No. 20, Summer 1987
(July 31, 1987)
(ISSN 0737-8130)

INSIDE THIS ISSUE

TORT REFORM AND LIBEL (1987) .................. 1
* Executive Summary .................. 1
* Contents .................. 3
* Background (Libel is a Tort) .................. 5
* The Case for Tort Reform:
  Libel and Other Torts Compared .................. 5
* The Agenda for Tort Reform .................. 14
* Conclusion and Notes .................. 23

LDRC TORT REFORM PROJECT UPDATE (PART II)
(As of July 31, 1987) .................. 35
* State-by-State Status Report .................. 36

LDRC TORT REFORM PROJECT PUBLICATIONS LIST
(and Order Form) .................. 50

SUPREME COURT REPORT -- PART I:
LDRC Update: End of 1986-87 Term Report .................. 53

SUPREME COURT REPORT -- PART II:
The Libel Records of President Reagan's
Nominees to Replace Justice Lewis F. Powell .................. 59

*******************************************************************************

NOTE TO BULLETIN SUBSCRIBERS: Your current subscription to
the LDRC Bulletin ends with Bulletin No. 21 which you will be
receiving within the next month. To renew your subscription,
please complete and return the enclosed blue Bulletin
Subscription Form, with your check in the appropriate amount
payable to LDRC, today. Bulletin No. 22 and succeeding
Bulletins cannot be sent to you until your check is received.

*******************************************************************************

Copyright 1987 Libel Defense Resource Center
Executive Summary

* Libel is a tort that is and should be encompassed within the current tort reform effort, an effort that extends broadly to tort claims of all kinds affecting business and government, individuals and groups, for-profit and not-for-profit entities, large and small.

* Libel claims hurt not only large national media companies, but also small and local publishers and broadcasters, as well as private individuals and non-media groups of all kinds.

* Libel insurance premiums have increased, on average, 200-300% over the past two years, while deductibles have gone up sharply, and available coverage is down. Despite these changes, libel insurance is becoming increasingly difficult to obtain.

* Over the past four or five years libel damage awards in media cases have averaged in excess of $2 million dollars. These damage awards are, on average, higher than awards in such volatile areas as medical malpractice and product liability.

* Like other torts, the number of million-dollar-plus libel awards has increased exponentially. Where there had been only three, million-dollar libel awards in the recorded history of libel litigation prior to 1980, there have been more than thirty, million-plus libel awards since 1980.

* Over the past four or five years the average punitive award in libel actions against the media has been even higher

* This paper was originally presented in January 1987 to the American Tort Reform Association. The generous support and assistance of Time Incorporated (Harry M. Johnston, III, Esq., Vice President and General Counsel, Magazine Group and Arthur B. Sackler, Esq., Director, Publishing Policy Development) in the preparation of this paper is gratefully acknowledged.
than the average libel damage award -- in excess of $2.5 million. Punitive damages accounted for some 80% of the total media libel damages awarded during that period.

* Punitive damages are awarded in 60% of losing media libel cases, which contrasts with such awards in fewer than 10% of all other losing tort cases.

* Noneconomic damage awards in libel cases, while not as high as punitive damages, are still averaging into the six figures in media cases.

* Skyrocketing defense costs alone amount to 80% or more of the dollars spent by insurers of the media in libel cases.

* The average cost of defending a media libel action has doubled over the last four years to about $150,000, and many libel actions cost far more to defend. This is despite the fact that well over 90% of all such cases are disposed of prior to trial. In contrast, defending the average civil tort action in federal court costs about $1,740 per tort case filed and $8,000 to $15,000 for an average federal tort jury trial.

* Fifteen states have already enacted reform legislation potentially related to libel in the key areas of (1) limits on punitive damages; (2) limits on noneconomic damages; and (3) remedies for frivolous actions. Much of this legislation is broad enough to cover libel claims.

* The legislative tort reforms that are advocated by the American Tort Reform Association, in these key areas, adopt positions and justifications that would clearly cover libel.

* "Model" legislative proposals drafted by the American Legislative Exchange Council (ALEC), a nonpartisan group representing over 2000 state legislators, are also more than broad enough to cover libel. Indeed, the ALEC proposals would consistently resolve ambiguities, that have cropped up in tort reform legislation already enacted, in favor of libel coverage.
Contents -- Tort Reform and Libel (1987)

Executive Summary ............................................. 1
Background ......................................................... 4
Libel is a Tort ................................................... 5
The Case for Tort Reform: Libel and Other Torts Compared ........ 5

(i) The Insurance Crisis ........................................ 5
   -- General Problem ......................................... 5
   -- Libel Insurance ........................................ 6

(ii) High Damage Awards ........................................ 9
    -- General Problem ......................................... 9
    -- Excessive Libel Awards ................................ 10

(iii) High Transaction Costs .................................. 12
     -- General Problem ......................................... 12
     -- Libel Litigation and Defense Costs .................... 12

The Agenda for Tort Reform ..................................... 14

(i) General Reform ............................................. 14
(ii) Application of Proposed Reforms to Libel ................. 14

Reforms Already Enacted: Application to Libel .................... 16

(i) Already Enacted Restrictions on Punitive Damages .......... 16
(ii) Already Enacted Limits on "Noneconomic" Damages .......... 17
(iii) Already Enacted Penalties for Frivolous Actions .......... 18

The ATRA and ALEC Reform Proposals: Application to Libel .... 18

(i) Punitive Damages .......................................... 19
    -- The ATRA Position ....................................... 19
    -- Proposed ALEC Model "Punitive Damages Limitation Act" .. 20

(ii) Noneconomic Damages ...................................... 21
    -- The ATRA Position ....................................... 21
    -- Proposed ALEC Model "Noneconomic Damages Awards Act" ... 21
Background

Skyrocketing insurance costs, unrestrained damage awards, and unacceptably high litigation expenses -- these phenomena have converged to precipitate a liability crisis that has spawned a sweeping national movement to reform significant aspects of tort law and tort litigation practices. The convincing case for general tort reform has been well and amply articulated elsewhere and need not be rehearsed at length here. What does need exposition is the fact that libel is as severely afflicted as any other tort, and is in every bit as much need of reform.

In point of fact, the case for reform in the area of libel, based on available empirical data, is strikingly similar to that for general tort reform. As regards insurance, damages and defense costs, libel litigants are clearly subject to the very same phenomena that have been persuasively cited in support of wide-ranging tort reforms already passed or currently under consideration.

Previous liability insurance crises were responded to by reforms that focused narrowly on discrete issues such as medical malpractice claims. This time around proposed reforms have generally extended to a far broader range of actions. With the exception of some proposals that would still limit reforms to medical malpractice, for example, or to actions against municipalities or the officers and directors of nonprofit entities, most tort reform legislation currently under consideration is broad enough to encompass all tort claims, including those for libel.

While broad tort reform thus appears to be the intent of all but the narrowest proposals, the precise extent of coverage as regards libel is not always as clear as it should be. But the fact is that the very same justifications that support reforms in other areas of tort litigation apply as well to
actions for libel. Indeed, the claim of libel litigants for reform and relief may in key respects be even stronger than in many other areas. Certainly there is no justification for excluding libel claims from the reach of tort reforms.

**Libel is a Tort**

Because of the constitutional revolution in the law of libel since 1964, and the many First Amendment issues that have been debated as a part of libel law developments since that time, it is sometimes easy to forget that libel is at bottom a tort like all others -- indeed, one with a long and venerable common law history. Although they may have been intended to do so, these constitutional developments have not, as a practical matter, diminished litigation excesses in libel actions. Today these excesses amply support the application of tort reform to libel.

