule favoring summary judgment.[34] While summary judgment is still frequently granted this is so not because judges are widely applying special rules favoring summary judgment, but because the cases under consideration either completely lack merit on the undisputed facts or because, as a practical matter, it is apparent that the plaintiff could never meet the high burden of proving constitutional malice by the "clear and convincing" standard required under *Sullivan*.[35] Now, even this "neutral" application of summary judgment procedures is under scrutiny by the Supreme Court in *Liberty Lobby v. Anderson*.[36] While it is by no means certain that the Supreme Court will go back on the promise of *Sullivan* in this regard, the continued ability of libel defendants to enforce constitutional protections at the pre-trial stage of libel litigation could be significantly affected should the Supreme Court undermine application of the "clear and convincing" standard on motions for summary judgment.

IV. Problems at Trial

In theory the heavy constitutional burdens placed on libel plaintiffs should obviate the need for trials in most cases. Although the

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judgment during that period).

33. With regard to the specific precedential effect of *Hutchinson*, federal courts considering summary judgment motions cited *Hutchinson's* footnote in only 6% of the cases in the 1982-1984 period and state courts in only 7% of the cases. This represented a substantial decrease from the 1980-1982 study where federal judges were citing *Hutchinson* in 30% and state judges in 12% of the summary judgment rulings. LDRC Bulletin No. 12, Dec. 31, 1984, at 7.

34. *Id.* at 4, 19-37 (summarizing data that a majority of courts apply a "neutral" standard, rather than a "special" standard, in summary judgment motions made by media defendants).

35. *Id.* at 6 ("clear and convincing" standard expressly noted and relied upon by courts in connection with the grant of summary judgment in 28 cases of 136 analyzed).

36. 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 53 U.S.L.W. 3847 (June 7th, 1985) (No. 84-1602) (argument heard December 3, 1985). In *Anderson*, and in conflict with precedent in other circuits, a panel of the District of Columbia Court of Appeals had reversed the district court's grant of summary judgment dismissing Liberty Lobby's libel action against Jack Anderson, holding that a plaintiff is not required to establish the existence of actual malice with "convincing clarity" in order to survive a motion for summary judgment. Instead, the panel decision held that the lesser standard of preponderance was sufficient at that stage.

lion's share of libel cases is still dismissed prior to trial,[37] in reality more libel cases are going to trial. And, at least at the trial court level, media libel defendants fare far worse than the average civil defendant in a tort action. LDRC's first major study of litigation results at the trial level, covering libel trials involving media defendants in the period 1980-1982, documented jury verdicts against media defendants at the astounding rate of almost ninety percent.[38] However high this rate may seem, other available data suggest that the rate of pro-plaintiff libel verdicts, however high, was not significantly greater than the rate for the previous four years.[39] A more recent LDRC study for the years 1982-1984 has, for the first time, shown a decline in trial losses for media libel defendants — just over sixty percent.[40] Thus, media defendants in the 1982-1984 period reduced the jury loss rate by approximately thirty percent. Any enthusiasm, however, must be tempered. A sixty percent loss rate is obviously unacceptable and still compares unfavorably to other comparable tort actions where defendants generally *win* sixty to seventy percent or more of their trials.[41]

Over the last year, LDRC has begun to explore the reasons for these disturbing realities. It has now completed two in-depth juror attitude case studies.[42] These studies, based on extensive interviews

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37. In addition to disposition by summary judgment, LDRC studies have also documented the substantial success achieved by libel defendants on earlier motions to dismiss or on demurrers. *See* LDRC Bulletin No. 8, September 30, 1983, at 1-60 (study of 95 motions to dismiss during the period April 1981 to August 1983, finding that, when made, more than two out of three motions to dismiss result in complete dismissal of the action in favor of the defense).

38. In LDRC Bulletin No. 4, Part 1, October 15, 1982, LDRC data revealed plaintiffs prevailed in 42 out of 47 (89%) cases submitted to juries during that period. In addition, plaintiffs were only slightly less successful in bench trials during the same period, winning 5 out of 6 (83%). *Id.* at 5.

39. Prof. Mark Franklin's research survey entitled *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. F. RES. J. 445, found that between 1976 and 1980 plaintiffs won at the trial level in 20 out of 24 cases before juries, a loss rate for defendants of 83%. Thus, for the combined period, 1976-1982, media defendants consistently lost jury trials at a rate of nearly 90%. *See* LDRC Bulletin No. 4, *supra* note 38, at 5.

