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EDITOR'S NOTE

As the careful reader will note, unexpected developments since publication of our last Bulletin have necessitated a change of plans for the content of Bulletin No. 7. In Bulletin No. 6 we published Part 1 of our review of private figure standards under Gertz. We had expected to complete and publish Part 2 of the Gertz discussion in this Bulletin. However, on April 25 the Supreme Court granted certiorari in Bose v. Consumers Union. It quickly became apparent that Bose could be one of the most important cases for libel defendants in recent years. It was therefore decided that LDRC should immediately undertake a comprehensive study of standards for appellate review in libel actions, the issue presented for consideration in Bose. The bulk of this Bulletin is given over to the results of that Study.

Special thanks for her invaluable assistance in the preparation of LDRC Study # 3 and other portions of this Bulletin go to Diana Frost, LDRC's intern, a second year student at Fordham University Law School in New York City.

It is envisioned, assuming there are no other unexpected developments, that Part 2 of the Gertz article will be published in Bulletin No. 8, along with a new LDRC Study of motions to dismiss in libel actions and a final tally of Supreme Court actions last Term.

Finally, another reminder that LDRC's first libel defense workshop, co-sponsored by the American Newspaper Publishers Association and the National Association of Broadcasters, is coming up on August 25 and 26 in Chicago. If you wish to attend and have not already registered, please send in your application today. The application form appears in the enclosed brochure which more fully describes what we expect to be an invaluable seminar program for all media defense counsel.
SUMMARY OF FINDINGS. LDRC studied appeals in 60 federal and state court actions (24 federal cases; 36 state). 11 of the 12 federal circuits and 22 states were represented in the LDRC Study. (For a complete listing of the 60 LDRC appeals see "Appellate Review Case List," infra.) The appeals were from final plenary judgments and presented the issue of the standards for independent appellate review in constitutional libel (and privacy) actions decided since New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (hereinafter "Sullivan"). The LDRC Study was undertaken because the Supreme Court's grant of certiorari in Bose v. Consumers Union of the United States, Inc., 692 F.2d 189, 51 U.S.L.W. 3774 (1983), appears to raise questions about the application of the independent appellate review principle first articulated in Sullivan. The LDRC Appellate Review Study documents that state and federal appellate courts that have ruled on the issue since Sullivan have almost universally followed Sullivan in applying a special, independent standard of review when considering judgments in constitutional libel (and privacy) actions. These LDRC findings regarding heightened appellate scrutiny take on especial importance when considered in light of the frequently adverse and often unsupportable verdicts and judgments that have been entered against defendants at the trial court level in libel actions as documented in LDRC's previous studies -- see, e.g., LDRC Bulletin No. 4 (Part 1) at 2-17 (August, 1982); LDRC Bulletin No. 6 at 2-13 (March, 1983).

- The mandate of New York Times v. Sullivan that independent appellate review of constitutional libel actions be undertaken to assure that constitutional standards have been constitutionally applied has had a deep and broad influence on the development of libel law in this country for almost two decades.

- Overall, 95% of the courts that have had occasion definitively to consider the standard of appellate review in constitutional libel actions have adopted and followed Sullivan and its progeny. 9 of the 11 Circuits that have ruled on the matter have clearly
followed Sullivan while only 1 Circuit has apparently not. More than 90% of the federal cases studied accepted independent review (see Table 4, infra). None of the 22 states that have discussed the issue has failed to follow Sullivan. (But note Table 4, footnote (2), infra.)

Independent review has served its purpose of locating reversible error in constitutional libel judgments. Of the 60 cases in the LDRC Study, 4 out of 5 of judgments entered against libel defendants were either reversed or modified on appeal.*

Independent review is widely accepted at both the state and federal levels. In fact, the state reversal rate in the LDRC Study, 83%, was higher than the federal rate, 75%. (See Table 3B, infra.)

Despite this high reversal rate, application of independent review has not lead to extreme "de novo" fact-finding by appellate courts. Only 7 of the LDRC cases expressly stated they were exercising de novo review; 3 expressly rejected de novo review. A majority of the cases accorded some degree of deference to the factual findings of the lower court. For example, at least 7 cases expressly declined to reconsider credibility issues; at least 16 courts indicated they were according permissible inferences, or were viewing the evidence in the light favorable to the judgment winner. (See Table 5, infra.)

The burden of proving actual malice by clear and convincing evidence is without doubt the most significant single factor in the disposition of constitutional libel cases on appeal. At least 24 cases specifically adverted to this heavy burden of proof.

BACKGROUND. In 1964, in Sullivan, as one co-ordinate branch of its landmark ruling constitutionalizing libel actions that threatened to violate First Amendment rights, the Supreme Court mandated a special, heightened standard of appellate review

* This data parallels earlier LDRC findings documenting high reversal and modification rates in all recent libel appeals -- compare LDRC Bulletin No. 4 (Part 1) at 3-4 and Table 3-B and LDRC Bulletin No. 6 at 2, 4, with Table 3B, infra. It also parallels still earlier data compiled by Professor Franklin -- see LDRC Bulletin No. 4 (Part 1), supra, at 4.
in constitutional libel actions. The Court thereupon applied that "independent" review standard in declining to remand Sullivan to the Alabama courts. Instead, it reversed plaintiff's judgment in that case and awarded judgment for the New York Times Company and other defendants on the ground that plaintiff could not establish actual malice with the requisite "convincing clarity." The Supreme Court's adoption of an independent appellate review standard was far from unprecedented, albeit that independent review does in fact represent a marked departure from the traditional and far more constrained standards for appellate review in other civil actions, jury and non-jury, state and federal. The Supreme Court had previously mandated and applied heightened appellate scrutiny in a wide variety of settings, primarily having to do with assuring the protection of constitutional rights of one kind or another. For example, independent review has been applied to protect First Amendment rights in numerous other contexts. These include cases involving obscenity, freedom of assembly, disorderly conduct, boycott, contempt of court, freedom of expression in public schools and expression rights of public employees.* (For a summary of subsequent Supreme Court cases applying the Sullivan independent review rule in libel actions see note on "The Supreme Court and Independent Review," infra.)

THE LDRC APPELLATE REVIEW STUDY. As is documented below, the LDRC Appellate Review Study found that, since Sullivan, independent appellate review in constitutional libel actions has been almost universally accepted in the Supreme Court, and in the lower federal and state courts. In fact, independent review has been so widely accepted and so frequently applied that it has seldom even been questioned. However, within this past year, questions have been raised in the Supreme Court about the application of Sullivan independent review; particularly by Justice Rehnquist. (See LDRC Bulletin No. 5 at 6-7 (November, 1982)). Finally, the Supreme Court took the Bose case in response to a cert. petition focusing on and challenging the application of independent review in Bose by the First Circuit Court of Appeals. (See note on Miskovsky, Lawrence and Bose, infra.) In order to better understand the operation of Sullivan independent appellate review in libel actions, and in particular to relate the history of

Sullivan review to the issues presented in Bose, LDRC undertook this study of the application of cases applying independent review since Sullivan. All cases mentioning or applying "independent" (or "de novo") review in a defamation or privacy action since Sullivan were reviewed. This general survey was supplemented by a review of all libel damages cases previously collected by LDRC. (See "Further Note on LDRC Sample Data," infra.) Ultimately 60 cases, 24 federal and 36 state, from 11/12 federal circuits and 22 states, were identified and are charted, infra, in various Tables and in the "Appellate Review Case List." The key findings gleaned from LDRC's study of these cases have been summarized supra. What follows are additional comments on LDRC's findings regarding independent appellate review in libel actions.

THE SCOPE AND APPLICATION OF INDEPENDENT REVIEW. The appellate process, in practice, is an art rather than a science. It is always subject to many variables including the particular facts and circumstances of the case under review, the nature of the legal issues and interests at stake, the posture of the case as it comes to the reviewing court, and even the personalities and proclivities of the attorneys arguing, and the judges deciding, the appeal at issue. Needless to say, therefore, even application of the traditional standards for appellate review have often been the subject of debate; review standards have generally defied the many attempts made to formulate and articulate them with precision. Independent review in constitutional libel actions is no exception. It is subject to similar problems; it has not been perfectly defined and perhaps can never be. Indeed, given the intention of Sullivan to accord appellate courts a broader than normal mandate to search the record in libel actions to prevent error of constitutional dimension, there is a real danger that even the best intentioned effort to define independent review with precision will leave the First Amendment rights of libel defendants less well protected than they are currently.* Thus, if

* In this regard consider the following statement by Professor Jaffee discussing Woodby v. Immigration and Naturalization Service and the companion Sherman case, 385 U.S. 276 (1966) (cases which, by the way, adopted a standard of "clear, unequivocal and convincing" evidence to support deportation orders issued under the Immigration and Naturalization Act):

"Generally we know that most rules, particularly most general principles of law, are guides rather than formulas dictating a decision. They prescribe basic positions without excluding deviations in individual cases. Each of us studying a series of cases will

(footnote continued on next page)
nothing else, independent review is simply (but most importantly) both a general constitutional mandate and an overall psychological commitment, searchingly to scrutinize the entire record in a constitutional libel action in order to assure that the high standards defined in Sullivan, qualitative and quantitative, have assuredly been met if not exceeded. Nonetheless, since the prospect exists that Bose will, at minimum, result in some attempt to crystallize the definition of independent review, the following comments, based upon the LDRC Appellate Review Study, are offered as pertinent to this definitional process.

(i) "DE NOVO" REVIEW/TRADITIONAL APPELLATE REVIEW. Presumably, independent appellate review, properly defined, falls somewhere on a continuum between what can be labelled extreme "de novo" review, on the one hand, and the more traditionally limited standards for appellate review, of findings by jury or judge, on the other. De novo review in this sense would entail fresh, plenary fact finding where the findings of the inferior tribunal would be entitled to little if any weight and, indeed, where additional evidence or facts could be found or received as required. It would be for the de novo reviewer to reassess and reweigh all evidence, to draw its own inferences from all of the evidence and even to be the judge of such matters as credibility and the like which normally would be considered peculiarly the province of the initial fact finder. Traditional appellate review, in contrast, would involve the far more limited standards of review, such as "clearly erroneous" or "substantial evidence," that generally govern run-of-the-mill civil actions. At this conclude that courts in certain situations -- some unique, some typical -- require either more or less evidence than what we would generally consider to be "substantial." When the deviation gores our own ox we are angry; when it gores the other man's we are glad. Even though I may deplore some of its consequences, I feel that the general phenomenon is one that I should applaud. Rules and principles have tremendously important functions; but if they are taken to exclude a judge's appreciation of the special instance, if they are thought of as precise determinants, they become our masters rather than our servants. Jaffe, "Administrative Law: Burden of Proof and Scope of Review," 79 Harv. L. Rev. 914 (1966). See also Baumgartner v. United States, 322 U.S. 665, 676 (1944) ("It is idle to try to capture and confine the spirit of this requirement of proof [i.e., "clear, unequivocal and convincing"] with any fixed form of words.")
extreme all reasonable inferences from the evidence in favor of
the judgment winner must be granted, the reviewing court may not
reweigh the evidence or substitute its judgment for the initial
fact finder and the mere fact that the reviewing court would reach
a different conclusion on the evidence would not be justification
for overturning the initial determination. Generally, so long as
there is any substantial evidence in support of the judgment under
review it must be upheld. At times even this traditional
deference to the initial fact finder is somewhat less absolute
than just stated. This slightly less constrained traditional
review can be understood by comparing, for example, the
differences between federal review of a judge's findings under
Rule 52(a)'s "clearly erroneous" standard and federal review of a
jury verdict within the strictures of the Seventh Amendment's
requirement that jury findings of fact must be left undisturbed
unless reasonable men must conclude that there is insubstantial
evidence in their support.

(ii) INDEPENDENT APPELLATE REVIEW UNDER SULLIVAN.
As applied in the 60 cases studied by LDRC, independent review
falls somewhere between the extremes of de novo review and the
more traditional constrained notions of appellate review in civil
actions. Of the 60 cases studied, only 7 expressly stated that
they were applying "de novo" review; but none of these indulged in
fresh fact-finding or similar extreme review procedures. On the
other hand, 3 cases specifically rejected de novo review. In
fact, as is more fully set out in Table 5, infra, a number of
courts have adopted limitations and glosses that confine the
concept of independent review, arguably too greatly. Thus, for
example, according all permissible inferences, or viewing all
evidence in the light most favorable, to the verdict winner, might
be appropriate under the standards for traditional review.* But
where independent review is required, there must at minimum be an
ultimate weighing of the totality of the evidence to assure that
it arises to the level of constitutional malice. Due deference
can be given to underlying findings of fact, including permissible
inferences, but the appellate court must make the ultimate
determination, of both constitutional fact and law, after
scrutinizing the entire record with special care.

(iii) THE SPECIAL IMPORTANCE OF THE CLEAR AND CONVINCING
BURDEN OF PROOF. As noted, in Table 5, a substantial number of
the independent review cases turned upon the substantial
constitutional burden of proof by "clear and convincing" evidence.
Moreover, this higher quantum of evidentiary proof must also be

* Perhaps not surprisingly, in the cases which granted all
inferences the percentage of reversals on appeal dropped to as
low as 50%.
met in connection with the similarly demanding substantive aspects of the definition of actual malice -- e.g., the requirement of a "high degree" of awareness of "probable falsity," or proof of knowledge, "in fact," of falsity. This, in turn, makes it indispensable to search the record for evidence of such quantity and quality and, of course, makes it markedly easier to conclude, as the results of the LDRC Study document, that the heavy constitutional burdens have not been met. This need to assure through independent review that a higher quantum and quality of proof has been attained in constitutional cases can be contrasted with the less rigorous standard of review traditionally applied in normal civil cases when the burden of proof is merely a "preponderance" of the evidence and where there is thus less of a need to search deeply for the assurance that a heavier burden has been met. In cases subject to preponderance the law is the more willing to risk error in a judgment that cannot be said to be unsubstantiated; however, where the importance of the interest justifies the higher substantive standards and the heavier burden of proof, the law is intended to assure the greater protection of such important interests, and this in turn provides the substantive justification for the procedural requirement of more careful appellate review.