It is also often forgotten, perhaps because libel cases attracting recent attention have involved celebrities and nationally-known media, that most libel actions do not involve the media at all, and those that do most often involve unpublicized claims by unknown plaintiffs against small, local media defendants. While the most publicized libel cases have involved claims against major media entities, libel claims have often also resulted in onerous litigation costs and huge damage awards against smaller media concerns, as well as against private groups and individuals.

As a tort like all others, therefore, libel is subject to many of the same legal trends -- and, unfortunately, to many of the same excesses -- that are being experienced in those other areas of tort litigation that have received the greatest attention in connection with current efforts toward tort reform.

**The Case for Tort Reform: Libel and Other Torts Compared**

**(i) The Insurance Crisis**

-- **General Problem.** Increases in premiums of between fifty and several hundred percent have been widely cited as having adversely affected a broad range of municipalities, professions and businesses. For example, earlier this year the U.S. Attorney General's Working Group found "dramatic change[s] in the last two years in the availability, affordability and
The adequacy of liability insurance.⁶ The Attorney General's Working Group singled out newspaper and magazine publishers for mention as having been impacted in this fashion. The same report cited numerous other examples of marked dilution in the insurance coverage that such higher premiums purchase, and of sporadic but troubling instances of the outright unavailability of liability insurance. Based upon this evidence, and its finding that "developments in tort law are a major cause for the sharp premium increases," the Attorney General's Working Group recommended a series of "fundamental reforms" of tort law.⁷ These proposed reforms included strong measures to deal with the problem of excessive damage awards and high litigation costs.

-- Libel Insurance. The situation as regards libel insurance is no better. A recent study by the Libel Defense Resource Center (LDRC) of the costs and current problems associated with libel insurance found evidence of substantially increasing costs, of substantially diminishing coverage and of other adverse changes in the way libel insurance is being written.⁸

Over the past two years libel insurance premiums are up, on average, between 150% and 300%, and in many cases premium increases have been far greater. At the same time, deductibles have gone up sharply while available coverage is down. In contrast, until the recent insurance crisis, relatively low cost libel insurance represented an asset of great value in helping to provide a financial safety net for freedom of expression against the potential "chilling effect" of libel claims.⁹ Unfortunately, libel insurance has now been hit by precisely the same adverse trends as have been experienced in all other lines of liability insurance. And, because the market for libel insurance is so small, and so specialized, it is particularly fragile. The current crunch has thus not only dramatically increased costs and reduced coverage, but it has threatened the very survival of this line of insurance, to the severe detriment of those reliant upon it.

The current crisis in libel insurance is a new phenomenon. The last major insurance downturn in the mid-1970's is reported to have had no significant impact on the libel insurance market. That was an era when the number of libel claims was still relatively small; when the era of multi-million-dollar damage awards had not yet arrived; and, perhaps most importantly, when American libel law was still perceived as quite favorable to the libel defendant. In short, in the 1970's libel litigation was not yet viewed as a serious risk by those writing and reinsuring libel coverage.
Now there appears to be a real danger of careening to the other extreme. A significant erosion in the availability of libel insurance, or in its affordability which can amount to the very same thing, is currently threatened. And the unfortunate fact is that the hardest hit by these new insurance trends are likely to be smaller organizations, the offbeat and the anti-establishment media, as well as outspoken individuals and non-media, non-profit organizations. Yet these are precisely the targets whose existence, without adequate insurance coverage, would be the most tenuous and whose ability to survive would be the most fragile.

Perhaps the most economical libel insurance currently on the market is provided through certain group programs under the auspices of media trade associations. Such programs offer group insurance coverage to small and weekly newspapers, to small television and radio broadcasters and to public broadcasters and their independent producers. In the premium years 1985 and 1986 these inexpensive association policies experienced increases in excess of 100%. New treaties for 1987 are currently being negotiated for these policies, with predictions as to the results of this new round of negotiations ranging from an increase of at least 50% or more, to the dread possibility of a total cancellation of such group programs.

If the situation is tenuous for those lucky enough to qualify for group coverage, it is far worse for those who are not members of such groups and who must deal individually in the current libel insurance market. It is fair to say that on average most individual media companies not eligible for group programs have experienced a 200% to 300% increase in their insurance premiums during this same period. In many specific instances, the premium increases have been far more substantial.10

Despite higher premiums, libel insurance coverage has actually contracted while premium rates have been rising. This has resulted from a number of factors, including a reduction in the number of companies writing libel insurance and in what apparently is a radical contraction of the reinsurance market for libel. In fact, the number of major, active libel insurance carriers can now be counted on fewer than the fingers of one hand.11 Certain other companies that were once also active in the libel and media field are reported to have substantially reduced their willingness to write libel insurance.12
One fundamental element of the present libel insurance crisis is the inability of underwriters to reinsure the risks they cover. The higher cost of reinsurance necessarily forces libel premiums upward. Absent reinsurance capacity, available primary coverage will also necessarily be restricted. One specialist in media coverage, representing a leading insurance brokerage firm in New York, recently even suggested the dire possibility that in 1987 reinsurance for libel policies might become almost entirely unavailable, sending libel insurance companies' maximum capacities drastically downward and potentially forcing several to stop doing business altogether. Whether or not such a total catastrophe ultimately occurs, it is certainly clear that the libel insurance market is at the present time experiencing its greatest crisis and it is difficult to envision precisely how or when these fundamental problems will be resolved.

As a result of these troubling market trends, other aspects of libel insurance have also been severely impacted. Deductibles for libel coverage have sharply increased at the same time that limits have been sharply decreased. Where once $10 or $20 million in excess could readily be obtained for relatively low marginal cost, now it is said to be difficult to obtain more than $1 million in coverage and it is a real struggle to obtain levels of $5 or $10 million, if available at all. The additional premiums for such excess can be staggering. In this era of potential multi-million dollar litigation costs, and threatened multi-million dollar damage awards, the availability of such excess is no longer a luxury but a pressing necessity in the libel field in order to assure for full protection. Where once libel coverage deductibles might have fallen in the $10,000 - $20,000 range for larger media entities, today those same companies may be required to accept deductibles of $75,000 - $100,000 or more per claim.

With defense costs continuing to rise, libel insurance deductibles of this size have serious implications. If the average defense cost is now running as high as $150,000, this means virtual self-insurance in most libel cases for the majority of companies being required to accept $100,000 deductibles. While a number of the specialized carriers will still insure 100% of defense costs, at least one major carrier has already introduced a 20% co-insurance feature and other carriers are aggressively seeking ways to reduce defense costs -- an effort that, while it may be economically justified, in the long run could have a greater impact on how libel cases are defended than any substantive constitutional ruling by the United States Supreme Court.
The impact of the rising costs of libel insurance could perhaps be discounted if this issue were simply a matter of increased but still affordable costs for insurance coverage. However, the issue may be rapidly becoming one of outright unavailability of coverage, either because carriers are refusing to write libel policies for certain kinds of entities and risks, or because cost increases have become so dramatic that they are simply not affordable, particularly to smaller or economically-marginal operations, but also to some of the largest entities as well. Right now the data is incomplete, with scattered but troubling reports of unavailability. It is unclear whether this suggests continued general availability, or a failure of reporting more widespread instances of unavailability. The final chapter of the libel insurance crisis is thus yet to be written.

(ii) High Damage Awards

--- General Problem. The Attorney General's Working Group has cited the "explosive growth in tort damages awards over the last decade" as "[a]nother area of great concern." The Working Group found no "apparent justification" for such increases "vastly in excess of the rate of inflation," noting startling increases in the relative size of awards, in the absolute size of awards -- particularly verdicts in excess of a million dollars -- and in awards involving noneconomic and punitive damages.

According to data cited in the Working Group Report, in the past decade average medical malpractice jury verdicts increased more than 350%, from over $220,000 in 1975 to just over $1 million for a portion of 1985. Average product liability jury awards increased 370% during the same period, from just under $400,000 to $1.85 million. These two categories apparently represent the highest non-libel tort awards and are probably the areas of the most explosive increases. Wrongful death awards, in contrast, doubled between two periods, from $166,000 to $336,000 in constant dollars.