40. LDRC Bulletin No. 11, *supra* note 6, at 10.

41. For example, a 1982 study of 20 years of civil trials in Cook County, Illinois revealed that the rate of plaintiff's victories, in the aggregate was 51%. This percentage varied significantly with the type of case, ranging from 33% in professional malpractice trials and 38% in product liability actions to 60% in business torts and contract cases. *See* Peterson and Priest, *The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979*, FIC Quarterly 361 (Summer 1982). The more relevant point of comparison for libel actions would be medical malpractice and product liability claims, where any liability arises out of an after-the-fact evaluation of allegedly faulty professional acts or products, rather than business or contract actions, where the plaintiff and defendant have presumably previously agreed upon express mutual obligations.

42. LDRC Bulletin No. 14, June 30, 1985 (Jury Study I) (newspaper defendant/public official plaintiff); LDRC Bulletin No. 15, October 31, 1985 (Jury Study II) (broadcast defendant/private figure plaintiff). In LDRC Jury Study I, seven out of twelve regular jurors and both alternates were interviewed after a trial in which jurors had assessed damages approaching $1,000,000. The case is currently on appeal. In LDRC Jury Study II, three out of six

with jurors who actually rendered the verdicts, explore juror attitudes toward those cases and assess how those attitudes translated into verdicts against the media. Additional in-depth studies are planned.

LDRC has also recently produced two videotapes that examine jury attitudes in actual or hypothetical trials. One tape juxtaposes a professional jury consultant's interviews of two CBS defense lawyers with interviews of nine of the actual jurors in the *Westmoreland* case. Working with its jury consultant and a law firm in San Francisco, LDRC also videotaped a full-scale simulated libel trial, based on an actual case, presented to four groups of six jurors selected demographically to represent a cross-section of the community. Each of the four jurists was videotaped discussing variations of the case and rendering their verdicts.

These LDRC studies and videotapes have already begun to generate a wealth of data on juror attitudes in libel and privacy cases. Given the complexity of libel trials and the multitude of factors that distinguish one case from another, ultimate generalizations must await further studies. Nonetheless, some preliminary observations can be made. The early LDRC empirical data on the results of jury trials suggested to some that it was well nigh impossible for a defendant to win a libel trial before a jury.[43] The improved record at the trial level over the last two or three years and the results of these initial jury attitude studies clearly dispel that suggestion.[44] The recent trial results and LDRC's studies also appear to indicate that juries are not inherently biased against the media in libel cases. However, the recent evidence also shows that jurors are prepared to hold the media to a very high standard of liability, despite the heavy burden of proof imposed on libel plaintiffs by the first amendment. And once jurors find liability, they are prepared to enter heavy damage awards.[45]

The LDRC jury studies also make clear that jurors are able to comprehend the legal requirements of *Sullivan* and *Gertz*. But it is a difficult undertaking to overcome a juror's natural inclination to impose a common-sense rule of "fairness" on media libel defendants. In particular, jurors can understand the actual malice rule, but only if carefully schooled. And even when the legal standards are well articulated by defense counsel, many jurors are often still inclined in

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jurors and one alternative were interviewed after trial in which plaintiff had been awarded $250,000 in compensatory damages and $1,000,000 in punitive damages.

43. *See supra* notes 38-39 and accompanying text.

44. *Id.*

45. *See infra* notes 49-54 and accompanying text; *see also* LDRC Bulletin Nos. 14 and 15, *supra* note 42.

effect to nullify them, unless constrained by appropriately clear and detailed legal instructions and by special verdict forms which specify the long series of legal hurdles that must be overcome before liability may be imposed.[46]

Despite defense counsel's difficulties in educating jurors and the already poor, though improving, statistical record compiled by the media at trial in recent years, the Supreme Court has taken a case this term that could potentially increase the burden on the defense and possibly erode recent gains in the trial success rate of media libel defendants. In *Hepps v. Philadelphia Newspapers*,[47] the Supreme Court is considering whether the constitution requires that the burden of proof of falsity be shifted to a private-figure libel plaintiff and whether it is unconstitutional to place the burden of proof of truth on the defendant as Pennsylvania law requires. If the Supreme Court in *Hepps* declines to find burden of proof a matter of constitutional dimension, the states would be free to impose on a libel defendant the burden of proving truth, an often impossible task. To place the burden on the defendant is contrary to the great weight of authority in the lower courts, as documented in LDRC's annual 50-State Survey of libel law developments[48] and would represent a