INDEPENDENT REVIEW IN CASES RAISING ISSUES OTHER THAN ACTUAL MALICE. Sullivan makes clear that independent review must be accorded, at least in those constitutional libel cases where the legal issue under consideration is actual malice. In more than 30 instances the cases studied by LDRC also applied independent review when a dispositive issue was other than actual malice. Heightened review is certainly appropriate in such cases when they involve constitutional libel claims by public officials or public figures; the fact that such cases can be disposed of in defendant's favor without reaching the actual malice issue should not obviate the need for close appellate scrutiny, since an erroneous judgment would lead to the imposition of liability against constitutionally protected expression. A similar situation arises in cases involving private-figure plaintiffs where the applicable standard of fault is governed by Gertz. At least two leading commentators have argued that the heightened Sullivan standard of review should be applied to review application of fault standards under Gertz. See Anderson, "Libel and Press Self-Censorship," 53 Tex. L. Rev. 422, 467-68 (1975) ("If the Gertz standard differs from that of Times only quantitatively, it would follow that negligence verdicts are reviewable on the same basis.... Gertz' negligence...is a constitutional standard no less than Times' recklessness. The Times Court provided for [heightened] appellate review of the evidence to assure that the reckless disregard standard would be applied constitutionally. The potential for unconstitutional application of the Gertz standard -- and therefore need for

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appellate review -- is surely no less.)"; Robertson, "Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.," 54 Tex. L. Rev. 199, 249-50, 258-59 (1976) ("Because of the impact of defamation liability on first amendment rights, liability became a 'constitutional fact' of which the Court was the final arbiter. This reasoning applies equally to a negligence standard, although the Gertz opinion failed to address the issue. ...de novo review will play an important role in mitigating the danger of self-censorship under Gertz.") The American Law Institute appears to agree with these commentators. See RESTATEMENT (SECOND) OF TORTS §580 B, comment K: "Appellate review of determination of negligence. The [Gertz] rule...is a rule imposed by the Constitution. The application of the standard, therefore, necessarily involves a constitutional right, as in the case of the determination of...reckless disregard [under Sullivan].... As in that case, the determination is subject to possible constitutional review all the way through the appellate process." Despite these weighty authorities, experience in the Courts on the Gertz private-figure review issue is limited. Among the LDRC cases are 11 cases involving private figures. In several of these independent review was applied. However, most of these cases were decided in the period before Gertz when lower courts considered private figures raising issues of public concern to be subject to the Sullivan actual malice rule and also appellate review. Only one case involved a post-Gertz negligence standard -- E.W. Scripps v. Cholomondeloy (state case #11). The negligence finding was affirmed but on an independent review of actual malice as to damages, the punitive award was overturned. Among cases excluded from the LDRC sample were numerous other cases involving private-figure plaintiffs, including some asserted against media defendants and arguably involving issues of public interest and concern. But courts deciding these cases did not consider or apply independent review and therefore they were not included in the LDRC sample.* Since these excluded cases did not expressly reject independent review, but simply failed to consider it, it may be that defense counsel did not argue for independent review in these cases. A final note is in order here. As was noted in LDRC Bulletin No. 6 at 42 (March, 1983) commenting upon "Damages Watch" sections of the LDRC Bulletin: "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." Regrettably, this finding is corroborated in the LDRC Appellate Review Study. Thus, as noted, only the Scripps case applied independent review in a case where one issue was

* See "Further note on LDRC Sample," infra.
negligence, but the negligence finding was affirmed. All of this gives even greater credence to the argument that a lesser standard of fault under Gertz must, at minimum, be considered a constitutional issue requiring independent appellate review to assure sufficient protection of First Amendment rights.

**PLAINTIFFS' APPEALS.** It is not at all clear that the same special rules governing appeals by libel defendants from adverse trial court judgments should govern appeals by plaintiffs where their defamation claims have been rejected in the trial court. In the case of a defendant's appeal, the constitutional First Amendment interest in freedom of expression is at stake. This was the basis for adoption of the Sullivan rule in the first place. In the case of a plaintiff's appeal, the interest at stake is in vindication of reputation. This is certainly a valid interest, but not one arising to constitutional dimension — see Paul v. Davis, 424 U.S. 693 (1976). Nonetheless, LDRC identified several cases involving plaintiff's appeals in which the identical independent review standard was applied for the benefit of the libel plaintiff. Despite this possibly unwarranted extension of independent review, plaintiffs fared far less well than defendants in the LDRC Study. Only 3 out of the 9 trial level judgments for the defendant were reversed or modified on appeal (33%) compared to 41 out of the 51 plaintiffs' judgments that were reversed (80%).

**THE SUPREME COURT AND INDEPENDENT REVIEW SINCE SULLIVAN.** Although LDRC did not separately study and chart the leading Supreme Court cases, which are well known to the Court itself and to libel litigants, it almost goes without saying that the Supreme Court has itself been one of the leading exponents of independent review as a means of curing defective judgments in libel actions subject to constitutional principles. The LDRC Case List does not include several of the leading cases in which the Supreme Court granted certiorari to review an erroneous libel judgment and itself applied the independent appellate standard to review the judgment. These include: New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Rosenblatt v. Baer, 383 U.S. 75; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Associated Press v. Walker, 388 U.S. 130 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 730 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967) (invasion of privacy); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Cooperative Pub. Assn. v. Bresler, 378 U.S. 6 (1970); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) (libel claim under federal labor laws).

In addition to these independent review cases actually heard and decided by the Supreme Court, the LDRC Appellate Review
Case List also strikingly demonstrates the extent to which the Supreme Court has, since Sullivan, been exposed to petitions for certiorari from intermediate appellate court judgments, in federal and state cases, seeking review of the affirmance or reversal of libel judgments subject to independent appellate review. (See Table 7, infra.) Thus, according to the LDRC data, the Supreme Court has had before it over the past 15 or so years at least 30 cert. petitions in independent review cases, 9 from cases in which a trial court judgment imposing liability was affirmed and 21 from cases in which the trial court judgment imposing liability was reversed (or the trial court judgment denying liability was affirmed). Of these 30 cert. petitions only two were granted -- Gertz in 1974 and Bose in 1983. And Gertz was not taken for the purpose of questioning the Seventh Circuit's application of independent review -- indeed, the Supreme Court assumed in Gertz that the Seventh Circuit was correct in its finding that actual malice had not sufficiently been established -- but rather to consider the appropriate standard of liability for private figures. From this data it is difficult to conclude that the Supreme Court has been unaware of the pervasive application of the independent review standard by appellate courts since Sullivan.

NOTE ON CASES NOT APPLYING, OR NOT FULLY APPLYING, SULLIVAN INDEPENDENT REVIEW. Guam Federation of Teachers v. Ysrael, 492 F.2d 438 (9th Cir.), cert. denied, 419 U.S. 872 (1974) has been miscited on a few occasions for the proposition that independent review on appeal is not required under Sullivan. Guam itself did not involve an appeal from a final judgment after jury verdict, but rather involved the question whether a directed verdict for the libel defendant, taking a case away from the jury, had properly been ordered. The Guam court cited Sullivan favorably with regard to independent review, albeit that it adopted a relatively narrow definition of that independent review. Guam's broad statement that "the manner in which the evidence is to be examined...is the same as in all other cases" was specifically limited to the question of directing a verdict. Maheu v. Hughes Tool, 569 F.2d 459, 3 Med. L. Rptr. 1847 (9th Cir. 1977), therefore, misapplies Guam to a final judgment for the libel plaintiff entered upon a jury verdict after trial. In any event, the dispositive legal issues on appeal in Maheu were truth and damages, rather than the constitutional standard of actual malice. Dixon v. Newsweek, 562 F.2d 626 (10th Cir. 1977), carries the misreading of Guam to its final extreme, citing Guam for the bald and unqualified proposition that "[t]he standard of review in libel actions is the same as in other cases." Dixon also mischaracterizes Walker v. Colorado Springs Sun, Inc., 188 Colo. 86, 538 P.2d 450, cert. denied, 423 U.S. 1025 (1975), suggesting that Walker rejected independent review when it did not. Perhaps a partial explanation for the aberrance of Maheu and Dixon is that in both cases the libel defendant was urging a "de novo" review. Given the Ninth Circuit's adherence to a limited definition of independent review, the Maheu and Dixon decisions can justifiably be read simply as overstating their rejection of what they viewed as the improperly broad review standard suggested by defense counsel's use of the de novo terminology. At the state court level only Dunlap v. Philadelphia Newspaper, Inc., 301 Pa. Super. 475, 448 A.2d 6, 8 Med. L. Rptr. 1974 (1982), specifically appears to reject independent review. But Dunlap was decided in what the court viewed as the special context of appeal from the denial of judgment n.o.v. The three other state cases not expressly adopting independent review -- Palm Beach v. Early, 334 So.2d 50 (Fla. Dist. Ct. App. 1976), appeal dismissed, 334 So.2d 50, 3 Med. L. Rptr. 2183 (1977), cert. denied, 423 U.S. 1025 (1975); McInnis v. Inhabitants of the Town of Livermore, 381 A.2d 1110 (Me. 1978); Rayzor v. Belo Corporation, ___ S.W.2d ___, 8 Med. L. Rptr. 2425 (Tex. Cir. App. 1982) -- are, each for different reasons, not fairly viewed as actually rejecting independent review. (See notes to Table 4, infra.)

A NOTE ON MISKOVSKY V. OKLAHOMA PUBLISHING CO.; LAWRENCE v. BAUER PUBLISHING AND PRINTING, LTD.; BOSE v. CONSUMERS UNION OF UNITED STATES, INC. As noted above, a virtually unbroken line of cases over a period of almost 20 years, in the Supreme Court and in lower state and federal courts, supports the application of
independent appellate review in constitutional libel cases. Only in this past year have questions for the first time been raised in the Supreme Court about the use of such independent review in two or three cases. It is not the purpose of this Study to assess at length or in great detail the specific facts and circumstances of each of the many cases in which independent review principles have been defined and applied over the past two decades. It nonetheless seems appropriate to comment briefly on the three cases that have, in one way or another, been questioned by one or another of the Supreme Court Justices, in light of the findings of this Study.

(i) Miskovsky v. Oklahoma Publishing Co. The first suggestion that the state appellate courts may have been extending the notion of independent review in libel actions too far, appeared in the opinion of Justice Rehnquist (joined by Justice White) dissenting to the denial of certiorari in Miskovsky v. Oklahoma Publishing Co., ___ P.2d ___, 7 Med. L. Rptr. 2607 (Okla.), cert. denied, ___ U.S. ___, 8 Med. L. Rptr. 2302, 51 U.S.L.W. 3284 (1982). Justice Rehnquist there noted that the Oklahoma Supreme Court had applied independent review in reliance upon Sullivan. However, it would appear that Justice Rehnquist's essential complaint was not over the scope of independent review but rather over the Oklahoma court's asserted misapprehension of the extent to which federal constitutional principles regarding statements of "opinion" govern a libel case brought under state law. Nonetheless, looking at Miskovsky from the point of view of proper appellate review it is difficult, despite the questions raised by Justices Rehnquist (and White), to fault the action or analysis of the Oklahoma Supreme Court in performing its constitutionally-mandated independent review. In fact, plaintiff's claims in Miskovsky would seem to have been so weak as a matter of common law regarding such fundamentals as falsity and defamatory meaning that it is not entirely easy to understand why the two Justices saw the Miskovsky case as an appropriate vehicle to complain about error in the state appellate process. Even as to the primary focus of the dissent -- the issue of opinion -- surely there was no overreaching in the Oklahoma Supreme Court's appellate review of whether the allegedly libelous statements at issue were, as a matter of law, statements of fact or of opinion. Such issues are generally considered questions of law for the judge -- particularly where the statements are unambiguously opinion. See Sack, Libel, Slander and Related Problems 183-85 (PLI 1979). Several of the appellate review cases in the LDRC Study disposed of appeals, in whole or in part, on such questions of law. (See Table 6, infra.) Finally, of course, as to the merit of Justice Rehnquist's challenge to the constitutional opinion privilege under Gertz, it is well to note, based on the results of the LDRC 50-State Survey, that the recognition of privilege for opinion is widespread, both as a matter of state
common, and federal constitutional, law. According to the LDRC Survey as many as 27 jurisdictions have now recognized special constitutional protections for opinion in reliance on Gertz. (Presumably, some if not all of these 27 jurisdictions formerly accorded protection for opinion as a matter of common law prior to Gertz.) Two of these jurisdictions also continue to recognize common law privileges for opinion as do another 12 jurisdictions, not in reliance on Gertz.