The size and frequency of million-dollar awards and punitive damage awards in tort actions also increased during these periods, according to the Working Group Report. At the extreme, million-dollar awards in medical malpractice and product liability actions increased 1200% over the decade between 1975 and 1984. And in one major metropolitan county the average punitive damage award in all personal injury cases increased from $40,000 in 1970-74 to more than $1.15 million in 1980-84.
-- Excessive Libel Awards. Available data suggest that, at least as to claims against media defendants, the general phenomena cited by the Attorney General's Working Group of drastically increased awards, of more million-dollar awards, as well as of the sheer size of noneconomic and punitive damages, have all been matched if not exceeded in the libel field.

According to the LDRC, the average (mean) initial damage award in media libel actions tried between 1980 and 1984 was in excess of $2 million, or higher even than the highest medical malpractice or product liability figures cited in the Attorney General's Working Group Report. Three of these awards were in excess of $10 million dollars. The average libel award during a period of several months in 1985, when no eight-figure awards were recorded, was just under $1.8 million dollars.

In terms of the sheer numbers of huge awards, LDRC has reported some thirty libel damage awards at or in excess of $1 million since 1980, a 1000% increase in a period of five years over all million-dollar libel awards in the previous two decades. This percentage increase is substantially greater than the 1200% increase cited above during an entire decade in probably the worst tort categories of medical malpractice and product liability.

In terms of the relative numbers of huge awards, the frequency rate of million-dollar libel damage awards has also dramatically increased, according to LDRC data. In 1954-1964, the decade before constitutional elements were incorporated into the law of libel, of thirty-eight libel damage awards initially entered only one was in excess of $1 million. In more than a decade after 1964, there were only two additional million-dollar awards out of 73 awards entered. In contrast, in the five-year period, 1980-84, almost 25% of eighty-one awards in media libel actions exceeded a million dollars. In the last several months of 1985, more than half of the media libel awards recorded by LDRC exceeded the million-dollar mark.

In terms of punitive awards, an incredible rate of almost three out of five of the damage awards recorded by LDRC during the period 1980-84 included an award of punitive damages. More than one-third of those punitive awards was in excess of $1 million. Indeed, the average punitive award in those cases was substantially in excess of $2.5 million. During the last two years of the period, the average punitive damage award was almost $3 million. During the same period punitive damages accounted for some 80% of the total amount of damages awarded.

-10-
To put these data into further perspective, a historical review of libel damage awards by LDRC found that, in contrast to current trends, the average media award during the decade prior to 1964, excluding the distorting effects of the single million-dollar award during that entire decade, was under $50,000. Indeed, the total amount of the awards in the thirty-seven cases during that period reporting damage figures (again excluding the single million-dollar verdict) was $1,839,468. This total for thirty-seven cases is less than a single average libel case during the 1980's. While adjusting for inflation accounts for some portion of this massive disparity, LDRC reports that even in constant dollars today's media libel damage awards remain between 400% and 500% higher than the period 1954-1964.

LDRC performed the same analysis for the period 1964-1977. LDRC found that the average (mean) media libel award during that period was $180,000. Excluding the two awards (out of 73) in excess of $1 million, the average dropped to $134,000. Adjusting these figures for inflation still yields average awards somewhere between 200% and 400% lower than the current experience.

LDRC has also published a study comparing and contrasting these libel trends with damage trends in two key areas of civil tort litigation -- medical malpractice and product liability -- the key areas that the Attorney General's Working Group cited as having experienced the most notable pattern of wild damage inflation. These particular torts often involve extensive economic injury and severe long-term physical debilitation. Nonetheless, libel actions against the media, which rarely entail substantial economic loss and even less frequently have provable physical impact, were found by LDRC to yield higher average damage awards. On the other hand, the average damage award in medical malpractice actions for the period 1980-84 was slightly in excess of three-quarters of a million dollars. (When million-dollar malpractice awards were excluded this figure dropped to under a quarter of a million dollars.) The average damage award in product liability actions for that same period was just under a million dollars. (When million-dollar product liability awards were excluded this figure dropped to just over a quarter of a million dollars.)

As for the frequency of million-dollar awards in these comparison areas, it is reported that between 1980 and 1984 million-dollar awards were entered in 24% of product liability cases. The frequency of million-dollar awards in medical malpractice actions was lower still -- 21% during the same period. Thus, both product liability and medical
malpractice are under the 25% frequency of million-dollar awards in media libel actions during the same period.

In contrast to the startling frequency with which punitive damages are currently being awarded against the media in libel actions, a recent study indicates that during the period 1981-1984 punitive damages were awarded in a far lower percentage of all civil cases involving an award of money damages. In two-thirds of the thirty-two reporting locations winning plaintiffs were awarded punitive damages less than 10% of the time. In New York City, Chicago and Los Angeles, for example, punitive damages were awarded in 1.6%, 2.2%, and 8.6%, respectively, of the cases in which money damages were awarded. Imposition of punitive damages ranged from 0% in some locations to a maximum of 21.6% in the county studied that had the highest rate of punitive awards. In sum, every location studied reported far lower percentages than the nearly 60% average for imposition of punitive awards in recent media libel actions.  

(iii) High Transaction Costs

-- General Problem. According to the Attorney General's Working Group Report, "another serious problem of the tort system is its extraordinarily high transaction costs."  
The Report cited as an example one study, of one of the most notoriously expensive series of class action litigations, finding that 62 or 63 cents of every dollar went into legal fees and expenses (30 cents in plaintiff costs and 33 cents in defense costs) for every dollar paid out in these cases -- leaving only 37 cents for compensation to the plaintiff. The Working Group concluded that "such extraordinary transaction costs are particularly difficult to justify" and must ultimately be borne by injured plaintiffs being inadequately compensated and by consumers "who ultimately must pay for these costs through higher prices for goods and services."  

-- Libel Litigation and Defense Costs. The greatest problem in libel today is almost certainly the cost of litigation. It has been estimated that defense costs alone amount to 80% or more of the dollars spent by insurers of the media in libel cases. While in excess of 90% of media libel claims are ultimately won by the defendant, the problem is that the cost even of successfully defending such cases is onerous and getting worse. In contrast, the general data on the civil justice system indicates that attorneys fees and costs for both sides range from under 40 cents to slightly over 70 cents for every dollar awarded in a final judgment, depending on the
type of case. Certain types of cases, such as workers compensation claims, generally yield litigation costs on the lower end of this range while cases involving automobile accidents, medical malpractice and product liability, generate the higher costs that have been widely cited as documenting the gross inefficiency of the general tort system in delivering compensation to injured claimants. Yet if 40 to 70 cents for all parties is woeful inefficiency, then what is the 80-plus figure for defense costs experienced in the libel field? Obviously, what that libel figure represents is a system that has almost nothing to do with compensation and almost everything to do with funding litigation — litigation that in almost all cases compensates only the attorneys involved.

In terms of specific dollar costs of libel litigation, it is difficult to compute meaningful "averages" when the nature, extent and duration of such litigation can vary so widely, from one case to the next. The cost to defend two libel claims, both based on the identical legal standards and both theoretically involving the same potential for concrete damages — great, small or non-existent — can vary as widely as the minimal costs of reviewing a summons or complaint, thereupon abandoned, to the costs of retrying, in a months-long libel trial, aspects of a monumental historical event such as the Vietnam war and the practices and procedures of a major news network in covering that event — from almost nothing to millions of dollars.