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46. LDRC's videotaped interview of jurors in the *Westmoreland v. CBS, Inc.* case, *see* text accompanying note 42 *supra*, provides a prime example of how effective defense counsel, with ample time to communicate with the jury, and a trial judge willing to give the jury careful and repeated interim instructions on the legal standards, can educate a jury to understand and abide by the otherwise confusing or counter-intuitive legal standards that are applicable in constitutional libel actions. It is reported that the jurors in another recently widely-publicized libel action, *Sharon v. Time, Inc.*, 599 F.Supp. 538 (S.D.N.Y. 1984), were able to understand and generally abide by an elaborate set of jury instructions and a detailed special verdict form separating the elements of libel to be determined by a jury in such cases. *See* N.Y. Times, January 31, 1985, at A23 col. 1. In *Sharon* the jury ruled in favor of Defense Minister Sharon on the issues of falsity and defamatory meaning, but gave a verdict to *Time* by finding an absence of "actual malice."

47. Hepps v. Philadelphia Newspapers, 506 Pa. 304, 485 A.2d 374, *cert. granted*, 105 S. Ct. 3496 (1985) (No. 84-1491) (argued December 3, 1985). On April 21, 1986, before this article went to press, the Supreme Court decided the *Hepps* case. In a 5 to 4 decision written by Justice O'Connor (and joined by Justices Blackmun, Brennan, Marshall and Powell) the Court held that the first amendment requires the burden of proof of falsity to be placed on the libel plaintiff. This ruling would apply to both private plaintiffs and public, in any action against a media defendant, at least so long as the subject of the allegedly libelous communication involves matter of "public concern." Although the limitation to matter of public concern could create problems in certain kinds of cases, the Supreme Court's recognition that effectuation of "substantive" constitutional protections necessarily requires the constitutionalization of special "procedural" mechanisms, such as burden of proof, is most welcome. The Court's desire to avoid a "chilling" effect "antithetical to the First Amendment," *slip. op.* at 10, also holds out some hope for future developments in the field that will continue to be protective of the rights of libel defendants. On the other hand, the fact that so narrow and fragile a majority supported the bedrock first amendment principle at stake in *Hepps* — i.e., proof of falsity before liability may be imposed in a lible action — gives continuing cause for concern.

48. LDRC 50 State Survey 1984 at 879. As of Dec. 31, 1984 and counting the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, 30 states placed the burden on the plaintiff, 14 states on the defendant (including the challenged Pennsylvania statute in *Hepps*), 6 states had divided authority on the issue, 3 states had no authority, and Montana initially placed the burden on the plaintiff, but permitted it to shift. It should be noted that the parties

troubling departure from basic constitutional libel theory; falsity has long been considered an essential element of libel under the first amendment.

V. Uncontrolled Damage Awards

LDRC studies and continuing statistical updates have systematically monitored recent damage awards entered by juries in media libel actions. The average award, in excess of $2 million over the past four years, is grossly excessive.[49] In fact, some data suggest that media libel defendants have been harder hit than defendants in medical malpractice and product liability cases, which are notorious for high awards.[50] The recent LDRC jury attitude studies are only now beginning to provide some insights into these damage awards. First of all, jurors seek far more guidance than they typically receive from the parties or the judge in identifying competent evidence on damages and in fixing an appropriate damage award. Although it is understandable that the defense would rather win their cases on liability, surely greater attention must be paid to damages issues. Most important, the trial judge must clearly articulate meaningful legal limits on damages. Without such guidance, the LDRC statistics and initial jury studies clearly indicate that jurors — even if not predisposed against the media — will tend to impose huge awards. These awards may be largely if not entirely unrelated to plaintiff's actual damages, particularly if the defendant is a large corporation and the jury is permitted to consider wealth as an issue.[51]

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in *Hepps* have not disputed that the burden as to truth or falsity in a *public* plaintiff libel action must be on the plaintiff as a matter of constitutional mandate.

49. LDRC Bulletin No. 11, *supra* note 6, at 14. Of course, these excessive awards rarely survive appeal, *see supra* note 7; *infra* note 59 and accompanying text.

50. According to Jury Verdict Research, Inc., *Injury Valuation Reports, Current Award Trends*, No. 270 (Solon, Ohio, 1983), the average award in a product liability action during the period 1980-1982 for 332 product liability awards was $785,651 and for 322 medical malpractice awards was $665,764. When the psychic nature of defamation injury is compared to the massive and permanent physical debilitation and lifelong expense that often accompany product liability and medical malpractice awards, only a desire to punish unpopular parties or disfavored expression can explain this remarkable disparity between libel damage awards and these other categories.