(ii) Lawrence v. Bauer Publishing & Printing Ltd. The second case in which questions were raised about the propriety of the state review process -- Lawrence v. Bauer Publishing & Printing Ltd, ___ N.J. ___, ___ A.2d ___, 8 Med. L. Rptr. 1536, cert. denied, ___ U.S. ___, 8 Med. L. Rptr. 2454, 51 U.S.L.W. 3360 (1982) -- specifically challenged the extent to which the New Jersey Supreme Court had reviewed the evidence in the performance of its constitutionally-mandated independent examination of the record. Justice Rehnquist complained that the appellate court had thereby "invade[d] the constitutional office of the jury." Justice Rehnquist thereupon quoted at length New Jersey's traditional rules for considering and reviewing motions for directed verdict and judgment n.o.v. in non-constitutional civil actions. If, in focusing on the applicability of New Jersey's traditional rules for reviewing jury findings in any civil action, Justice Rehnquist is suggesting that the Sullivan independent review rule has no force or effect upon state courts in constitutional libel actions, his view would preclude application of independent review in certainly the majority of all libel cases since defamation is still primarily a state law cause of action albeit subject to constitutional principles. More to the point, the applicability of Sullivan independent review to state court judgments has universally been recognized; no distinction has ever been drawn between state and federal courts for these purposes. Indeed, there is probably greater reason to give careful review to state judgments than federal with regard to the proper application of federal constitutional principles. If, in adverting to New Jersey's standard appellate rules Justice Rehnquist is not propounding an untenable and unprecedented distinction between state and federal cases, but is instead suggesting that traditional state rules of appellate review governing non-constitutional civil actions are in their entirety binding upon courts reviewing constitutional libel actions, then the Rehnquist view is nothing less than a thinly-veiled suggestion that Sullivan, and its many progeny, was wrongly decided on the issue of independent review and must be abandoned. For surely if an appellate court is bound to accept all adverse inferences, to accept all adverse credibility findings, not in any way to review and weigh the evidence and not in any circumstances to substitute its judgment regarding the weight of the evidence for that of the jury, even in recognition of the especially heavy constitutional
burden of proof in constitutional libel cases, then nothing is left to the independent review mandated by Sullivan. Turning now to the actions of the New Jersey Supreme Court, although the court could perhaps have been clearer in articulating how it was evaluating the record evidence, it is not at all self-evident that the Court's independent review exceeded appropriate bounds under Sullivan. Contrary to Justice Rehnquist's suggestion that the New Jersey Court "reweigh[ed] testimony and reassess[ed] the credibility of witnesses" -- even assuming this would never be appropriate under Sullivan -- it is not at all clear that this is what the Court did. The New Jersey Supreme Court began its analysis of the facts pertinent to the actual malice issue by expressly recognizing that certain aspects of the key witnesses' testimony "is disputed." It then identified those aspects of this pivotal testimony that were undisputed. Finally, the Court described what it viewed presumably as the only legitimate inferences regarding the existence of actual malice based upon that testimony in the record and it considered at some length whether that evidence was legally irrelevant to the issue of actual malice. Having found that the undisputed evidence, plus the legitimate inferences from the disputed evidence, did not meet plaintiff's heavy constitutional burden of proof of knowing falsity by clear and convincing evidence, it found for the libel defendant and reversed the judgment. Justice Rehnquist may have disagreed with the New Jersey Court's analysis but it can hardly be said that justice, judicial economy or the important First Amendment interests at stake would be served by the Supreme Court's embarking upon a policy of granting certiorari simply to apply yet another layer of appellate review for the sole purpose of second-guessing state appellate courts in their independent consideration of the adequacy of the evidence regarding "the statements in issue and the circumstances under which they were made" in constitutional libel actions.

(iii) Bose V. Consumers Union. It is not our intention to argue the Bose case here, an effort that will certainly be performed with skill and persuasiveness by defense counsel and counsel for the supporting amici, The New York Times, et al. and the American Civil Liberties Union. The first point that can be made, it almost goes without saying, is that the grant of cert. in Bose does not necessarily portend that the Supreme Court intends to do away with independent review in constitutional libel actions or even to dilute independent review in any significant way. Over almost 20 years the Supreme Court has consistently adhered to the principles of searching independent review, as one indispensable aspect of the application of First Amendment protections in constitutional libel actions, beginning of course with Sullivan itself. Also, as the LDRC Study found, Sullivan independent review has been widely accepted and applied in literally dozens of state and federal cases, approximately half of which were
ultimately brought to the Supreme Court's attention via the filing of cert. petitions. Second, the Bose case would not seem to be a particularly appropriate case in which to consider a departure from the current standards. Bose did not involve jury findings and does not therefore meet the concern of Justice Rehnquist, stated in Lawrence v. Bauer, regarding the jury's "constitutional office." Bose was an appeal within the federal courts and therefore, again, does not meet the asserted concern over too broad an application of constitutional principles in contravention of state procedures or rules -- a concern, by the way, nowhere evidenced in the many state court opinions accepting Sullivan studied by LDRC. Also, judged by the range of techniques various appellate courts have used in exercising independent review, the First Circuit in Bose did not go too far in reviewing the district court's judgment -- a judgment surely suspect not only as a matter of law but of logic and common sense. Although the First Circuit said that it was employing a "de novo standard of review," it in fact did not perform de novo fact finding but instead applied no more than the limited form of independent review evidenced in a vast majority of the cases in the LDRC Study. For example, the First Circuit expressly noted -- as did many appellate courts in the LDRC Study -- that it had not re-evaluated matters of

* The concurring opinion of Circuit Judge Bell in Time, Inc. v. Firestone, 460 F.2d 712 (5th Cir.), cert. denied, 409 U.S. 875 (1972), is particularly relevant regarding the First Circuit's perhaps too casual use of the term "de novo":

"When considering the state of records to be reviewed in appellate courts, state and federal, jury and nonjury trials, it becomes apparent that the use of the term "de novo" in [Rosenbloom v.] Metromedia was one of emphasis -- to the end that reviewing courts must carefully consider the facts pertaining to constitutional questions. We do this by making our own careful examination of the record, with particular scrutiny of the underlying or subsidiary facts -- to see if the factual conclusions meet the high standard set in New York Times...of finding clear and convincing proof.

* * *

I hasten to add that Judge Ainsworth has only used the term "de novo" in his review of the record. I neither perceive nor suggest that he would or has ignored credibility findings or the clearly erroneous rule as it applies to underlying or subsidiary facts as distinguished from conclusions of fact." (Id. at 724)
LDRC BULLETIN NO. 7

credibility and demeanor.* And although the First Circuit was perhaps not as clear on the matter as it might have been, its review of the trial court's undisputed and non-credibility findings to ascertain whether those facts amounted to actual malice as a matter of law, or constitutional fact, was procedurally proper and substantively correct. In fact, a strong argument can be made that the district court's judgment in Bose was, in any event, clearly erroneous and in that sense the issue of independent review need not even be reached. Finally, of course, the Bose case was decided by the First Circuit on the issue of actual malice. It reserved judgment on two other critically important and potentially dispositive issues -- truth and opinion. Therefore, whatever the Supreme Court's ruling may be, the Bose case must still be remanded and can still very well be won by the media defendant under any standard of appellate review. In short, the Bose case -- itself involving a most curious libel/product disparagement claim that is difficult to consider worthy of twelve years of costly litigation and that has come down to a debate over the meaning of a single word in an inherently subjective product review by a respected independent and non-profit consumer testing organization being prosecuted by a loudspeaker manufacturer that has, since the publication at issue, become a highly successful if not dominant force in its industry despite the allegedly defamatory review -- is hardly the stuff of landmark First Amendment jurisprudence. Perhaps it is still not too late to hope that the Supreme Court will think better of its grant of certiorari or, if not, that it will recognize the wisdom of preserving intact the necessary and salutary coordinate rule of New York Times v. Sullivan guaranteeing independent review in constitutional libel actions.

SOME PRACTICAL LESSONS OF THE LDRC APPELLATE REVIEW STUDY. Unless and until the Sullivan independent review rule is overturned, clearly the pre-eminent lesson of the LDRC Appellate Review Study for the libel defense practitioner prosecuting an appeal from an adverse libel or privacy judgment is that every appellate court, in every appropriate case, should be prominently and repeatedly reminded of its constitutional obligation to perform an independent review, rather than some more traditional form of limited civil review, in considering the appeal. Both the 60 LDRC appellate review cases, and the numerous appellate cases excluded from the LDRC Study (see "Further Note on LDRC Data,"

* Although denominated a ruling on credibility by the trial court, a powerful argument can be made that one of the district judge's key findings in Bose was not a credibility finding at all. Even if it were, of course, it would still be subject to some degree of appellate review either as clearly erroneous or without substantial support in the record.

-16-
infra), document how crucially important it is to remind the Court of its constitutional function and how disadvantageous it can be to permit a court to consider the appeal without employing, where mandated, heightened independent review. Although this proposition might appear to be self-evident, it is inferrable from a review of the many appeals in which independent review was not considered by the court that in at least some of those cases counsel failed to argue, or to argue strongly enough, that the special standard must be applied. Correlatively, defense counsel in appropriate non-actual malice appeals, and particularly non-public figure appeals, should begin to work more systematically to assure the expanded application of independent review to such cases. (See note on "Independent Review In Cases Raising Issues Other than Actual Malice," supra.) Finally, it would be well for libel defense counsel to focus on litigation procedures and arguments --pre-trial, trial, post-trial and appeal -- geared to assuring the most effective possible independent review. Are there ways at each litigation stage to formulate legal vs. factual issues so as to maximize the usefulness of independent review? Can the case to be tried so as to minimize unreviewable (or at least less reviewable) credibility or similar findings. Can trial and post-trial motions be propounded in such a manner as to maximize necessary independent review? Should the record on appeal be developed in a special manner to assist in the requisite searching appeal? Surely, such questions should be answered in each case in which libel defense counsel may -- regrettably but at times unavoidably -- be faced with the task of prosecuting an appeal from an unfavorable libel judgment.

A FURTHER NOTE REGARDING THE LDRC SAMPLE DATA. The initial research step in the LDRC Appellate Review Study was a LEXIS search of all reported cases by the Federal Courts of Appeal and by all state courts, from March, 1964 (the date when New York Times v. Sullivan was decided) to June, 1983, in which either "Independent examination" or "de novo review" appeared in the text along with the words "defamation," "libel," "slander," "invasion of privacy" or "product disparagement." This LEXIS search yielded 51 federal cases and 83 state cases. The LEXIS cases were then supplemented and checked by an examination of the following topics in West's Seventh, Eighth and Ninth Decennial Digests and West's General Digest: Federal Courts; Constitutional Law; Libel and Slander. Finally, in order to be certain no relevant cases known to LDRC had been overlooked, all cases listed in previous LDRC Bulletins -- No. 2 (Franklin Damages Cases); No. 4 (Part 1) (LDRC Trial and Damages Study); and Nos. 5 and 6 -- LDRC's Damages Watch Case Lists, were examined, to which were added any very recent appeals from damages awards which have been brought to LDRC's attention as part of the ongoing LDRC Damages Watch Project. In total, more than 200 cases were identified for consideration by these various means. Only 60 of the cases initially reviewed were
ultimately selected as appropriate for detailed analysis in the Appellate Review Case List and Tables. The 60 cases represent those state and federal appellate court decisions, reviewing final judgments rendered during or after trial in defamation (or privacy) actions in which some kind of independent review standard is employed (expressly or implicitly in reliance on Sullivan and its progeny) and the small number of appellate decisions where Sullivan independent review would appear to have been mandated but in which the appellate courts expressly rejected the applicability of independent review. These selection criteria eliminated the following categories of cases: (i) numerous appeals from trial judgements in defamation or privacy actions in which the concept of independent review was not applicable or was not, for a variety of reasons, adverted to or applied; such appeals would include -- libel actions involving private figure plaintiffs, non-media defendants and no issue of public interest or importance in which no constitutionally-guaranteed right was asserted or at issue; libel actions potentially presenting constitutional-rights claims (either governed by Sullivan or by Gertz) but in which other non-constitutional issues were found dispositive -- most often public figure non-media actions presenting common law issues for resolution; non-appealed trial court rulings (other than summary judgment) such as rulings on motions for directed verdict or judgment n.o.v. even if they adverted to the independent review standard; (ii) all summary judgment cases, even if the concept of independent review was mentioned or applied; (iii) the many other types of constitutional rights and First Amendment cases not involving defamation or privacy claims in which the concept of independent review has been adopted or applied.