Reports place defense costs alone in, for example, the Westmoreland v. CBS libel action at $6 million and in the Tavoulareas v. The Washington Post action at $1.5 million, presumably with more yet to come in Tavoulareas. Plaintiff costs in those cases must surely also be in the millions of dollars. But these are clearly extremes. In terms of averages, one representative from a leading libel insurance carrier has estimated that defense costs in the average litigated media libel case (at least in larger cities) have at least doubled in the last four years, from an estimated $75,000 to $150,000 or more — and these represent cases that are most often favorably disposed of on the merits prior to trial. Needless to say, the cost of fully litigating that case through all necessary appeals would presumably far exceed the $150,000 average that is heavily influenced by cases disposed of prior to trial.

The huge cost figures in media libel actions, like other areas of high cost trial litigation, stand in stark contrast to the cost of litigating the average civil tort action which can be
disposed of for a fraction of these costs. Thus, Rand Corporation Institute for Civil Justice study estimated that the average expenditure per tort case filed in the federal court system was only approximately $1,740. And the average cost for a federal jury trial in all cases ranged from $8,000 to $15,000.44 Obviously, these numbers are miniscule compared to litigation costs associated with even the average libel action.

The Agenda for Tort Reform

(i) General Reform

Groups working toward tort reform have put forward an ambitious series of proposals. Some of these, such as "capping" noneconomic damages or limiting or "scheduling" attorneys' contingent fees, attempt quite directly to control the excessive economic costs of the tort system. Others, such as a return to fault-based liability, seek indirectly to avoid unfairness or inequity in the current system. The American Tort Reform Association Legislative Resource Book, for example, identifies a dozen key issues for tort reform: (1) Joint and Several Liability; (2) Comparative Negligence; (3) Fault Based Standard; (4) Pain and Suffering Awards -- "Intangibles"; (5) Punitive Damages; (6) Statutes of Limitation and Repose; (7) Collateral Source Rule (8) Structured Awards; (9) Prejudgment Interest; (10) Modification of Ad Damnum Clause; (11) Frivolous Suits; (12) Contingency Fees.75

(ii) Application of Proposed Reforms to Libel

Not all of the issues under consideration in connection with the general tort reform movement have equal application to libel. For example, constitutional proscriptions applicable to libel claims assure the retention of fault-based liability, at least when the publications at issue involve "matters of public concern."46 Most jurisdictions long ago adopted libel statutes of limitations of relatively short duration.47 The nature of libel as a publication tort, combined with the unique structure of common law and constitutional "privileges" and defenses, have curtailed the significance of issues such as comparative negligence and joint and several liability in the libel field. The rarity of severe out-of-pocket loss, and the absence of insurance for any such loss, has also meant that collateral sources do not generally come into play in libel litigation.
On the other hand, certain issues on the tort reform agenda are highly relevant to libel. Punitive damages are obviously a preeminent concern for libel defendants. The remarkable number, frequency and size of punitive damage awards in recent libel actions have already been noted.

Generally, compensatory damages in libel actions have not been as large as these frequent massive punitive damage awards that have averaged into the millions of dollars. Nonetheless, huge compensatory damages, far in excess of out-of-pocket economic loss, are also an all too frequent occurrence in libel actions. As with other torts, the greatest concern for libel defendants is not predictable and normally limited compensation for proven economic loss, but rather the unpredictable and often box-car sized awards that juries enter in libel actions based upon noneconomic components, akin to "pain and suffering" awards in medical malpractice cases. Such noneconomic damages are assessed in libel actions based on a variety of theories, including injury to reputation, embarrassment, humiliation and emotional distress. All of these potential damage components are vague and inchoate in nature, difficult to quantify, subject to emotional appeals and therefore equally open to substantial abuse. This is particularly true in those libel cases where the jury is, for one reason or another, not permitted to award punitive damages. For example, in one libel action involving an unpopular defendant in a state which by longstanding precedent did not allow an award of punitive damages, a state court jury recently entered an award, in lieu of exemplary damages, of $2 million in so-called "compensatory" damages. The celebrity plaintiff had suffered no out-of-pocket loss and made no claim for consequential business or economic damages.

Frivolous suits are also a critical issue in libel litigation. The great majority of all libel actions, especially those against media defendants, are ultimately found to be without merit. Indeed, one recent study confirmed that most libel actions are brought against the media without any serious expectation of prevailing on the legal merits, but rather for ulterior motives such as publicity, (non-legal) vindication, or outright revenge. Under such circumstances any bolstering of remedies against frivolous actions is likely to have a particularly favorable impact on unwarranted libel claims, either in deterring their filing or at least in compensating libel defendants forced to incur expense in defending them.
Finally, other tort reform issues are of lesser but still potential interest to libel defendants. Contingency fees are a growing phenomenon in the libel field. To the extent that limits on such fees introduce an appropriate sense of realism into the initial decision whether to commence a libel action, or into the libel plaintiff's litigation and settlement strategy, contingency fee reforms could well be of some assistance in the libel field.

Modification of ad damnum clause practices could also substantially benefit libel defendants. Many libel claims generate substantial publicity and, given the realities of libel litigation, inflated ad damnum clauses can only result in creating false expectations in the minds of libel plaintiffs and the public. Structured awards, and the limitation or elimination of prejudgment interest, might also be of benefit in the small number of libel actions where a substantial award is initially imposed or is ultimately upheld on appeal.

Reforms Already Enacted: Application to Libel

In their legislative sessions just ended more than forty states are reported to have had some tort reform (or liability insurance reform) legislation under consideration. More than thirty states actually enacted some legislation and, of these, fifteen states passed bills potentially related to libel in the key areas of (1) limits on punitive damages; (2) limits on noneconomic damages; and (3) remedies for frivolous actions. Much of this legislation is in fact broad enough to cover libel claims.

(i) Already Enacted Restrictions on Punitive Damages

Thus far nine states have passed legislation to limit punitive damages or their availability and all nine laws appear broad enough to apply to libel. Three states have limited punitive damage awards to specific multiples of compensatory or actual damages. In another state, the previous judicial ban on punitive damage awards has been codified in new legislation. Another state has also prohibited punitive damage awards unless supported by clear and convincing evidence. Finally, five states have adopted provisions requiring a preliminary hearing before a claim for punitive damages can be pleaded.
(ii) Already Enacted Limits on "Noneconomic" Damages

A total of thirteen states have thus far enacted caps of one kind or another on noneconomic damages. The applicability to libel of such caps is somewhat more difficult to discern than the limitations on punitive damages. Nonetheless, a strong argument can be made that libel is covered by most, if not all, of these bills. In some of the states where caps on noneconomic damages have been passed, the caps apply broadly to any "civil action based in contract or tort" or to "any civil action" where noneconomic damages may be awarded. In these states, on the other hand, the definition of "noneconomic damages" is relatively narrow and thus of uncertain application to libel. For example, in two of the states, the definition of noneconomic damages includes, inter alia, "emotional distress" and "embarrassment," although it does not include either injury to reputation or any broad catch-all that obviously covers the other elements of noneconomic damages in libel actions. In another state, on the other hand, the cap is said to apply to all "tort actions," and although the definition of "noneconomic damages" is fairly broad, the cap applies only to "pain and suffering that is the proximate result of physical injury."

In other states, the definition of "noneconomic damages" is broader. For example, in five states "catch-all" phrases, such as "other non-pecuniary injury," would appear to support a persuasive argument for the inclusion of libel-type damages. Indeed, in Washington, "injury to reputation and humiliation" is specifically included in the list of noneconomic damage elements to be limited. In all of these states, the caps do not apply as broadly to any or all civil actions, but are extended to actions involving "personal injury," a term that is not defined in any of the bills. The application of these limits to libel would therefore presumably depend on the construction that will be given to the concept of "personal injury."