51. For example, in LDRC Jury Study I, *supra* note 42, a case involving a major daily newspaper, a number of jurors expressed serious doubts as to whether the plaintiff, a former prosecutor who subsequently established a successful private practice, had suffered any economic injury from the alleged libel. Nonetheless, the jury's discussion of damages led off with a suggestion of $2 or $3 million as an appropriate figure. While most of the jurors expressed horror at the size of this amount, a relatively brief discussion led to the acceptance of a mathematical compromise verdict approaching $1 million. When one juror recalled the judge's instruction that the punitive and compensatory elements of any damage award must bear some reasonable relationship to one another, the jury simply divided the lump-sum figure they had already agreed upon roughly in half, 45% denominated as actual damages and 55% as punitive damages. *Id.* at 8. In LDRC Jury Study II, *supra* note 42, a case involving a major television defendant, the first suggestions of a relatively modest award of $10,000 or $50,000 were quickly rejected as not sufficiently large to have an impact on the wealthy defendant's future

On this score as well, signals from the Supreme Court are mixed. While the constitutionality of punitive damages technically remains an open issue, last term the Court affirmed a six-figure punitive damage award in *Dun & Bradstreet v. Greenmoss*.[52] The Court, however, limited *Greenmoss* to its facts, holding that the particular defendant was not entitled to protection under the first amendment. Moreover, even Justice White's concurring opinion, which suggested radical changes in substantive libel protections, recognized that additional limits might be placed on "recoverable damages" in libel actions through the removal of "the threat of large presumed and punitive damage awards."[53] It remains to be seen whether true reform on the damages issues — clearly demanded by the current situation — will be forthcoming in the trial courts, at the Supreme Court level, or in a variety of proposed or pending legislative initiatives.[54]

VI. Appellate Problems on the Horizon

All of these real-world litigation problems at the pre-trial and trial stages can, in theory at least, find an ultimate cure at the appellate level. Indeed, the *Sullivan* court itself wisely recognized the need for strong and "independent" appellate review in constitutional libel actions as a means of assuring that constitutionally-guaranteed rights were not violated in such actions.[55] Happily, despite other adverse trends in the Supreme Court, that core principle was strongly reaffirmed in *Bose v. Consumers Union*, just two terms ago.[56] LDRC data clearly indicate the importance of the appellate process in libel litigation, both as to liability issues and damages. LDRC's studies have documented an almost seventy percent reversal rate in favor of defendants on liability in libel actions since 1980.[57] When "indepen-

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conduct, although the jurors did not express anger at the defendant. Figures as high as $5 million were mentioned before the round sum of $1 million in punitive damages was awarded. In considering a compensatory award, the jurors interviewed did not appear to feel that the plaintiff had proven significant financial injury. Nonetheless, because they had some sympathy for the situation in which the plaintiff had been placed by defendant's broadcast, and in lieu of any other concrete basis for calculating plaintiff's actual damages, the jury agreed upon a compensatory award of $250,000, the amount the jury speculated plaintiff might have spent in pursuing the litigation, although no evidence in this regard had been presented to the jury and an award of attorney's fees presumably would not have been allowed. *Id.* at 14-15.

52. 105 S. Ct. 2939 (1985).

53. 105 S. Ct. at 2952.

54. For example, a pending federal "study bill" introduced by Congressman Charles E. Schumer of New York would eliminate punitive damages altogether in public official or public figure defamation actions. H.R. 2846, 99th Cong. 1st Sess. (1985). While the likelihood of federal legislation in this field must be questioned, the possibility of state legislative initiatives focused on punitive damages is, in the author's view, realistic and appropriate.