CONCLUSION

The 60 cases charted below, it is suggested, demonstrate that independent appellate review has not been improperly or inappropriately undertaken but rather that it has had a beneficial curative effect in assuring that actual malice and related constitutional principles have been properly defined and applied and that unwarranted imposition of liability -- often also entailing large and punitive damage awards -- has been prevented.
### TABLE 1

<table>
<thead>
<tr>
<th>Cases</th>
<th>TOTAL</th>
<th>FEDERAL</th>
<th>STATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases</td>
<td>60</td>
<td>24</td>
<td>36</td>
</tr>
<tr>
<td>Jury Trials</td>
<td>52</td>
<td>18</td>
<td>34</td>
</tr>
<tr>
<td>Bench Trials</td>
<td>8</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Public Figure Plaintiffs</td>
<td>49</td>
<td>19</td>
<td>30*</td>
</tr>
<tr>
<td>Private Figure Plaintiffs</td>
<td>11</td>
<td>5</td>
<td>6*</td>
</tr>
<tr>
<td>Media Defendants</td>
<td>51</td>
<td>21</td>
<td>30*</td>
</tr>
<tr>
<td>Non-Media Defendants</td>
<td>9</td>
<td>3</td>
<td>6*</td>
</tr>
</tbody>
</table>

* The coincidence in totals of 30 and 6 public figure/private figure state cases and 30 and 6 media/non-media state cases does not represent a complete convergence of private figure plaintiff and non-media defendant cases. There were actually 4 public figure/non-media cases and 6 private figure media cases in the state sample. Similarly, 2 federal public figure cases involved non-media defendants and 3 private figure federal cases involved media defendants. It is not the purpose of this study to discuss whether constitutional rules should be fully applied in non-media cases.
TABLE 2

RESULTS AT TRIAL
IN LDRC APPELLATE REVIEW CASES

<table>
<thead>
<tr>
<th></th>
<th>PLAINTIFF WINS</th>
<th>DEFENDANT WINS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jury Verdicts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(51)(1)</td>
<td>16 - federal</td>
<td>1 - federal</td>
</tr>
<tr>
<td></td>
<td>33 - state</td>
<td>1 - state</td>
</tr>
<tr>
<td></td>
<td>49 - total</td>
<td>2 - total</td>
</tr>
<tr>
<td>Bench Trials</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(8)</td>
<td>5 - federal</td>
<td>1 - federal</td>
</tr>
<tr>
<td></td>
<td>2 - state</td>
<td>0 - state</td>
</tr>
<tr>
<td></td>
<td>7 - total</td>
<td>1 - total</td>
</tr>
<tr>
<td>Judgments n.o.v.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(6)</td>
<td>0 - federal</td>
<td>5 - federal</td>
</tr>
<tr>
<td></td>
<td>0 - state</td>
<td>1 - state</td>
</tr>
<tr>
<td></td>
<td>0 - total</td>
<td>6 - total</td>
</tr>
<tr>
<td>Directed Verdict</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1)</td>
<td>0 - federal</td>
<td>1 - federal</td>
</tr>
<tr>
<td></td>
<td>0 - state</td>
<td>0 - state</td>
</tr>
<tr>
<td></td>
<td>0 - total</td>
<td>1 - total</td>
</tr>
</tbody>
</table>

(1) Although 52 LDRC cases were initially tried to juries, only 51 verdicts were rendered since 1 case resulted in a directed verdict for the defendant; there were no directed verdicts for the plaintiff.
### TABLE 3A

**APPEALS IN LDRC APPELLATE REVIEW CASES**

<table>
<thead>
<tr>
<th></th>
<th>TOTAL</th>
<th>FEDERAL</th>
<th>STATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff Appeals</td>
<td>9</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>Defendant Appeals</td>
<td>51</td>
<td>16</td>
<td>35</td>
</tr>
</tbody>
</table>

### TABLE 3B

**RESULTS OF APPEALS IN LDRC APPELLATE REVIEW CASES**

<table>
<thead>
<tr>
<th>PARTY APPEALING</th>
<th>AFFIRMED</th>
<th>MODIFIED</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>6(67%)</td>
<td>3(33%)</td>
<td>9</td>
</tr>
<tr>
<td>(state - 1)</td>
<td></td>
<td>(state - 0)</td>
<td></td>
</tr>
<tr>
<td>(federal - 5)</td>
<td></td>
<td>(federal - 3)</td>
<td></td>
</tr>
<tr>
<td>Defendant</td>
<td>10(20%)</td>
<td>41(80%)</td>
<td>51</td>
</tr>
<tr>
<td>(state - 6)</td>
<td></td>
<td>(state - 29)</td>
<td></td>
</tr>
<tr>
<td>(federal - 4)</td>
<td></td>
<td>(federal - 12)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>16(27%)</td>
<td>44(73%)</td>
<td>60</td>
</tr>
</tbody>
</table>
TABLE 4

ACCEPTANCE OR REJECTION
OF INDEPENDENT REVIEW

<table>
<thead>
<tr>
<th></th>
<th>TOTAL</th>
<th>FEDERAL</th>
<th>STATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accept(1)</td>
<td>53/56</td>
<td>21/23</td>
<td>32/33</td>
</tr>
<tr>
<td></td>
<td>(95%)</td>
<td>(91%)</td>
<td>(97%)</td>
</tr>
<tr>
<td>Reject(1)</td>
<td>3/56</td>
<td>2/23</td>
<td>1/33(2)</td>
</tr>
<tr>
<td></td>
<td>(5%)</td>
<td>(9%)</td>
<td>(3%)</td>
</tr>
<tr>
<td>Other</td>
<td>4</td>
<td>1(3)</td>
<td>3(4)</td>
</tr>
</tbody>
</table>

(1) Note that the percentages of acceptances and rejections exclude the "Other" category. Not to do so would tend to underestimate the degree of acceptance because the "Other" category encompasses only cases that arguably were applying, or would have applied, independent review but did not say they were applying it or had some other reason for not applying independent review other than outright rejection of heightened review. See notes (2) and (3), infra.

(2) Dunlap v. Philadelphia Newspapers, Inc. (state case #32) rejects independent review on appeal from denial of judgment n.o.v. But Corabi v. Curtis Publishing (state case #31) accepts independent review for general appeals and this would appear to be Pennsylvania's governing rule.

(3) See Orr v. Argus-Press (federal case #13). The Orr case arguably was so readily disposed of that the Sixth Circuit did not need to consider a heightened standard of review.

(4) See Palm Beach Newspaper v. Early (state case #8); Michaud v. Livermore (state case #14) and Rayzor v. Belo (state case #35). In Palm Beach the Florida District Court of Appeal did not expressly refer to independent review. However, in the Florida Supreme Court the dissenter to the denial of a petition for review complained about the extensiveness of the Court of Appeal's review. In Michaud the court did not reject, but simply declined to decide the issue of, independent review since it could reverse without so deciding. In Rayzor a strong argument can be made that the Texas Court of CivTh Appeal was in fact searching the record and applying independent review, but in reversing plaintiff's verdict on several grounds, many of them legal, the court simply did not need to articulate the heightened standard.
<table>
<thead>
<tr>
<th>TABLE 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>CERTAIN LIMITATIONS AND GLOSSES ON INDEPENDENT REVIEW IN THE LDRC CASES(1)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>TOTAL</th>
<th>FEDERAL</th>
<th>STATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>De Novo(2)</td>
<td>7</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Not De Novo</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Clear and Convincing(3)</td>
<td>24</td>
<td>10</td>
<td>14</td>
</tr>
<tr>
<td>Credibility/Demeanor Not Considered</td>
<td>7</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Undisputed Facts(4)</td>
<td>5</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Permissible(5) Infersons</td>
<td>9</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Light Most Favorable(5)</td>
<td>7</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Posture of Appeal(6)</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

(1) The reader should be aware that to some extent this Table inherently involves subjective characterization of the reviewing process in each LDRC case. Generally, an effort has been made to confine the limitations charted to those expressly indicated by the reviewing court in its opinion. Also note that the "Total" column equals a number greater than the 60 cases in the LDRC sample. There are several cases which specified more than one of the limitations listed on the scope of independent review to arrive at the standard employed. Some cases specified none of the charted glosses.

(2) Although these courts stated they were applying de novo review, properly understood none of these courts appeared to be embarking upon fresh fact-finding or similar extreme measures. See note on "De Novo Review/Traditional Appellate Review," supra. See also discussion of Judge Bell's concurring opinion in Time, Inc. v. Firestone, infra page 15 n.* characterizing de novo review as a matter of emphasis and not as an improper intrusion into the province of the finder of fact.

(3) These are cases where the court expressly noted the heavy burden of proof and, in most of them, expressly relied upon that heavy burden in finding no liability.

(4) Cases in which the court suggested that their dispositions, even applying independent review, depended only on undisputed facts in the record.

(5) "Permissible inferences" and "light most favorable" are closely related limitations basically indicating that these courts, in conducting their independent review, stated they were according permissible or reasonable inferences in favor of the verdict or judgment winner in the court below.

(6) These two courts declined to apply independent review when the appeal was not from the judgment but from the denial of a motion for directed verdict (see Guam — federal case #19) or from denial of judgment n.o.v. (see Dunlap — state case #32).
<table>
<thead>
<tr>
<th>DISPOSITIVE ISSUES IN LDRC APPELLATE REVIEW CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>Actual Malice</td>
</tr>
<tr>
<td>Opinion or Fact</td>
</tr>
<tr>
<td>Common Law Malice or Privilege</td>
</tr>
<tr>
<td>Negligence (Gertz)</td>
</tr>
<tr>
<td>Falsity/Truth (also substantial truth)</td>
</tr>
<tr>
<td>Defamatory Meaning</td>
</tr>
<tr>
<td>Public Figure</td>
</tr>
<tr>
<td>Summary Judgment</td>
</tr>
<tr>
<td>Damages</td>
</tr>
<tr>
<td>Satire</td>
</tr>
<tr>
<td>Standard of Liability</td>
</tr>
<tr>
<td>Privacy (misappropriation)</td>
</tr>
<tr>
<td>Improper Jury Instruction</td>
</tr>
<tr>
<td>Burden of Proof (actual malice)</td>
</tr>
</tbody>
</table>

(1) Total issues are greater than the number of cases studied because certain cases involved more than one dispositive issue.
**TABLE 7**

**SUPREME COURT EXPOSURE TO LDRC INDEPENDENT REVIEW CASES**

<table>
<thead>
<tr>
<th></th>
<th>LIBEL PLAINTIFF SEEKS CERTIORARI</th>
<th>LIBEL DEFENDANT SEEKS CERTIORARI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review Denied</td>
<td>19</td>
<td>9</td>
</tr>
<tr>
<td>Review Granted</td>
<td>2(2)</td>
<td>0</td>
</tr>
</tbody>
</table>

(1) Note that this Table includes only cert. petitions granted or denied among the 60 LDRC independent review cases. The Court itself has applied independent review in some 11 additional cases. See note on "The Supreme Court and Independent Review Since Sullivan," supra.

# APPELLATE REVIEW CASE LIST

## HOW TO READ THE CASE LIST

The cases are listed first federal, then state. Federal cases are listed circuit by circuit; state cases are listed alphabetically by state. Each case listing adheres to the following format:

- **⁰. Name of case and citation**
  - (a) status of parties
  - (b) judgment or verdict appealed from
  - (c) result of appeal
  - (d) standard of review employed
  - (e) authorit(ies) cited in discussing standard of review (see "Note on Authorities Cited," infra)
  - (f) dispositive issue(s) on appeal
  - (g) other pertinent matters

## I. FEDERAL CASES

### FIRST CIRCUIT


   - (a) public figure plaintiff (corporation); media defendant
   - (b) judgment -- $115,000 compensatory (bench trial)
   - (c) reversed
   - (d) "we must perform a de novo review, independently examining the record to ensure that the district court has applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof"
   - (e) *Sullivan; Pape; Long v. Arcell; Hotchner; Rosenbloom*
   - (f) actual malice
   - (g) - convincing clarity
     - no review of credibility and demeanor
SECOND CIRCUIT


(a) public figure plaintiff; media defendant
(b) jury verdict -- $1.00 compensatory; $75,000 punitive
(c) affirmed
(d) "full review of the...record"
(e) --
(f) actual malice
(g) --


(a) public figure plaintiff; media defendant
(b) judgment for plaintiff -- award of compensatory and punitive damages (bench trial)
(c) reversed in part, affirmed in part, and punitive award reduced
(d) "The First Amendment requires careful appellate review of the facts found at trial which have constitutional significance"
(e) Sullivan
(f) - opinion or fact
- actual malice
(g) no consideration of credibility and demeanor


(a) public figure plaintiff; media defendant
(b) jury verdict -- $1.00 compensatory; $125,000 punitive
(c) reversed
(d) "The Court [must] make 'an independent examination of the whole record' in scrutinizing a jury finding of scienter in a libel case"
(e) --
(f) actual malice
(g) clear and convincing evidence
THIRD CIRCUIT

5. Baldine v. Sharon Herald Company, 391 F.2d 703 (3d Cir. 1968)

(a) public official plaintiff; media defendant
(b) special verdict for plaintiff; entry of judgment n.o.v. for defendant
(c) judgment n.o.v. affirmed with costs to defendant
(d) The Court must make an "independent examination of the whole record," and "specifically examine for [itself] the statements in issue and the circumstances under which they were published"
(e) Sullivan
(f) actual malice
(g) undisputed facts


(a) public figure plaintiff; media defendants
(b) judgment for defendant (bench trial)
(c) affirmed
(d) no standard articulated, but court conducts its review by "examining all the evidence"
(e) --
(f) actual malice
(g) clear and convincing evidence

FOURTH CIRCUIT


(a) public figure plaintiff; media defendant
(b) jury verdict -- $5000 actual; $150,000 punitive
(c) reversed and remanded with instructions to enter judgment n.o.v. for defendants
(d) On the basis of defendants' challenge of the sufficiency of the evidence, the court has "followed the Supreme Court's lead in First Amendment cases and...conducted an independent examination of the record as a whole to determine whether the judgment constitutes 'a forbidden intrusion on the field of free expression'"
(e) Sullivan
(f) actual malice
(g) undisputed facts
FIFTH CIRCUIT

(a) public official plaintiff; media defendant
(b) jury verdict -- $40,000 compensatory
(c) reversed
(d) "we [must] examine for ourselves the statements in issue ... to see ... whether they are protected by the First Amendment"
(e) Sullivan
(f) actual malice
(g) -- convincing clarity
- evidence does not even approach stringent requirements

(a) private figure plaintiff (matter of public concern); media defendant
(b) judgment for plaintiff -- $15,000 compensatory; $15,000 punitive (bench trial)
(c) reversed
(d) - reviewing court "cannot avoid making an independent constitutional judgment" on the facts of the case
- constitutional facts compel de novo review
(e) Rosenbloom
(f) actual malice
(g) - clear and convincing proof
- dissent would apply "independent" but not "de novo" review

10. Vandenburg v. Newsweek, 507 F.2d 1024, 1 Med. L. Rptr. 1758 (5th Cir. 1975)
(a) public figure plaintiff; media defendant
(b) jury verdict -- $130,000; entry of judgment n.o.v. for defendant
(c) affirmed judgment n.o.v.
(d) "independent examination of the record" as mandated for First Amendment cases
(e) Sullivan; Pape; Buckley
(f) actual malice
(g) clear and convincing proof