Using New York as an example (based upon the fact that New York's recently enacted penalty for frivolous suits applies to actions for personal injury), LDRC recently surveyed New York statutory provisions and case law to determine the relationship between libel (and privacy) claims and the broader rubric of "personal injury" actions. LDRC's findings, reproduced in the margin, reveal that in New York libel would definitely be considered a personal injury for these purposes. In addition to the New York State approach, libel has also recently been held by the Ninth Circuit to be a "personal injury" for federal tax purposes in order to determine that an individual's "lump sum..."
recovery of [compensatory] damages from a [personal] defamation action is excludable from gross income under [Internal Revenue Code] §104(a)(2) as damages recovered 'on account of personal injuries.'

The consistent inclusion of libel under the rubric of "personal injury" in New York and by the Ninth Circuit suggests that a similar result can be expected in other jurisdictions which extend their caps on noneconomic damages to actions for personal injury. Moreover, since five states have expressly confined their noneconomic caps to actions involving "medical malpractice" or "health care," the contrast between the broader term "personal injury" used in other state provisions, and these very narrow bills, may well suggest a legislative intent in the "personal injury" states to cover a wider range of actions, presumably including libel. Such a conclusion would also be in harmony with the relatively broad list of compensable noneconomic elements that most of these states have included in their cap provisions.

(iii) Already Enacted Penalties for Frivolous Actions

During the recent push for tort reform as many as twelve states passed bills imposing penalties for frivolous actions. All of these penalties are defined broadly enough to cover frivolous libel claims. In nine states the newly-enacted penalties cover "reasonable" costs and attorneys' fees. Two states have created a maximum penalty of $10,000. Another state has allowed a sanction of up to 25% of the amount originally prayed for.

The ATRA and ALEC Reform Proposals: Application to Libel

Whatever uncertainties of application to libel may inhere in recently enacted legislation appear largely to have been resolved in the reform proposals supported by the American Tort Reform Association (ATRA). The ATRA proposals, as reflected in ATRA's "Legislative Resource Book on Tort Reform," are clearly intended to apply broadly to all torts, including libel, and are not intended to be restricted to a narrow class of cases such as medical malpractice.

Specifically, each of the legislative tort reforms that is advocated by ATRA in key areas highly pertinent to libel includes recommended positions and justifications that clearly cover libel. Moreover, ATRA supports the "model" legislative proposals
that have been drafted by the American Legislative Exchange Council (ALEC), a nonpartisan group representing over 2000 state legislators. These model bills are also more than broad enough to cover libel. Indeed, the ALEC "model" bills would consistently resolve the ambiguities that have cropped up in legislation already enacted in favor of libel coverage. ATRA's recommended positions and options for change on key issues relevant to libel are discussed below, followed in turn by a discussion of the pertinent "model" legislation supported by ATRA.

(i) Punitive Damages

-- The ATRA Position. ATRA supports a range of options for limiting punitive damage awards, over and above restrictions that may already apply to such damages in particular jurisdictions. While they are not all equally relevant, many of ATRA's "options for change" would be of value in libel actions.

ATRA recommends deferring all consideration of the issue of punitive damages until after a finding of liability at trial. In a libel action this would certainly help to diffuse the emotional issue of possible punitive sanctions and would even be of assistance in those libel actions where the issue of "actual malice" is also the standard for liability. Any provision that would require the jury to give separate consideration to punitive damages, even under closely related legal standards, might help to bring down the horrifying 60% punitive damage rate currently being experienced, for example, in media libel actions.

ATRA recommends that consideration of the amount of punitive damages be taken away from the jury altogether. Juries would only be permitted to determine whether or not any punitive damage award should be entered. The judge would determine the amount. Available data on the staggering amounts of punitive damages awarded by juries in libel cases, in contrast to the amounts, if any, ultimately approved by judges on post-trial review or on appeal, strongly suggests that this recommendation could have a very positive effect on reducing if not eliminating the grossest excesses of the current system.

ATRA recommends that some "meaningful limit" should be placed on the punitive damages that can be awarded in any action. Clearly any such limit would be of assistance in libel cases, although the significance of this recommendation will obviously depend on the precise nature of the limits ultimately adopted. Given the frequency and excessiveness of
recent punitive awards in libel actions, from the point of view of libel defendants the nature of such limits should be as specific and clearly defined as possible.

Other ATRA recommendations regarding punitive damages are somewhat less significant as applied to libel. Since constitutional libel precedents already require it, the adoption of an actual malice standard, to be established by clear and convincing evidence, would not add meaningfully to the protections currently available in most libel cases. Multiple punitive damage awards arising out of the same course of conduct are not generally a problem in libel cases and the question of violations of state or federal government standards have no application in the libel field.

-- Proposed ALEC Model "Punitive Damages Limitation Act". As noted in the ATRA Legislative Resource Book, the American Legislation Exchange Council's proposed or "model" legislation "closely corresponds to the justification statements for change drafted by ATRA." Nonetheless, the specificity of the ALEC "models" puts needed flesh onto the bare bones of the ATRA recommendations. In this sense, as well as in the sense that they originate from a nonpartisan group, the fact that ALEC's model legislation would cover libel is of great significance to libel defendants seeking relief through tort reform.72

On the issue of punitive damages, for example, the ALEC model "Punitive Damages Limitation Act" would apply broadly to "any action for personal injury, property damage, or wrongful death."73 Although "personal injury" actions are not defined, any arguable uncertainty as to libel coverage should be eliminated by the broad definition of noneconomic damages made a part of ALEC model Act, which includes as elements of noneconomic damages "injury to reputation, humiliation ... mental anguish, emotional distress ... [and] other nonpecuniary damages."74

The basic operative feature of the ALEC model legislation is a stringent, fixed economic limit on punitive damages, amounting to "twice the award of economic damages" -- such economic damages being limited to "objectively verifiable pecuniary [or monetary] losses."75 Although strong arguments can be made for the total abolition of punitive damages, particularly in libel actions which implicate First Amendment freedoms, a limit of any punitive awards to twice actual monetary loss would go a long way toward alleviating one of the most egregious excesses of current libel litigation.
Other features of the ALEC punitive damages model that would be of potential assistance in libel actions include the bifurcated pleadings and proceedings also recommended by ATRA, and the provision for special damages findings by the trier of fact that might help to guide the jury away from box-car damage awards unrelated to specific and proven compensable elements of damage.

(ii) Noneconomic Damages

-- The ATRA Position. The ATRA recommendations regarding "limitations on awards for 'intangible' injuries," would again appear more than broad enough to encompass such awards in libel actions. Its rationale focuses on "pain and suffering," a concept of more relevance to other torts than to libel. Nonetheless, it is quite clear that ATRA would apply its proposed noneconomic damage limitations broadly to all personal injury and wrongful death actions. Indeed, ATRA cites approvingly a broad definition of such noneconomic damages that includes injury to reputation, humiliation and emotional distress -- key elements in many libel damage awards. ATRA suggests a series of options for limitations on intangible injuries, including "flat caps," "proportionality" (i.e., a defined limitation to a multiple of actual economic injury), "schedules" (based either on "life expectancy" or both life expectancy and "severity of injury") or caps plus judicial discretion to waive the defined caps "in extreme cases." ATRA recommends scheduling as the most "individualized approach" to limiting the kind of noneconomic damages that are most likely to flow from the "pain and suffering" associated with physical injuries. The scheduling option would appear to provide somewhat less protection to libel defendants, however, because the scheduling criteria ATRA defines have more limited relevance to the kind of injury to reputation and associated non-physical injuries that are alleged to result from libelous publications. Such libel injuries would benefit more, therefore, from a defined cap on damages.