55. Sullivan, 376 U.S. at 285.

56. Bose, 466 U.S. 485 (1984).

57. Out of 19 actions resolved from 1982-84, fewer than ⅓ (6/19) of the awards were affirmed on appeal. This was consistent with results from the 1980-1982 period in which out of 42 actions resolved, only 14 (33%) were affirmed. LDRC Bulletin No. 11, *supra* note 6, at 2.

dent" review was specifically applied, the reversal rate was even higher, approaching eighty percent.[58] Post-trial and appellate rulings are also an indispensable tool in rejecting or reducing unreasonable damage awards. Thus, although more than two dozen million-dollar awards have been entered since 1980, not one has yet been finally affirmed on appeal. The average affirmed award has actually decreased by half, to well under $100,000, during that same period.[59]

But even these favorable appellate results, so necessary to ameliorate excesses at trial, remain under attack. The recent panel decision in *Tavoulareas v. Washington Post*, now vacated pending rehearing *en banc*, would gravely undermine independent appellate review of actual malice verdicts by according improper deference to any factual findings arguably made in the trial court, and by unjustifiably expanding the cognizable elements of actual malice — substituting sheer speculation, cynical inference, and circumstantial proof of malice for actual, direct proof of knowing falsity.[60] The *Hepps* case also portends additional problems for appellate review in private-figure libel actions.[61] LDRC data already make clear that jurors may often leap easily from a finding of falsity to a finding of negligence, which will escape meaningful review on appeal.[62] Accordingly, if *Hepps* were to shift the burden of proving truth to the defense, and recognize the validity of a presumption of falsity, there might be nothing left for an appellate court to review. In effect, pri-

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58. LDRC Bulletin No. 7, *supra* note 6, at 2, 21 (independent appellate review study undertaken by LDRC to determine whether *Sullivan* mandate was being followed revealed nearly universal adherence by state and federal courts, as well as an 80% reversal or modification rate on appeal when an independent review standard was applied).

59. LDRC Bulletin No. 11, *supra* note 6, at 20-22. For the 1980-82 period the average award affirmed was $119,456 compared to $60,416 for the 1982-84 period.

60. Tavoulareas, 759 F.2d 90, *rev'd* 763 F.2d 1472 (D.C. Cir. 1985) (en banc) *reh'g granted*, *supra* note 13. Judge Skelley Wright, in his dissent in *Tavoulareas*, described the panel decision as:

> no less than an ambitious, wide-ranging revision of libel jurisprudence . . . accomplish[ed] in two ways. First, it counts, as elements of actual malice, factors that are completely impermissible considerations in reaching the daunting conclusion that the First Amendment does not apply to the challenged expression . . . . Second, the majority dramatically narrows our well-established constitutional responsibility to conduct an independent review of the record in these First Amendment cases. The nature of that review is critically important, and the majority seeks to reduce it to a pro forma, mechanical ratification . . ."

759 F.2d 90, 145 (Wright, J., dissenting).

61. Hepps, 506 Pa. 304, 485 A.2d 374, *cert. granted*, 105 S.Ct. 3496 (1985) (*argued* Dec.3, 1985). *But see* note 47, *supra*, for a brief summary of the Supreme Court's recent resolution of this issue in *Hepps*.

62. For instance, LDRC's data does not reveal a single case tried to a negligence standard in which a verdict or judgment for the plaintiff was reversed based exclusively upon an appellate ruling that the finding of negligence was erroneous. LDRC Bulletin No. 6, March 15, 1983, at 42. *See also* LDRC Bulletin No. 12, *supra* note 32, at 7 (data indicating that negligence standard provides little protection for media defendants at summary judgment stage. A study of 136 summary judgment motions found that in none of those cases was summary judgment granted where negligence was the dispositive issue).

vate actions would revert to strict liability, once plaintiff proved a defamatory publication by the defendant.

VII. Conclusion

All of these realities of media libel litigation suggest that the substantive constitutional protections adopted by *Sullivan* and *Gertz* remain only promises today. In order to become fully effective, the promised protections must be more sensitively and vigorously applied using all of the tools, substantive and procedural, available to courts and to communications lawyers. Unfortunately, the relationship between substance and procedure has been more clearly recognized by the lower courts than by the current Supreme Court. Some Justices have even suggested that developing procedural mechanisms to effectuate substantive protections is somehow improper "double counting."[63] In fact, LDRC data on the real-world operation of libel demonstrates that the suggested dichotomy between substance and procedure is wholly illusory. Isolating substantive protections and then permitting them to become progressively less effective for want of a workable means of enforcement simply erodes the substantive rules themselves. It remains to be seen whether the promises of *Sullivan* and *Gertz* will be thus undermined, or whether the realities of current libel litigation will eventually be recognized, leading to a more sensitive, careful, and consistent protection for the first amendment rights of media defendants and the entire public.

63. Calder, 465 U.S. 783 (1984) (rejecting a special constitutionally-based rule regarding personal jurisdiction in media libel actions, Justice Rehnquist wrote that "to reintroduce [first amendment] concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." *id.* (citations omitted)).