   (a) public figure plaintiff; media defendant
   (b) jury verdict -- actual and punitive; trial court grant of defendant's motion for judgment n.o.v.
   (c) affirmed judgment n.o.v.
   (d) "independent examination of the evidence..."
   (e) Pape; Beckley; Vandenberg
   (f) actual malice
   (g) clear and convincing
       - no consideration of credibility


   (a) public figure plaintiff; media defendant
   (b) jury verdict -- $400,000; remitted to $150,000 (two plaintiffs)
   (c) reversed and judgment entered for defendant
   (d) "This court must make an independent examination of the whole record to determine whether plaintiffs made [a showing of actual malice with clear and convincing evidence]"
   (e) Vandenberg; Sullivan; Pape; Beckley
   (f) public figure
       - actual malice
   (g) --

**SIXTH CIRCUIT**


   (a) public figure plaintiff; media defendant
   (b) jury verdict -- $5000 compensatory; $15,000 punitive
   (c) judgment vacated and cases remanded for trial court to dismiss plaintiff's suit with prejudice
   (d) "no evidence at all in the record to support a reasonable inference" of actual malice
   (e) --
   (f) defamatory meaning
       - fair comment
       - fact or opinion
       - actual malice
   (g) --

(a) private figure plaintiff (matter of public concern); non-media defendant
(b) judgment -- $7500 (bench trial)
(c) reversed with directions to dismiss action; defendants recover costs on appeal
(d) "when defamation is claimed under federal labor laws a reviewing court should make an independent examination of the entire record to determine whether the speech or publication...is actionable"
(e) Letter Carriers v. Austin
(f) actual malice
(g) --

SEVENTH CIRCUIT


(a) private figure (matter of public concern); media defendant
(b) jury verdict -- $50,000 compensatory; judgment n.o.v.
(c) affirmed judgment n.o.v.
(d) "appellate court has an independent obligation to make its own analysis of the record [on the issue of actual malice]"
(e) Sullivan; Rosenbloom; Beckley
(f) - proper standard of liability - actual malice
(g) - lacks "convincing clarity"

EIGHTH CIRCUIT


(a) public figure plaintiff; media defendant
(b) jury verdict for defendant
(c) affirmed
(d) "the court [has] the duty to review the evidence to see whether it could constitutionally support a finding of actual malice"
(e) Sullivan
(f) actual malice
(g) - convincing clarity
LDRC BULLETIN NO. 7


(a) public figure plaintiff; media defendant
(b) jury verdict -- $25,000
(c) reversed and remanded with directions that dismissal be entered
(d) "In First Amendment cases...this Court must make an independent judgment as to whether the facts will support a verdict for the plaintiff without abridging the rights of freedom of speech and press...."
(e) Rosenbloom
(f) actual malice
(g) --


(a) private figure plaintiff (corporation); media defendant
(b) jury verdict -- $245,000 general damages
(c) reversed and remanded for new trial
(d) "careful analysis of the record"
(e) --
(f) actual malice
(g) "no basis in fact to support a verdict on the actual malice theory"

NINTH CIRCUIT

19. Guam Federation of Teachers v. Ysrael, 492 F.2d 438 (9th Cir.)
cert. denied, 419 U.S. 872 (1974) (Justice Douglas would grant certiorari)

(a) public figure plaintiffs; non-media defendant
(b) grant of defendant's motion for a directed verdict
(c) reversed and remanded
(d) "[Sullivan] requires a reexamination as to whether the evidence, viewed most favorably to the plaintiff, is sufficient to meet the New York Times standard if the jury accepts it"
(e) Sullivan; Rosenblatt; Time v. Hill
(f) actual malice
(g) - no consideration of credibility
   - permissible inferences; light most favorable
   - no independent review on motion for directed verdict
LDRC BULLETIN NO. 7

20. **Alioto Cowles Communications, Inc.**, 519 F.2d 777 (9th Cir.), cert. denied, 449 U.S. 1102 (1975)

(a) public figure plaintiff; media defendant
(b) jury special verdict; judgment n.o.v. for defendant
(c) reversed judgment n.o.v.
(d) "Because of the importance of the interests in freedom of speech and press which are at stake, a court must review the facts to determine whether the jury applied the proper standard"
(e) Sullivan; Rosenbloom; Guam
(f) actual malice
(g) - no consideration of credibility - permissible inferences - convincing clarity

21. **Maheu v. Hughes Tool**, 569 F.2d 459, 3 Med. L. Rptr. 1847 (9th Cir. 1977)

(a) public figure plaintiff; non-media defendant
(b) jury verdict -- $2.8 million compensatory
(c) reversed in part (as to damages) and remanded for new trial
(d) "the traditional standard of review of a jury's fact finding"
(e) Guam
(f) - truth - damages
(g) --


(a) public figure plaintiff; media defendant
(b) judgment for plaintiff -- $338,234 compensatory; $325,000 punitive against various defendants (misappropriation claim) (bench trial)
(c) reversed as to article's author and one publisher/defendant; affirmed as to second publisher/defendant; damages modified
(d) "Because of the First Amendment implications in this case [the Court] examined the trier's findings with the extra care required"
(e) --
(f) knowledge of falsity or reckless disregard -- misappropriation
(g) --
TENTH CIRCUIT

23. Dixon v. Newsweek, 562 F.2d 626 (10th Cir. 1977)
(a) private figure plaintiff; media defendant
(b) jury verdict -- $75,000 compensatory; reduced by trial judge to $45,000; both parties appeal
(c) award affirmed as reduced
(d) Court rejects de novo review and employs "the same [standard of review] in libel cases...as in other cases"
(e) Guam
(f) -- fair comment
   - excessive damages
(g) --

D.C. CIRCUIT

(a) public figure plaintiff; media defendant
(b) judgment for nominal and $1500 punitive damages (bench trial)
(c) affirmed
(d) Court was "mindful of the Supreme Court's admonitions...to review the evidence in the record to determine whether it could constitutionally support a judgment"
(e) Pape
(f) -- actual malice
   - punitive damages
(g) --
II. STATE CASES

CALIFORNIA

   (a) public figure plaintiff; media defendant
   (b) jury verdict -- $150,000 compensatory; $1,000 punitive
   (c) affirmed
   (d) "Reviewing the evidence as we are required to do...
   (e) Sullivan
   (f) actual malice
   (g) convincing clarity

   (a) public figure plaintiff; non-media defendant
   (b) jury verdict -- $750,000 compensatory; $7,000,000 punitive; but trial judge grants judgment n.o.v. for defendant
   (c) reverses grant of judgment n.o.v.; affirms order for new trial primarily because of excessive damage award
   (d) "close...examin[ation of] the record to determine whether it could constitutionally support a judgment in favor of the plaintiffs..."
   (e) Sullivan
   (f) actual malice
   (g) "...not de novo review of the trial court proceedings wherein the jury's verdict is entitled to no weight"

   (a) public figure plaintiff; media defendants
   (b) jury verdict -- $38,000 compensatory; $25,000 punitive vs. publisher; remitted to $25,000 against author
   (c) affirmed liability and modified damage award to $50,000 compensatory (joint) and $25,000 punitive (publisher)
   (d) "reviewing court is required to review the evidence in a libel action by a public figure to be sure that the principles were constitutionally applied"
   (e) Montandon (which cited Sullivan); Widener
   (f) actual malice
(g) does not involve a de novo review of the proceedings below wherein a jury's verdict is entitled to no weight


(a) private figure plaintiff (matter of public concern); media and non-media defendants
(b) grant of judgment n.o.v. for defendant
(c) affirmed
(d) after "considering the evidence of plaintiff in the most favorable light," the court conducts a "review of the entire record" and concludes there is an absence of proof of malice in any sense (common law or constitutional)
(e) none
(f) actual malice
    - common law malice
(g) --


(a) public figure plaintiff; media defendant
(b) jury verdict -- $25,000 general; $50,000 punitive
(c) reversed
(d) "examination of the evidence in support of the jury's verdict"
(e) Bindrim; Montandon (which cites Sullivan)
(f) actual malice
(g) --

COLORADO


(a) private person (matter of public concern); media defendant
(b) jury verdict -- $29,200 compensatory; $9,900 punitive
(c) finding of liability affirmed as to publisher and editor, but reversed as to reporter
(d) "questions of constitutional fact compel an appellate courts de novo review"
(e) Sullivan  
(f) actual malice  
(g) convincing clarity  

(a) public official plaintiffs; media defendants  
(b) jury verdict -- $53,000 compensatory; $16,500 punitive (3 plaintiffs; 2 defendants)  
(c) intermediate appellate court reverses; Supreme Court reverses and reinstates judgment against defendants  
(d) "First Amendment questions of 'constitutional fact' compel our de novo appellate review"  
(e) Rosenbloom; Walker v. Colorado Springs  
(f) actual malice  
(g) - questions of credibility and permissible inferences are decided in verdict winner's favor; - clear and convincing  

FLORIDA  

(a) public official plaintiff; media defendants  
(b) jury verdict -- $1,000,000 compensatory and punitive  
(c) reversed and remanded with directions to enter judgment in favor of defendant  
(d) "[a]n examination of the briefs and those portions of the record to which our attention has been directed"  
(e) -  
(f) actual malice  
(g) - convincing clarity  
- dissent agrees with plaintiff's complaint that intermediate court "reweigh[ed] the evidence, retr[ied] the case, and generally substitute[d] its judgment for that of the trial court"

(a) public official plaintiff; media defendant
(b) jury verdict -- $114,000 compensatory (against newspaper publisher and employees); $100,000 punitive (against newspaper publisher)
(c) affirmed
(d) "review[ed] the entire record, as we must on appeal in a libel case involving a public official"
(e) Sullivan; Alioto
(f) actual malice
(g) - clear and convincing
   - credible evidence adduced at trial is viewed in light most favorable to the verdict

**ILLINOIS**


(a) public official plaintiff; media defendant
(b) judgment for plaintiff -- $27,500 compensatory; $20,000 punitive (bench trial)
(c) affirmed
(d) reviewing court must make "an independent examination of the record to determine whether it could constitutionally support a judgment"
(e) Sullivan
(f) actual malice
(g) --

**KENTUCKY**


(a) private figure plaintiff; media defendant
(b) jury verdict -- $32,500 compensatory; $100,000 punitive
(c) affirmed compensatory award; reversed punitive award
(d) as to actual malice, court "look[ed] at the whole record"
(e) --
(f) - actual malice (punitive award)
   - negligence
   - substantial truth
(g) - no "substantial evidence" of actual malice
   - even unfavorable testimony did not suggest that reporter in fact was aware of falsity

(a) public figure plaintiff; media defendant
(b) jury verdict -- $100,000
(c) reversed
(d) independent examination of the record; independent constitutional judgment on the facts of the case; "de novo review" of "constitutional fact"
(e) Sullivan; Rosenbloom
(f) actual malice
(g) jury verdict is entitled to weight
   all permissible inferences in plaintiff's favor and all questions of credibility, citing Alioto, Guam, Cape v. Adams
   convincing clarity

LOUISIANA


(a) public official plaintiff; media defendant
(b) jury verdict -- $400,000 actual; intermediate court affirms but remits to $100,000
(c) reversed; plaintiff's suit dismissed
(d) none articulated by Supreme Court of Louisiana; however, intermediate appellate court had adopted "independent examination of the record," 345 So.2d 922
(e) Sullivan
(f) actual malice
(g) clear and convincing

MAINE

14. Michaud v. Inhabitants of the Town of Livermore, 381 A.2d 1110 (Me. 1978)

(a) public figure plaintiff; non-media defendants
(b) jury verdict in favor of plaintiff but without award of damages; both parties appeal
(c) reversed; directed entry of judgment n.o.v. for defendants; plaintiff's appeal denied
(d) expressly declines to consider whether independent or de novo review is required since reversal is mandated even under normal state rule
(e) refers to Sullivan; Rosenbloom but does not actually decide their applicability
(f) actual malice
(g) - no disputed facts
- sufficiency of evidence and all justifiable inferences in light most favorable to verdict winner

MARYLAND

   (a) public figure plaintiff; media defendant
   (b) jury verdict -- $7,500 compensatory
   (c) reversed and costs awarded to defendant
   (d) court must "make an independent constitutional judgment on the facts"
   (e) Sullivan
   (f) - public figure
      - actual malice
   (g) - clear and convincing

   (a) private figure plaintiff; non-media defendant
   (b) directed verdict for plaintiff; on damage issue jury awards $1.00 general damages and $5,000 punitive damages
   (c) reversed and judgment entered for defendant with costs
   (d) court must review the evidence and make an independent examination of the whole record
   (e) Sullivan; Greenbelt
   (f) defamatory meaning
   (g) --

   (a) public figure plaintiff; media defendants
   (b) jury verdict -- $250,000 compensatory (remitted to $175,000); $106,000 punitive
   (c) reversed
   (d) "review the evidence to make certain that constitutional principles have been constitutionally applied"
   (e) Sullivan
   (f) - opinion
      - actual malice
(g) all credible inferences of fact viewed in light most favorable to non-moving party, but court made "our constitutional appraisal of it"


(a) public figure plaintiff; media defendants
(b) jury verdict -- $25,000 compensatory; $40,000 punitive
(c) affirmed in part, reversed in part and remanded on issue of punitive damages
(d) "independent examination of facts submitted at trial" when reviewing ruling on motion for directed verdict or judgment n.o.v. in a defamation action
(e) Sullivan
(f) defamatory meaning
- punitive damages
- actual malice
(g) court assumes truth of all credible evidence tending to sustain plaintiff's contentions and all credible inferences reasonably deducible from the evidence in light most favorable to plaintiff