-- Proposed ALEC Model "Noneconomic Damages Awards Act". The ALEC model "Noneconomic Damages Awards Act" adopts a more direct solution, from the libel point of view, than ATRA's preferred recommendations in that it would not only clearly apply to libel claims but in that it would also establish the kinds of limitations that make more sense when applied to the intangible injuries allegedly suffered by victims of libel. The Act would apply to any "personal injury action." It would define noneconomic damages to include "injury to reputation, humiliation ... mental anguish, emotional distress ... [and] other
nonpecuniary damages." Finally, its operative limits would be based either on a flat cap of $250,000, or on "the amount awarded in economic damages, whichever amount is greater." Since actual damages in libel actions rarely if ever amount to $250,000, if adopted the flat cap of $250,000 would generally represent the outer limit for noneconomic damages resulting from libel claims.

(iii) Frivolous Suits

-- The ATRA Position. ATRA wisely recognizes the growing need for sanctions to remedy and deter the filing, or continued prosecution, of frivolous actions in all areas of tort litigation. It quite properly concludes that the system is not working when the number of tort claims is increasing but yet the majority of those claims are found to be without merit, resulting in unwarranted imposition of costs and time spent in defending unjustifiable claims. ATRA suggests as one option "Rule 11-type" sanctions against either attorney or party for signing, after "reasonable inquiry," pleadings, motions or papers not well grounded in fact or not "warranted by existing law or a good faith argument for extension, modification, or reversal of existing law," or interposed for any improper purpose such as harassment, delay or increase in the cost of litigation. Proposed sanctions can include reasonable expenses, including reasonable attorneys fees. ATRA also makes note of Colorado's version of Rule 11 that lists a series of factors for use in determining whether to impose attorneys fees. Finally, ATRA mentions California's "Certificate of Merit" procedure, used in the area of professional malpractice, and requiring consultation with an independent "professional in the defendant's discipline" -- a procedure that would not appear applicable to libel actions.

All of ATRA's recommendations would have important applications to the growing numbers of frivolous and bad faith libel claims.

-- Proposed ALEC Model "Litigation Accountability Act". The ALEC "Litigation Accountability Act" would also be of substantial benefit to libel defendants. It is drafted broadly to apply to "any civil action." The Act is triggered by the presence or absence of "substantial justification," as defined, or whether the action "was interposed for delay or harassment." It would provide for the assessment of (reasonable) attorneys fees and establishes a procedure and criteria for assessing such fees.
Conclusion

The efforts of broadly-based groups like the American Tort Reform Association and the American Legislative Exchange Council, in bringing a reasoned approach to the important issues of tort reform, are greatly to be commended. From the point of view of libel defendants, both ATRA and ALEC have wisely chosen to address their tort reform proposals, not to narrow parochial interests, but rather to a broad agenda for needed reforms, covering the gamut of torts, including libel. While the ATRA and ALEC recommendations and proposals would thus appear already to cover key issues of concern to libel defendants, it is important that systematic efforts be made to assure that this broad coverage is retained and fought for as specific tort reform proposals are considered and debated around the country. It is to be hoped that media organizations and others concerned with preventing the excesses that have become an unfortunate aspect of recent libel litigation will work, on their own as well as through ATRA and other like organizations, to secure meaningful and just tort reform.

Notes*


* As this paper was originally prepared in January 1987 certain of these notes are somewhat out of date in terms of legislative developments during 1987 -- see notes 53-61, 65-68, infra. For a summary of such later developments see infra, pp. 35-49.

3. For a recent discussion of some of the most significant practical failings of constitutional libel privileges in the litigation context, see Kaufman, Libel 1980-85: Promises and Realities, 90 Dick. L. Rev. 545 (Spring 1986).

4. One leading commentator has noted that a majority of libel claims involve "non-media" parties. See Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 A.B.F.Res.J. 455, 465. Franklin also identifies the frequency with which even media claims involve private parties or less prominent media defendants. Franklin, Suing Media for Libel: A Litigation Study, 1981 A.B.F.Res.J. 795, 807-811 (hereinafter "Franklin II").

5. LDRC regularly publishes lists of cases that have resulted in damage awards against media libel defendants, many of them huge awards, into the millions of dollars. Some of these huge awards have been imposed against smaller media concerns. See, e.g., Green v. Alton Telegraph Printing Co., 8 Med.L.Rptr. 1345 (Ill. App. 5th Dist. 1982) (jury awarded $6.7 million in compensatory damages and $2.5 million in punitive damages against small, family-owned newspaper; appeal dismissed due to inability of defendant to secure a sufficient bond, and case reportedly settled for $1.4 million, slightly in excess of the available insurance coverage.) LDRC Bulletin No. 4 (Part 1), August 15, 1982 at 11. As a result of the high damage awards and defense costs, the Alton Telegraph reportedly ceased publishing high-risk investigative news stories. Wall Street Journal, September, 1983, quoted in Massing, "The Libel Chill: How Cold Is It Out There?" Columbia J. Rev. 31, 34 (May/June 1985). For a case awarding more than a half-million dollars in compensatory and punitive damages (plus interest), later reduced to just under a quarter-million dollars, against a private individual who accused a white man of being "racist" for opposing a black real estate development, see Fleming v. Moore, 229 Va. 783 (1985), cert. denied, ___ U.S. ___, 55 U.S.L.W. 3250 (October 14, 1986).

7. Id. at 2 et seq.

8. The information in this section on "Libel Insurance," and the section below on "Libel Litigation and Defense Costs," is based on a report prepared by LDRC for the Gannett Center for Media Studies and the Center for Telecommunications and Information Studies at Columbia University entitled "Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation." Papers presented at the conference will soon be published by the Gannett Center in book form.


10. Greenwald, supra note 8 at 1. See also Massing, Libel Insurance: Scrambling for Coverage, Columbia Journalism Review, January/February 1986 at 35-36 for examples of libel premium increases ranging from 400% to more than 800% in a single year.

11. Indeed, when CNA withdrew from the media-related market at the end of 1985, only two major libel insurers were left in the U.S. market: Employers Reinsurance Corporation and the Mutual Insurance Company. Ultimately, the Safeco Insurance Company came in to replace CNA as an underwriter of media-type risks through Media Professional Insurance; but Safeco is currently reported to be imposing conservative risk limits.

12. Lloyd's of London has begun to reject new business altogether and to be only renewing certain preferred clients. Chubb, once among the leaders writing insurance for publishers, and broadcasters, now restricts its business to producers, distributors, and cable television operators. The Seaboard Surety Company, once a major source of advertising insurance, provides only moderate coverage to publishers and broadcasters. The Fireman's
Fund has also been substantially affected by reinsurance difficulties. And American International Group (AIG) is implementing significantly more demanding approval criteria.


14. Greenwald, supra note 9 at 19.

15. For other sources expressing concerns over the dramatic increase in libel insurance "deductibles" see Greenwald, supra note 8, at 1; and Garbus, "The Cost of Libel Actions -- Pressure Not to Publish," 196 New York Law Journal 12 (July 17, 1986).


17. Working Group Report, supra note 5 at 35.

18. Id. at 42.

19. Id. at 36, citing Jury Verdict Research, Inc. (hereinafter "JVR") Injury Valuation: Current Award Trends, No. 304 (1986); but see also note 33 infra.


21. Id. at 39, citing JVR.


23. LDRC Bulletin No. 11 (November 15, 1984) at 18 (Table B-9).

24. LDRC Bulletin No. 16 (March 15, 1986) at 44. Since this Bulletin was published there has, very recently, been another eight-figure libel award entered, the largest ever recorded against an established news medium. See Los Angeles Times, Pt. I at 1, 30 (December 18, 1986) (reporting on a total of $19,271,750 in damages awarded by a Las Vegas jury to entertainer and Nevada hotel and casino owner, Wayne Newton, in his libel suit against NBC; Newton's award...
was broken down by the jury into the following components: $7.9 million for loss of income, $1,146,750 for loss of future income, $5 million for loss of reputation, $225,000 for "physical and mental suffering" and $5 million in punitive damages).


26. See LDRC Bulletin No. 17, supra note 23 at 4 (Table 2) (awards for 1954-64, 1964-77, 1982-84); and LDRC Bulletin No. 4 (Part 1), supra note 23 at 6 (Table 2-A) (awards for 1980-82).

27. LDRC Bulletin No. 16 (March 15, 1986) at 44.


29. LDRC Bulletin No. 17, supra note 23 at 1-2.

30. Id.

31. Id. at 3.

32. LDRC Bulletin No. 9 at 26 (January 31, 1984). The data published in Bulletin No. 9 relied on medical malpractice and product liability figures through 1982. These comparison figures were later updated by LDRC in the report presented to Columbia University, see supra note 8. The figures cited in the text are taken from that updated comparison and reflect data through the end of 1984.

33. JVR, supra note 19 at 18-19. In contrast to the figures discussed at this point in the text, the Working Group Report relies on partial figures from JVR for 1985, which it acknowledges are incomplete and therefore potentially inaccurate. But even those partial 1985 figures, which reflect marked increases in both medical malpractice and product liability average awards, while they somewhat close the gap, still do not bring up the average awards in these two categories to the level of recent libel awards.

34. Id.

35. Daniels, Punitive Damages: The Real Story, 72 ABA Journal 60 (August 1, 1986).
36. Working Group Report, supra note 5 at 42.


38. Id. at 45.

39. See Lankenau, supra note 9 at 171.

40. Franklin II, supra note 4 at 811.


42. Lankenau, supra note 9 at 171. In addition to these estimated defense costs, it is known that William Tavoulareas, as a libel plaintiff, had spent as much as $2 million as of the entry of the jury verdict in his action against The Washington Post, as this figure was put into evidence on the issue of damages. See The New York Times, June 2, 1983 at A20.

43. Another leading libel insurance carrier has estimated its average trial cost, not including appeal, at $150,000. Editor & Publisher, Dealing With Libel Suits, May 11, 1985 at 16. For yet another comparison, a recent study by the American Society of Newspaper Editors estimated that the average defense costs per publisher for all newspapers engaged in libel and privacy litigation over a three-year period was $95,852 -- a figure again far higher than average litigation costs in other areas. The average three-year defense costs for large newspapers, with a circulation above 400,000, was $541,967. Weber, "Editors Surveyed Describe Half of All Libel Cases as 'Nuisance' Suits," ASNE Bulletin, January 1986 at 38. Although the ASNE study represents a useful effort to estimate costs and the frequency of litigation among a broad sample of newspapers, its figures are, unfortunately, difficult to
use in assessing per-case defense costs. The data obtained involved costs per newspaper over a three-year time span rather than on a case-by-case basis. Moreover, an unknown number of editors indicated that they had not included in their estimates defense costs that had been paid by their insurance companies, the inclusion of which would presumably dramatically increase the cost figures in those cases where insurance was available, most likely a majority of the cases.


45. Legislative Resource Book on Tort Reform (American Tort Reform Association 1986) (hereinafter "ATRA Legislative Resource Book").

46. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1975), the Supreme Court held that the First Amendment precludes states from imposing liability in libel actions without, at minimum, proof of "fault." 418 U.S. at 347. A recent case suggests that some aspects of the Gertz constitutional mandate may not be applicable in libel actions that do not involve publications about "matters of public concern." Dun & Bradstreet v. Greenmoss Builders, 86 L. Ed.2d 593, 603 (1985).

47. For a state-by-state list of libel statutes of limitations, generally one year in duration, see, Sanford, Libel and Privacy (Law & Business, Inc./Harcourt Brace Jovanovich 1985) at 701.

48. A First Amendment-based case can be made for the outright abolition of punitive damages in libel actions. See, e.g., Report of the Association of the Bar of the City of New York, "Punitive Damages in Libel Actions," 41 The Record ___ (1986). The arguments here, however, focus not on any special constitutional rule, but simply on the empirical excesses that have been experienced by libel defendants regarding punitive damages and, therefore, the appropriateness of assuring that any general limitations on punitive damages that are adopted apply to libel as well as to other torts.

50. See Franklin II, supra note 4 at 797, confirming earlier findings that as few as 5% of libel plaintiffs secure judgments that are upheld on appeal.


53. This summary of tort reform developments is updated, infra, at pp. 35-49.

54. In Florida punitive damages are to be restricted to three times compensatory damages, and in Oklahoma and Colorado to an amount no more than actual damages unless the court makes a prior finding by clear and convincing evidence, of wanton or reckless disregard, fraud or actual malice. Florida: Florida Statutes §768.73; Oklahoma: Okla. Stat. tit. 23, §9.A. (Supp. 1986) (effective Nov. 1, 1986); Colorado: Colorado Rev. Stat. 13-21-102 (1)(a) (Supp. 1986) (effective July 1, 1986).


62. See supra note 61.

63. The New York General Construction Law expressly includes libel and slander in the definition of personal injury. N.Y. Gen. Constr. Law §37-a (McKinney 1951). This definition dates back at least seventy-five years, to the former New York Code of Civil Procedure, which also included libel and slander in the definition of personal injury. Moreover, New York's current General Construction Law provides that this definition of personal injury is to be applied to every statute treating personal injury, unless a specific exception is also provided by statute. N.Y. Gen. Constr. Law §110 (McKinney 1951). Significantly, New York's new frivolous suit penalty, which is to be applied to all suits for personal injury, contains no such exception to the governing definition of personal injury. N.Y. Civ. Prac. Law & Rules §8303 (a) (effective June 12, 1986). Libel has also been treated as a personal injury for statute of limitations purposes in New York. New York
LDRC BULLETIN NO. 20


That "personal injury" includes libel, slander and invasion of privacy has also been judicially recognized in New York. James v. Gannett Co., Inc., 47 A.D.2d 437, 366 N.Y.S.2d 737 (4th Dept. 1975). In a libel action against a newspaper publisher, the court expressly noted that "[a]n attack on [a] person's reputation is considered in New York to be a personal injury." 366 N.Y.S.2d at 741. (Cardamone, J., dissenting to the denial of defendant's motion for summary judgment.) In another case, an invasion of privacy action was permitted to be classified as one for personal injury because, the court held, an injury to a person does not necessarily involve "the element of personal contact with the person complaining of the injury." Riddle v. McFadden, 201 N.Y. 215, 218 (1911). Finally, one New York case considered the extent of coverage of a personal excess insurance policy based on "occurrences" resulting in "personal injury." Personal injury was defined by the policy to include "libel, slander, defamation of character or reputation, invasion of rights of privacy, humiliation or mental anguish." Shapiro v. Glen Falls Insurance Company, 39 N.Y.2d 204, 347 N.E.2d 624, 382 N.Y.S.2d 263, 264 (1976). While the case ultimately turned on another provision of the policy, neither the majority nor the dissenters questioned the propriety of including defamation and invasion of privacy within the concept of personal injury.

64. Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983).

65. The five states that passed such narrowly applicable caps on noneconomic damages are: Kansas, Missouri, South Dakota, West Virginia and Wisconsin.


69. ATRA Legislative Resource Book, supra note 46 at E-4.

70. Id. at E-5.

71. Id.

72. The American Legislative Exchange Council (ALEC) "model" bills discussed here are published in American Legislative Exchange Council, The Source Book of American State Legislation 1987-88 (1986) (hereinafter "ALEC Source Book"). This publication presents model legislation addressing a wide range of policy issues. In response to the intensive activity on tort reform in state legislatures during the past two sessions, the 1987-88 edition of the Source Book contains a comprehensive section on civil justice reforms, ALEC Source Book at 1-2, 31-81.