MASSACHUSETTS


(a) private figure plaintiff (matter of public interest); media defendants
(b) jury verdict -- $10,000 general damages
(c) reversed and judgment for defendant
(d) "independent analysis of the record"
(e) Sullivan; Rosenbloom
(f) actual malice
(g) convincing clarity


(a) public figure plaintiff; media defendants
(b) jury verdict -- $100,000
(c) reversed
(d) "role as reviewing court is necessarily broad... requir[ing] a careful review of the facts"
(e) Sullivan
(f) opinion or fact
(g) --

**MICHIGAN**


(a) public official plaintiffs; non-media and media defendants
(b) jury verdict -- $300,000 compensatory and exemplary; $700,000 punitive; trial court remitted punitive
(c) verdict against defendants reversed; striking of punitive award upheld
(d) "an independent examination of the whole record to determine if the evidence is sufficient to support the jury's finding...a de novo review"
(e) Sullivan; Pape
(f) actual malice
(g) convincing clarity

**MINNESOTA**

22. Rose v. Koch, 278 Minn. 235, 154 N.W.2d 409 (1967)

(a) public figure plaintiff; media defendant
(b) jury verdict -- $10,000 compensatory and punitive
(c) reversed and remanded for new trial
(d) court "examined the whole of the original transcript and the exhibits in compliance with [its] constitutional responsibility"
(e) Sullivan
(f) actual malice
- constitutionality of jury instructions
(g) --
MISSISSIPPI

   (a) public official plaintiff; media defendant
   (b) jury verdict -- $200,000 actual; $100,000 punitive
   (c) reversed
   (d) "In determining the sufficiency of evidence to pass constitutional muster, the appellate court must make an independent review of the evidence"
   (e) Sullivan
   (f) ~ defamatory meaning
       ~ actual malice
   (g) ~ conflicting testimony as to circumstances leading to publication

NEVADA

   (a) public figure/official plaintiff; media defendant
   (b) jury verdict -- $675,000 general damages
   (c) affirmed as to liability; damages remitted to $50,000 or new trial ordered on damages issue
   (d) because a constitutional right is implicated, the jury determination is subject to close appellate scrutiny
   (e) ~
   (f) ~ opinion
       ~ falsity
       ~ actual malice
       ~ damages
   (g) ~ no review of credibility
       ~ heightened scrutiny primarily given to issue of damages, because of its "impact on free speech"

NEW JERSEY

   (a) public figure plaintiff; media defendant
   (b) Appellate Division affirmed:
       (1) jury verdict in favor of one plaintiff, and
       (2) trial court reversal of its original decision to dismiss second plaintiff's libel claim -- it granted second plaintiff a new trial after jury found in favor of plaintiff #1
(c) judgment for plaintiff #1 reversed; order for new trial for plaintiff #2 vacated; judgment for defendant

(d) court "carefully examined the record below [in light of the 'clear and convincing' standard for proving actual malice] to determine whether the evidence at trial was sufficient to present a jury question

(e) --

(f) - public figure
   - actual malice

(g) - considered only undisputed testimony
   - clear and convincing

NEW MEXICO


(a) public official plaintiff; non-media defendants
(b) judgment -- $15,000 (bench trial)
(c) remanded with instructions on burden of proof
(d) "independent examination of the whole record"
(e) Sullivan
(f) burden of proof on issue of actual malice
(g) clear and convincing evidence

OHIO


(a) public official plaintiff; media defendant
(b) jury verdict -- $149,000
(c) intermediate appellate court reversed on ground that pretrial motion for summary judgment should have been granted; this reversal is upheld
(d) "independent examination of the whole record"
(e) Sullivan
(f) - actual malice
   - summary judgment
(g) - convincing clarity
   - no review of credibility
   - all inferences for plaintiff

(a) public figure plaintiff; media defendant
(b) jury verdict -- $3.3 million compensatory; $37 million punitive; remitted by trial judge to $2.3 million compensatory; $2.85 million punitive
(c) affirmed as to liability; reversed as to damages
(d) "thorough...examin[ation] of the record on appeal"
(e) --
(f) actual malice
- satire
(g) appeal on actual malice issue challenged jury instruction to which defendant had not fully preserved its objection

OKLAHOMA


(Justice Rehnquist dissenting)

(a) public figure plaintiff; media defendant
(b) jury verdict -- $1 million compensatory and punitive
(c) reversed and remanded with directions to enter judgment for defendant
(d) "we must review the evidence to make certain constitutional principles have been correctly applied"
(e) Sullivan
(f) - defamatory meaning
- statement of opinion or fact
- actual malice
(g) --

OREGON


(a) private figure plaintiff (matter of public concern under Rosenbloom, pre-Gertz); media defendants
(b) jury verdict for plaintiff
(c) reversed
(d) "First Amendment questions of 'constitutional fact' compel [a] de novo review"
(e) Sullivan; Rosenbloom
(f) actual malice
(g) clear and convincing
PENNSYLVANIA

   (a) public figure plaintiff; media defendant
   (b) jury verdict -- $250,000 compensatory; $500,000 punitive;
       defendant appeals denial of motion for judgment n.o.v.;
       plaintiff appeals from grant of new trial on issue of
       excessive damages
   (c) affirmed denial of judgment n.o.v. but also affirmed
       order for new trial on libel count
   (d) "our task is to make an independent examination of the
       evidence adduced to determine if it is constitutionally
       sufficient to warrant" jury's verdict
   (e) Sullivan
   (f) actual malice
   (g) evidence to be considered in light most favorable to
       winner in trial court

    448 A.2d 6, 8 Med. L. Rptr. 1974 (1982)
   (a) public official plaintiff; media defendant
   (b) jury award of compensatory and punitive damages
   (c) reversed; judgment n.o.v. entered
   (d) does not make independent examination of the whole record
       when reviewing appeal from denial of judgment n.o.v.
   (e) --
   (f) actual malice
   (g) court views evidence in light most favorable to verdict
       winner

RHODE ISLAND

   (a) public figure plaintiff; non-media defendant
   (b) jury verdict for defendant
   (c) affirmed
   (d) the United States Supreme Court "would seem to require
       this Court to make an independent examination of the
       whole record in order to determine the correctness of the
       trial justice's decision"
   (e) Sullivan
   (f) - public figure
      - actual malice
   (g) - all inferences in favor of verdict winner
TEXAS


(a) public figure plaintiff; media defendant
(b) jury verdict -- $135,000 compensatory; $250,000 punitive
(c) reversed
(d) "our review of the evidence is of the entire record"
(e) Sullivan
(f) actual malice
(g) question decided as a matter of law
   evidence undisputed as to sources relied upon


(a) public figure plaintiff; media defendant
(b) jury verdict and award of actual and punitive damages
(c) reversed
(d) none articulated
(e) --
(f) actual malice
(g) court said it "searched the record with care"

WEST VIRGINIA


(a) public figure/official plaintiff; media defendant
(b) jury verdict -- $250,000 actual; $500,000 punitive
(c) affirmed liability and compensatory award but strikes
   punitives as a matter of law
(d) "independent evaluation of the evidence to insure First
   Amendment protection..."
(e) Monitor Patriot
(f) actual malice
(g) --
LDRC PRESS RELEASE (July 15, 1983)

NEW LDRC STUDY FINDS WIDESPREAD USE OF SPECIAL APPELLATE REVIEW TECHNIQUE IN LIBEL CASES

New York, New York -- A new Study published today finds that federal and state courts almost universally support special, more intensive appellate review of court and jury damage awards in libel cases involving First Amendment rights. The Study of these special appellate procedures, referred to as "independent review," was undertaken by the Libel Defense Resource Center (LDRC) in connection with a case now pending before the United States Supreme Court (Rose v. Consumers Union) challenging the special appeal procedures. Traditionally, appellate courts have only limited power to review trial court findings of fact in civil cases and are required to uphold judgments unless they are not supported by any evidence or are clearly erroneous. The independent review technique in libel actions, on the other hand, permits courts to examine for themselves the entire record on appeal and requires reversal of any judgment that fails to adhere to strict constitutional requirements and would thereby violate the defendant's First Amendment rights.

LDRC studied sixty cases that have considered independent review and found that, overall, 95% adopted the special rule. Courts that have applied the rule included 9 out of 11 federal circuit courts of appeal and courts in 22 states. Four out of five of the awards against libel defendants, primarily media organizations, were reversed or modified on appeal when the independent review procedures were applied. This reversal or modification rate is even higher than the generally high rate of reversals in all recent libel cases. Previous studies of appeals since 1976, including two by LDRC, found that between 70 and 78% of all judgments against libel defendants were reversed or modified on appeal. Despite this high reversal rate, LDRC found, independent review has been applied with restraint and has not lead appellate courts to overturn proper factual findings by juries and judges in the trial courts.
In a statement accompanying release of the 47-page Study, Henry R. Kaufman, LDRC General Counsel, commented on the LDRC independent appellate review study:

"The LDRC study documents the fact that independent review has become an indispensible feature of constitutional protection for media defendants in libel actions. Federal and state courts have almost universally followed the independent review rule first established in *New York Times v. Sullivan*. It is difficult to believe that the Supreme Court would abandon a rule that has had such a deep and broad influence on the development of libel law in this country for almost two decades.

"It is believed that this new Study gives powerful ammunition to those arguing for continuation of independent review in constitutional libel actions. First, it documents how indispensible independent review has become in assuring that legally unsupportable libel awards will not be allowed to jeopardize the First Amendment rights of libel defendants. But it also demonstrates that appellate courts have not gone too far in applying the independent review procedure. In short, independent review is doing what it was designed to do, in a wholly proper manner, and should be retained without limitation by the Supreme Court."

The Libel Defense Resource Center is an information clearinghouse organized by leading groups to monitor and study developments in libel and privacy litigation. Supporting organizations include media and professional trade associations representing newspaper, magazine and book publishers, broadcasters, journalists, authors, news directors and newspaper editors; also, libel insurance carriers and leading publishers and broadcasters.

LDRC BULLETIN NO. 7
The Supreme Court is now solidly back in the libel business with three cases currently pending, two since our last report. All three are presently being briefed, but they will not be heard until next Term. We have previously reported on the grant of certiorari in *Keeton v. Hustler* (See LDRC Bulletin No. 6 at 14) presenting a potentially significant jurisdictional issue in the context of admitted forum shopping to circumvent unfavorable statutes of limitation. A second jurisdictional case has now been accepted, *Calder v. Jones*, presenting the key question of state court jurisdiction over out-of-state editors and reporters. The journalists' jurisdictional motion was denied by the California Court of Appeal, thus marking the first time since prior to *Gertz* that the Supreme Court has granted certiorari in a libel case decided unfavorably to the media defendant. However, since *Calder* becomes a companion case to *Keeton*, it would be unwise to read too much into this grant of certiorari.

In perhaps the most significant grant of certiorari in a libel action over the past several years, the Supreme Court also agreed to consider *Bose v. Consumers Union*, a case presenting the critically important question of the appropriate standard for appellate review of trial court judgments in a libel action. In *Bose*, the First Circuit had reversed a six-figure libel and product disparagement judgment against Consumers Union. It did so on the ground that plaintiff had failed to prove by clear and convincing evidence that CU's review of a Bose loudspeaker had been published with constitutional actual malice. On plaintiff's petition for rehearing the First Circuit reiterated the established rule that independent review is required in a constitutional libel action, but reaffirmed that it had not, in reversing the judgment, substituted its views for that of the trier of fact as to such matters as witness credibility and demeanor. Plaintiff's petition for certiorari, now granted by the Supreme Court, presented six questions for review, all essentially and fundamentally challenging the standard of appellate review applied by the First Circuit. Bose is
urging the Supreme Court to apply Rule 52(a)'s "clearly erroneous" standard instead of the heightened, "independent review" rule that was established in *New York Times v. Sullivan* almost two decades ago.

In considering the implications of this grant of *cert.* in *Booe* it is doubtless relevant to recall Justice Rehnquist's dissent to the denial of *certiorari* earlier this Term in *Lawrence v. Bauer Publishing & Printing Ltd.*, 8 Med. L. Repr. 1536 (N.J.), *cert. denied*, 51 U.S.L.W. 3360-61 (11/8/82), in which he complained, *inter alia*, of the New Jersey Supreme Court's invasion of the "constitutional office of the jury" in "reweigh[ing] for itself the credibility of interested witnesses who might have been disbelieved by the jury." (See also *Miskoovsky v. Oklahoma Publishing Co.*, *cert. denied*, 51 U.S.L.W. 3284 (10/12/82) (Rehnquist and White dissenting); LDRC Bulletin No. 5 at 6-7). Finally, considering the impact of any possible abandonment or dilution of the long-standing tradition of independent appellate review in First Amendment and other constitutional rights cases, it is also pertinent to consider LDRC's data regarding relative defense success rates at trial and on appeal. (See LDRC Bulletin No. 4 (Part 1) at 2-17, especially at 7, Table 3-B; see also LDRC Bulletin No. 6 at 2-12, especially at 4.) Clearly, one of the indispensable mainstays -- particularly in light of the media's distressingly poor performance at trial -- of successful libel defense, is the availability of searching and sympathetic appellate review. Without such review, constitutional protections would be of little practical value. And there is a real danger that a gutting of independent review would only be the first step in a wide-ranging effort to strip away various substantive and procedural protections that have made *New York Times v. Sullivan* a meaningful limitation on libel actions violative of First Amendment rights. (For a more extensive study of independent appellate review in libel actions see this Bulletin, *supra*, at 1 - 47).

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The Supreme Court's actions from March 15, 1983 through July 12, 1983, as reflected in 51 United States Law Week, Issue No. 35 (3/22/83) through 52 United States Law Week, Issue No. 2 (7/12/83) are as follows:

I. Certiorari granted -- Favorable Decision Below (1)

*Bose Corporation v. Consumers Union of the United States, Inc.*, 692 F.2d 189, 8 Med. L. Rptr. 2391 (1st Cir. 1982), *cert. granted*, 51 U.S.L.W. 3774 (4/25/83, No. 82-1246) (First Circuit had reversed a $115,000 defamation/product disparagement judgment and dismissed claim on grounds that, even assuming the publication was neither substantially true nor a statement of opinion, plaintiff had failed to meet its burden of proof of actual malice with convincing clarity--see LDRC Bulletin No. 3 at 30-31 and No. 4 (Part 1) at 8; see also this Bulletin, *supra*, at 14-16).

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

*Caldex v. Jones*, 138 Cal. App. 128, 187 Cal. Rptr. 825 (Ct. App. 2d Dist., Div. 1 1982), *prob. juris. noted*, 51 U.S.L.W. 3756 (4/18/83, No. 82-1401) (California Court of Appeal had reversed an order of the Superior Court which quashed service on personal jurisdiction grounds in this California libel action against an editor and reporter of the National Enquirer who were both residents of Florida. The Court of Appeal held that the individual defendants' lack of substantial contacts with Florida was irrelevant because the complaint sufficiently alleged acts outside the State intended to cause tortious injury within the State; it also rejected adoption of a special First Amendment jurisdictional rule in libel cases).

* It is believed this report, (when read in combination with previous reports in Bulletin No. 5 at 6-9 and No. 6 at 14-19) reflects all Supreme Court actions for the October 1982 Term. However, final totals for the Term will not be reported until LDRC Bulletin No. 8, to be published later this summer, when the final U.S. Law Week Supreme Court indexes can be canvassed to assure that no pertinent actions have been overlooked.
III. **Media Defendants -- Unfavorable Decisions Left Standing (5)**

**American Broadcasting Companies, Inc. v. Clark**, 684 F.2d 1208, 8 Med. L. Rptr. 2049 (6th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3685 (3/21/83, No. 82-1288) (Sixth Circuit had reversed grant of defendant's motion for summary judgment, holding that the broadcast in question was "reasonably capable of a defamatory meaning," that it was not within the scope of Michigan's common law public interest privilege, and that plaintiff was not a public figure).

**Associated Press v. Bufalino**, 692 F.2d 266, 8 Med. L. Rptr. 2384 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3872 (6/6/83, No. 82-1527) (Justices Brennan and White would have granted *certiorari*) (Second Circuit had reversed the grant of defendant's motion for summary judgment holding that: (i) as to the "fair report privilege," defendant is not entitled to summary judgment on the basis of official records upon which defendant did not actually rely in preparing the allegedly defamatory statement, but which defendant instead only discovered in preparation for the subsequent libel action; and (ii) as to the requirement that plaintiff prove actual malice, the news report's failure to identify plaintiff, either directly or impliedly, as a public officeholder and the absence of a showing that plaintiff's name is otherwise immediately recognized in the community as that of a public official, render the case unsuitable for application of the public official doctrine).

**Forum International, Ltd. v. Cher**, 692 F.2d 634, 8 Med. L. Rptr. 2484 (9th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3883 (6/13/83, No. 82-1719) (See LDRC Bulletin No. 3 at 29, and No. 6 at 7) (Ninth Circuit had affirmed a misappropriation/publicity judgment of $69,117 general damages, $100,000 special damages and $100,000 punitive damages against defendant/magazine publisher, Forum International, holding that the evidence supported a finding that Forum knowingly published advertisements, in its issue which included an interview with plaintiff, that falsely implied plaintiff endorsed the magazine, and therefore judgment against magazine for misappropriation of entertainer's name and likeness and violation of her right of publicity was warranted).*

* Note that *cert.* petitions were filed by both plaintiff and losing defendant in the Cher case. Both were denied.
National Enquirer, Inc. v. Superior Court of California, Los Angeles County, ___ Cal. Rptr. __, ___ Med. L. Rptr. ___ (1983), cert. denied, 51 U.S.L.W. 3902, 6/20/83, No. 82-1770. (California Court of Appeal for the Second District had denied defendant's petition for mandate seeking review of trial court protective order which (i) was imposed on newspaper (as a libel defendant) as condition of obtaining certain court ordered discovery in libel suit; and (ii) prevented newspaper from publishing any information or "fruits" of any information designated as confidential by libel plaintiff).

Northern Publishing Co., Inc. v. Green, ___ P.2d __, L. Rptr. 2515 (Alaska 1982), cert. denied, 51 U.S.L.W. 3919 (6/27/83, No. 82-1797) (Alaska Supreme Court had reversed grant of defendant/newspaper's motion for summary judgment holding that: (i) evidence presented by libel plaintiff/public official/physician, that reporter and editor were aware of coroner's report and inquest indicating death due to natural causes and not criminal negligence, raises material question of fact concerning newspaper's actual malice in publishing editorial concerning physician's responsibility for prison inmate's death, thus precluding summary judgment; and (ii) newspaper's editorial was capable of defamatory meaning in that it could reasonably be interpreted as implying the fact that a state official believed plaintiff/physician to be partially at fault in death of inmate).

IV. Media Defendants -- Favorable Decisions Left Standing (2)

Cher v. News Group Publications, Inc., 692 F.2d. 634, 8 Med. L. Rptr. 2484 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3883 (6/13/83, No. 82-1740) (See LDRC Bulletin No. 3 at 29 and No. 6 at 7) (Ninth Circuit had reversed a six-figure judgment against defendant/publisher News Group Publications for allegedly misappropriating public figure/entertainer's name and likeness and violating her right of publicity, holding that the use of the words "Exclusive Series" in connection with publication of a newsworthy interview of a public person cannot support the requisite finding of publication with knowing or reckless falsity under Time, Inc. v. Hill).

*Note that cert. petitions were filed by both plaintiff and losing defendant in the Cher case. Both were denied.
Pring v. Penthouse International, Ltd., 695 F.2d 438, 8 Med. L. Rptr. 2409 (10th Cir. 1982), cert. denied, 51 U.S.L.W. 3902 (6/20/83, No. 82-1621) (See LDRC Bulletin No. 1 at 19-20 and No. 5 at 11) (Tenth Circuit had reversed a judgment of $14 million with directions to set aside the jury verdict and dismiss plaintiff's action, holding that a fictional magazine article describing certain physically impossible sexual acts performed during a nationally televised Miss America pageant by a "Miss Wyoming" could not reasonably be understood to be describing actual facts about the libel plaintiff, or actual events in which the plaintiff participated, and therefore is not defamatory).

V. Non-media Defendants -- Favorable Decisions Left Standing (3)

Butler v. Peabody Institute of the City of Baltimore, ___ Md. App. ___, ___ A.2d ___ (Ct. Spec. App. 1982), cert. denied, 51 U.S.L.W. 3789 (5/2/83, No. 82-1546) (Maryland Court of Special Appeals had affirmed trial court's decision to sustain defendant's demurrer to the complaint without leave to amend; a statement contained in transcript of grades sent to libel plaintiff/musician's employer at her request indicating she was "dropped on account of illness" does not impute mental illness as plaintiff alleged).

Queen v. Tennessee Valley Authority, 689 F.2d 80 (6th Cir. 1982), cert. denied, 51 U.S.L.W. 3756 (4/18/83, No. 82-1148) (Sixth Circuit had affirmed grants of summary judgment for non-media defendants [the TVA and certain TVA employees] on the ground that the employees enjoyed an absolute immunity from suit under Barr v. Matteo, 360 U.S. 564 (1959), and that the TVA was immune from suit for statements made when it acts solely as a governmental entity).

Williams v. Fasna, 656 P.2d 219, 9 Med. L. Rptr. 1004 (Mont. 1982), cert. denied, 51 U.S.L.W. 3841 (5/23/83, No. 82-1640) (Montana Supreme Court had affirmed the lower court's grant of defendant's motion for summary judgment, holding that: (i) libel plaintiff who had, through his activities, attained general fame or notoriety within a community, and had exhibited pervasive involvement in the affairs of society, is a public figure as a matter of law; (ii) libel defendant who mistakenly made incorrect statement that
plaintiff had been under "federal indictment" (when in fact plaintiff had only been charged, not indicted) but who made such statement in good faith, has not been shown to have acted with actual malice; and (iii) the First Amendment privilege established by New York Times v. Sullivan, and expanded in Gertz v. Welch, includes matters involving all public figures, and applies to all defendants in cases involving comment upon public officials and public figures, whether media or non-media).

VI. Unfavorable Decision Left Standing (1)*

Vince v. DeJohn, (La. Ct. App., 1st Cir. 198_), unpublished decision, cert. denied, 51 U.S.L.W. 3789 (5/2/83, No. 82-1537) (Louisiana Court of Appeal for the First Circuit had dismissed defendant's interlocutory appeal from the trial court's overruling of defendant's no-cause-of-action exception, holding that defendant had failed to show that irreparable injury would result if interlocutory appeal were not heard).

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

Demos v. Commercial Union, ___ F.2d ___ (7th Cir. 198_), cert. filed, 51 U.S.L.W. 3921 (6/28/83, No. 82-2703) -- non-media -- (Defendant raises affirmative defense of defamation to action seeking recovery of insurance proceeds).

Fisher v. Larson, 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (ct. App. 4th Dist. 1982), cert. filed, 52 U.S.L.W. 3001 (6/22/83, No. 82-2130) -- favorable -- media and non-media -- (California Court of Appeal had partially affirmed an order of the Superior Court granting summary judgment in favor of media and non-media defendants in defamation action brought by an unsuccessful school board incumbent against her successor and a local newspaper reporter; the trial court, properly exercised its sound discretion in denying plaintiff a continuance to pursue discovery and plaintiff had not shown how she was pre-

* At the time the Bulletin went to press, it was not possible for LDRC to determine whether Vince v. DeJohn involved a media or non-media defendant.
judiced by such denial; plaintiff's motion to amend her complaint after summary judgment was entered for defendants was properly denied).

**Levine v. Silsdorf,** __ A.D.2d ____, 447 N.Y.S.2d 936, 9 Med. L. Rptr. 1815, (1st Dept. 1982), cert. filed, 52 U.S.L.W. 3005 (7/5/83, No. 82-2165) -- favorable -- non-media -- (New York Appellate Division had reversed trial court's order denying defendants' motion to dismiss, holding that an open letter, published and circulated during heat of a reelection campaign, which criticized plaintiff/incumbent was non-actionable opinion).

**National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus,** __ P.2d __ (4th Cir. 198_), cert. filed 52 U.S.L.W. 3005 (7/1/83, No. 82-2153) -- non-media -- (charitable foundation's status as public figure at issue, based upon its efforts to seek financial support from the public).

**Larson v. Fisher,** 138 Cal. App. 3d 627, 188 Cal. Rptr. 216 (Ct. App. 4th Dist. 1982), cert. filed, 51 U.S.L.W. 3921 (6/28/83, No. 82-2082) -- unfavorable -- media and non-media -- (California Court of Appeal had partially reversed an order of the Superior Court granting summary judgment in favor of media and non-media defendants in defamation action brought by unsuccessful school board incumbent against her successor and a local newspaper reporter; the appellate court held there remained triable issues of fact).


**Seattle Times v. Rhinehart,** 98 Wash. 2d 226, 654 P.2d 673, 8 Med. L. Rptr. 2537 (1982), cert. filed, 51 U.S.L.W. 3791 (4/22/83, No. 82-1721) -- unfavorable -- media -- (Washington Supreme Court had affirmed trial court's protective order prohibiting libel defendant/newspaper from publishing any information obtained through discovery, holding that such order was issued pursuant to court rule authorizing such restrictions upon showing of "good cause," and was not an unconstitutional prior restraint).
LDRC Bulletin No. 7

LDRC Damages Watch:

More Staggering Damage Awards Entered, Although Defendants Win Three Jury Trials and Success on Appeal Continues at High Level

New developments in 23 cases involving damage awards against media defendants in libel (or privacy) actions have occurred, or have been brought to LDRC's attention, since publication of LDRC Bulletin No. 6 (March 15, 1983). At the trial level, of the 11 jury trials, 8 were lost by defendants, with huge damage awards entered, but three were won, thus improving somewhat upon the loss rate previously documented by LDRC (73% v. 89%). The jury victories included the highly publicized Galloway case against CBS. There were two bench trials with one loss and one win. On the damages front, the dollar awards have literally flown off the top of the chart. LDRC's 1982 damages study of 54 cases included nine judgments of over a million dollars during a period of 2 or 3 years. That level of high awards was itself a quantum increase over the single million-dollar award in 23 cases documented over the previous 4-year period by Professor Franklin. Now, in this latest sampling of 8 awards entered in a period of only a few months, 7 additional million-plus mega-judgments were entered, with the remaining award at three-quarters of a million and the average amount of all 7 awards approaching $8 million! As for results post-trial and on appeal, defendants continue to fare exceptionally well. Among the post-trial actions reported, all but one resulted in some reversal or modification of the trial award. The notorious Burnett judgment was affirmed but reduced to a total of $200,000 (from the $1.6 million jury verdict that had itself been reduced $800,000 post-trial). The only awards left standing were the one which was fully affirmed involving $250,000 in compensatory damages (Marion v. Hall, Alabama) and two awards modified downward on appeal, one reduced to $50,000, down from $675,000 (Nevada v. Allen) and the other reduced to $269,117, down from $663,234 (Cher v. Forum).
I. TRIAL AWARDS

A. Defendant Wins

1. Ayers v. Des Moines Register, 9 Med.L.Rptr. 1401 (Iowa Dist. Ct., 3/15/83)

   Award (Judge): - 0 -

   Holding: Judgment for defendant on the ground that the publication was a substantially true and fair report of public records; in any event plaintiff was found to be is a limited-purpose public figure who had failed to adduce any evidence of actual malice.


   Award (Jury): - 0 -

   Holding: verdict for defendants (6/6/83) (private figure action; actual malice standard)

   Status: Plaintiff's motion for new trial pending


   Award: -0-

   Holding: jury verdict for defendant (3/29/83) (private figure; gross irresponsibility standard)

   Status: no appeal


   Award: -0-

   Holding: verdict for defendant (11/25/82) (public official action)
B. Plaintiff Wins


Award (Jury): $1.7 actual; $4.2 million punitive (outrage and conspiracy claims)

Status: post-trial motion pending


Award (Jury): $500,000 compensatory; $1.5 million punitive (vs. publisher); $500,000 (vs. photographer) (invasion of privacy claim)

Status: post-trial motions expected


Award (Judge): $2.0 million compensatory; $5.0 million punitive

Status: post-trial hearings regarding judicial disqualification


Award (Jury): $750,000 compensatory

Status: post-trial motions pending


Award (Jury): $40 million ($7 million compensatory; $33 punitive) (6/17/83) (invasion of privacy)

Status: post-trial motions granted to extent of reducing the award to $10,000 ($7 million compensatory; $3 million punitive)

Award (Jury): $1.5 million ($513,000 compensatory, $250,000 punitive vs. publisher; $496,000 compensatory, 250,000 punitive v. source)

Holding: damages against publisher remitted by trial judge to $200,000 compensatory; $100,000 punitive

Status: appeal pending


Award (Jury): $1.05 million damages (5/27/83) (private figure negligence standard)

Status: motion for new trial denied; appeal pending


Award (Jury): $1.5 million compensatory; $3.0 million punitive

Status: post-trial motions

II. POST-TRIAL AND APPEAL

A. Defendant Wins (i.e., award reversed or modified)


Award (Jury): $300,000 compensatory; $1.3 million punitive; remitted by trial judge to $50,000 compensatory; $750,000 punitive

Status: Court of Appeal affirms as to liability and $50,000 compensatory award; punitive award remitted to $150,000 or new trial on punitive damages

Holding: denial of plaintiff's cert. petition leaves standing Ninth Circuit's reversal of award as against one media defendant, thus leaving only $269,117 of initial award in effect against second media defendant

3. Gulf Publishing Co. v. Lee, 9 Med.L.Rptr. ____ (Miss. 1983) (See LDRC Bulletin No. 4 (Part 1) at 13; Bulletin No. 7, supra, at 43) Award (Jury): $200,000 actual; $100,000 punitive (2 plaintiffs)

Holding: reversed and dismissed


Holding: directed verdict for defendant in public official's libel action based on constitutionally-protected statements of opinion

Status: affirmed

5. Health Unlimited, Inc. v. Loyola University, 9 Med.L.Rptr. 1511 (La.Ct. App. 5th Cir. 1983) (see LDRC Bulletin No. 4 (Part 1) at 12) Award (Judge): $150,000 compensatory; $15,000 attorneys fees

Holding: reversed and dismissed

Award (Jury): $675,000 general

Holding: Nevada Supreme Court affirms as to liability; but damages remitted to $50,000


Award (Jury): $26.5 million; reduced to $14.035 million by trial judge

Holding: cert. denied by Supreme Court thereby leaving in effect 10th Circuit's reversal of the verdict and judgment


Award (Jury): $210- compensatory
§ 2.5 million punitive

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

Status: In early July, 1983 the Texas Supreme Court granted Doubleday's application for writ of error on all eight points of error alleged; appeal will now be heard on the merits*

* While the grant of review in Rogers does not necessarily suggest the judgment will be reversed, a review of the record in Rogers leads one to the strong conviction that reversal on one or more grounds is highly likely.

Award (Jury): $2,050,000

Holding: grants judgment n.o.v. for defendant

Status: appeal pending

10. **Van Dyke v. KUTV, ___ Utah __, ___ P.2d ___, 9 Med.L.Rptr. 1546 (Utah 1983)**

Award (Jury): -0-

Holding: judgment for defendant upon jury special verdict that publication was false, but that actual malice was not established in public official's libel action

Status: affirmed

B. Plaintiff Wins (i.e., award affirmed or reinstated)

1. **Cher v. Forum International, Ltd., 692 F.2d 634, 8 Med.L.Rptr. 2484 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3883 (6/13/83)**

Award (Judge): $663,234 (invasion of privacy)

Holding: denial of defendant publisher's cert. petition leaves standing Ninth Circuit's affirmation of award totalling $269,117 against one media defendant

2. **Marion v. Hall, ___ Ala. __, ___ So.2d ___, (Ala. 2/11/83), pet. for rehe. denied**

Award (Jury): $250,000 compensatory

Holding: affirmed; constitutional privilege defense not considered because not asserted in trial court
Litigious Groups --

THREE CONSERVATIVE, "PUBLIC INTEREST" GROUPS
TURN TO LIBEL LITIGATION

In previous LDRC Bulletins we have reported on the activities of "litigious" groups. Such groups were defined, for these purposes, as organizations or individuals inclined to commence libel litigation in response to unfavorable media coverage. Past articles have focussed on such groups as the Church of Scientology (see Bulletin No. 2, at 28-30), a group of ex-CIA officials (See Bulletin No. 2, at 30-31) and Synanon (See Bulletin No. 3, at 27-28). As part of this ongoing series of reports, LDRC has recently gathered and reviewed information on three additional organizations which have, to varying degrees, committed resources and time to challenging through libel litigation what they view as media abuses, primarily if not exclusively among broadcasters, particularly the networks including most prominently CBS. Unlike organizations such as the Church of Scientology and Synanon, however, these groups are not responding to media coverage of their own activities; rather their purpose seems to be to use the libel laws as one means to further and publicize their institutional view that "liberal" media organizations are "biased," "unfair" or worse. Such institutionalized right-wing criticism of powerful "liberal" media entities is hardly news. What is new, however, and a development of some concern, is that these conservative media gadflies are now urging resort to, and in some cases actually sponsoring, libel litigation in addition to or in lieu of their more traditional "fairness" complaints and public relations activities. All three of these not-for-profit organizations are located in Washington, D. C. Two describe themselves as public interest groups, committed to exposing, and correcting, media abuses. These organizations, Accuracy in Media and American Legal Foundation, are self-avowedly conservative groups, dedicated to bringing public attention to the 'other side' of issues the "liberal" press reports on with alleged bias. The third group, Capital Legal Foundation, claims to be neither conservative nor liberal in ideology, but merely dedicated to promoting a "fair, free market economy." As noted, all three have recently become active in the libel field.

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American Legal Foundation (ALF) describes itself as: "a nonprofit, public interest law center created in 1980 to ensure that the nation's electronic and print media present balanced news stories. Composed of approximately 20,000 members and supporters, ALF has been active since its creation in attempting to offset the disproportionate influence wielded by the media. ALF is the only pro-free enterprise, public interest legal center in the nation devoted exclusively to media fairness issues in the Courts and administrative agencies." Until recently, ALF appears to have focused its media litigation efforts primarily within the regulatory, licensing and review proceedings of the Federal Communications Commission. However, ALF has recently turned its attention toward libel litigation as one major aspect of its media "fairness" agenda. Thus, in the past several months ALF has provided in-kind legal support in behalf of Dr. Carl Galloway's (unsuccessful) California action against CBS for an allegedly libellous broadcast of a "60-Minutes" report on medical insurance fraud. ALF provided a full-time attorney who assisted Galloway's personal counsel throughout the trial. ALF may also have provided financial assistance in the Galloway case. ALF is also reported to have offered financial assistance to two plaintiffs (Frank Possert and John Farley, New Jersey police officers) prosecuting another libel claim against CBS' "60-Minutes" in New Jersey. In addition to support for actual litigation, ALF has moved in other ways to advance its anti-media efforts and libel litigation strategy. Thus, in addition to its aid for libel litigants in court, ALF has also prosecuted administrative complaints seeking FCC sanctions against CBS in connection with the Galloway broadcast, and also in connection with CBS' broadcast about General William Westmoreland's role in Vietnam (see below). Finally, in its publications ALF also grinds its libel axe urging its readers "to be alert to the possibility of instituting libel litigation. Anyone involved in a dispute that receives broadcast (or print) coverage should be alert to the law of libel.... If you are involved in a libel dispute consult an attorney immediately." See Licensed to Serve: A Citizen's Guide to the Regulation of the Broadcasting Media at 11 (ALF 1981). Thus, ALF regularly urges its readers to consider libel litigation as one in the arsenal tools to challenge the media.
(iii) Capital Legal Foundation

Capital Legal Foundation (CLF) describes itself as "a public interest law firm concerned with a fair, free market approach to federal regulation." Its President and moving force is an attorney named Dan Burt; its Board includes representatives of the Fluor Corporation and the American Enterprise Institute. CLF was organized in 1977 as a not-for-profit organization "to provide representation ... consistent with [its] objectives, [for persons] unable to afford legal counsel." In the past, CLF has spearheaded litigation, primarily in behalf of small business, challenging various federal regulatory activities including Department of Labor restrictions on home businesses; Department of Agriculture market regulation and subsidy programs; Census Bureau competition with private businesses; CAB regulation of air fares; FCC radio de-regulation; and other cases involving such agencies as the Commodity Credit Corporation, the Department of Energy, the Community Services Administration and the International Trade Commission. These activities, of course, are of no direct concern to potential media libel defendants. However, in August 1982, CLF issued a policy statement indicating a new direction for its litigation activities entitled "Beyond Deregulation -- Libel Law and the Media." Focussing on the then-recent $2 million judgment in the Tavoilereas case and the breaking dispute between General William Westmoreland and CBS, CLF proclaimed that libel litigation was a "splendid...solution" to the "abuse [of] individual rights" by "large commercial [media] units." CLF argued: "The answer here is not regulation, but litigation. General Westmoreland and others like him, should take the opportunity the courts offer to vindicate themselves, so that the only fair, effective, and flexible check on media unfairness and concentration -- the courts and the jury system -- can operate. There is, we believe, an almost absolute right for the media to publish whatever they wish. But this right carries with it a corresponding obligation to be reasonably fair and accurate about what they say." Shortly after this policy statement was issued CLF directly took on the representation of General Westmoreland and commenced the action against CBS. In vigorously prosecuting the Westmoreland claims -- now considered by CLF to be one of its "highest priority activities" -- it is apparent that CLF has the fundraising capacity to finance a litigation in which expenses (for one or two CLF staff attorneys and at least one outside litigator) are almost certainly running
in the tens of thousands or more every month. While it is not clear that CLF intends to take on other major libel actions in the future, and indeed CLF continues to insist that it is not conducting an anti-media crusade, the fact is that CLF currently views libel litigation as an appropriate outlet for its efforts, and that it has the ability to secure very substantial funding for such anti-media libel litigation through the kind of wealthy individuals and foundations that are associated with "conservative" causes. This is certainly a disturbing new development of real concern to the media.

Accuracy in Media

Accuracy in Media (AIM) is a Washington-based, conservative watchdog group headed by its Chairman, Reed Irvine, well-known as a vocal assailant of the major broadcast networks and their coverage of almost all newsworthy events. In the past, AIM has worked primarily through the FCC seeking to advance AIM's, suffice it to say, idiosyncratic views of "accuracy" and "fairness" in broadcast news reporting. It has in general attempted to portray an image of recklessness if not worse in the major media. Now, during the past twelve months, AIM has focussed particular attention on CBS and its participation as defendant in libel litigation brought by General Westmoreland and by Dr. Carl Galloway. In October of 1982 AIM appealed for contributions to a legal aid fund for the benefit of General Westmoreland. According to AIM, $41,000 was raised for that purpose. But plans to contribute this money to General Westmoreland's legal counsel, Capital Legal Foundation, were frustrated when CLF said it was unwilling to accept AIM monies specifically earmarked for Westmoreland's case. According to Reed Irvine, CLF's President, Dan Burt, "decided that the case might in some way be jeopardized if Accuracy in Media was in any way connected with it. He said that he did not want to run the risk of being accused of carrying out an anti-media crusade." Since AIM was unwilling to contribute generally to Capital Legal Foundation, the monies were not used to help General Westmoreland in his libel action against CBS. Rather, Reed Irvine requested contributors to that fund to authorize a transfer of the monies to a general "Legal Aid Fund," to be used to help "poor" libel plaintiffs, who find themselves up against media organizations characterized by Irvine as "very tough and very rich" adversaries. "They must not be allowed to defeat justice by simply wearing down
their poor opponents." It is known that AIM contributed $5000 to Galloway and that it has offered to contribute some amount to the Possert and Farley case against CBS in New Jersey. AIM also pursued the unusual tack of advancing resolutions at CBS' annual shareholders' meeting, demanding the settlement of the pending Westmoreland libel action. Through the AIM Report, AIM supporters were encouraged to attend the CBS annual meeting and to vote in favor of these resolutions. Although clearly in the minority, with little hope of being adopted, the resolutions allowed AIM representatives an opportunity to "dominate the question period" and to get their views before the CBS shareholders. AIM's Chairman has written that AIM "has no desire to encourage libel suits, which we view as an expensive and cumbersome way of solving the problem [i.e., 'seeking redress for damage done to reputations by giant corporations such as CBS']." Nonetheless, perhaps because of the de-regulation spirit in Washington or its past failure to secure satisfaction from the FCC, AIM is yet another conservative group now turning at least some part of its anti-media attention in the direction of libel litigation.
### LDRC BULLETIN No. 7

**LDRC BRIEF BANK — BY NAME OF CASE**

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