73. ALEC Source Book at 46, §6.

74. Id. at 45, §2(A).

75. Id., §3.

76. ATRA Legislative Resource Book at D-2.

77. Id. at D-1, citing ALEC's Noneconomic Damages Awards Act -- see note 80, infra.

78. ATRA Legislative Resource Book at D-3 - D-4.

79. Id. at D-5.

80. ALEC Source Book at 42-44.

81. Id., §3.

82. Id., §2(A).

83. Id. at 44, §3(B)(1) and (2).

84. ATRA Legislative Resource Book at K-1.
85. Id. at K-3 - K-5.
86. Id. at K-5 - K-6.
87. Id. at K-6.
88. ALEC Source Book at 39-42.
89. Id. at 40, §3(A).
90. Id., §3(C).
LDRC TORT REFORM PROJECT UPDATE (Part II)  
(As of July 31, 1987)*

Over the past several months the Libel Defense Resource Center (LDRC) has worked closely with state press and state broadcaster associations around the country to develop and implement a legislative lobbying effort to try to ensure that any "tort reform" legislation enacted is written in such a way as to be broad enough to cover libel and the media. This effort has focused on three priority issues: (i) "caps" on "noneconomic" damages; (ii) clear and enforceable limits on punitive damages; and (iii) strengthened remedies for frivolous or abusive litigation.

In pressing for the inclusion of libel in such reforms, LDRC does not believe that media representatives are simply seeking to advance the media's interests since the majority of all libel claims do not even involve the media. In any event, the empirical case for inclusion of libel within tort reforms is a strong one -- see supra, pp. 1-34 -- and certainly there is no principled basis for excluding libel from the ambit of such reforms.

As a part of its tort reform effort, LDRC has sought to provide necessary information regarding the operation of the libel system to all interested parties. What follows is a state-by-state recap of where this effort stands as of approximately July 31, 1987. The recap was prepared based on two major sources of information. First, including the above-mentioned, newly-received information, to date LDRC has received survey replies from a total of 36 states. In 24 of these tort reforms of potential assistance to libel defendants have been reported to be either enacted or under consideration: (i) caps on non-economic damages (16 states); (ii) limits on punitive damages (12 states); (iii) remedies for frivolous litigation (16 states). Up to 17 other states are reported to be studying tort reforms on these priority issues, but it is unclear at this time whether or not proposed legislation has a serious chance of being enacted or whether, as enacted, the legislation will or will not apply to libel and the media. The

* For a previous LDRC Report on Tort Reform, focusing on developments in 1986, see LDRC Bulletin No. 18 at 1-16 (December 15, 1986). See also, supra, pp. 1-34.
second source used in the preparation of this recap, primarily
to fill in those gaps in information provided directly to LDRC
by its state contacts, is data on tort reform activity compiled
by the National Conference of State Legislatures (NCSL) in its
monthly State Legislative Summary on Liability Insurance. Our

State-by-State Status

ALABAMA

LDRC's state contacts report that the Alabama legislature
has now passed a statute that places a $250,000 cap on punitive
damages in any civil action. However, civil actions expressly
excluded from the cap include libel, slander or defamaiton. To
LDRC's knowledge, Alabama is only one of two states that have
passed tort reform legislation during the past two years of
active reform activity that specifically excludes libel from its
coverage and Alabama is the only state where libel is excluded
on a major issue of potential significance to the media.
(Missouri is the other state, see infra, pp. 42-43.) In a more
positive vein, another newly enacted statute raises the minimum
standard of proof to determine if an issue will be submitted to
a jury from the mere "scintilla rule" to a substantial evidence
rule -- a very important development that should support a more
favorable state court attitude toward the grant of summary
judgment motions in libel actions. Finally, the Alabama
legislature also enacted legislation which allows all parties in
any civil action, thus including libel, to file a claim for
legal fees and expenses when a frivolous claim or defense has
been filed.

ALASKA

Citizens for Tort Reform, of which the Alaska Broadcasters
Association is a member, reports the introduction of a bill
which would cap non-economic damages at $100,000 for all tort
actions, presumably including libel.

ARIZONA

LDRC has received no information from Arizona on tort
reform. However, according to NCSL, in a measure specifically
dealing with libel the Arizona House of Representatives has
passed a retraction statute which sets forth the level of
evidence required for the award of punitive damages when a
correction is demanded and is not published or broadcast within the statutory time provided. According to NCSL, the Arizona Senate has not yet acted upon that statute.

ARKANSAS

As of March 1987, LDRC's state contacts reported that an Arkansas State Bar committee has been studying tort reform but that no bills had been introduced. However, according to information received from NCSL since our contacts' report, Arkansas recently enacted legislation which provides that in civil actions, presumably including libel, the court can award attorneys' fees to the prevailing party if the losing party is found to have brought a frivolous claim. Media groups in Arkansas have not yet taken a position on tort reform.

CALIFORNIA

According to LDRC's state contacts, consideration of tort reform is expected in 1987. A coalition, headed up by representatives of the Chamber of Commerce, is currently working toward introduction of broad-based reforms intended to expand medical malpractice-only reforms enacted a few years ago to cover a broader list of tort actions. No media position has yet been taken.

NCSL information received subsequent to our contacts' report indicates that the California legislature is currently considering a wide range of proposals covering punitive damages including a limitation of twice the amount of economic damages or three times the amount of compensatory damages awarded, and remedies for frivolous actions. It is unclear from the NCSL report whether these reforms would apply to libel and the media. In regard to remedies for frivolous actions, while the precise language of this legislation was not provided in the NCSL report, based on the patterns that such legislation has followed in other states it is likely that the legislation would apply to libel.

COLORADO

According to LDRC's state contacts, major tort reform legislation was enacted in 1986, including: (i) a $250,000 cap on non-economic damages potentially broad enough to cover libel; (ii) a provision, applicable to all civil actions, that "exemplary" (punitive) damages may not exceed actual damages; and (iii) remedies for frivolous actions. It does not appear that media groups took a position on the 1986 legislation.
CONNECTICUT

LDRC's sources in Connecticut have indicated that major tort reform legislation was enacted in 1986. This included remedies for frivolous actions broadly applicable to all suits, including libel. The 1986 legislation did not include caps on punitive or non-economic damages. Although additional consideration of tort reform is expected, it is reportedly more likely to focus on insurance regulation. No media position has been taken. Some libel-specific reform legislation may also be in the pipeline.

DELAWARE

LDRC has received no information from Delaware on tort reform. However, according to NCSL, Delaware has enacted legislation limiting punitive damages to no more than three times the amount awarded as actual damages and prohibiting the inclusion in any initial pleading of a prayer for punitive damages. It is unclear from the NCSL report whether this reform would apply to libel and the media, although the pattern of many other such punitive measures suggests that it likely would apply.

FLORIDA

According to LDRC's state contacts, Florida enacted major tort and insurance reform legislation in 1986, including: (i) a $450,000 cap on non-economic damages of possible application to libel; and (ii) a provision limiting punitive damages to three times the amount of the compensatory award, applicable to all civil actions. According to information received from NCSL since LDRC contacts' report, an "Academic Task Force," charged with an intensive two-year study of the tort system and the insurance dilemma, will be making recommendations to the 1988 Florida legislature.

GEORGIA

LDRC has received no information from Georgia on tort reform. However, according to NCSL, legislation was recently enacted that caps punitive damages at $250,000 and allows remittitur and additur of jury verdicts upon agreement of the parties. It is unclear from the NCSL report whether this reform would apply to libel and the media. While the precise language of this legislation was not provided in the NCSL report, based on the patterns that such legislation has followed in other states it is likely that it applies to libel and the media.
HAWAII

According to LDRC's state contacts, Hawaii enacted major tort and insurance reform legislation in 1986, including: (i) a $375,000 cap on non-economic damages of doubtful application to libel and (ii) a remedy for frivolous actions, applicable to all civil actions of up to 25% of the plaintiff's ad damnum. No media position on tort reform was previously taken, but the state broadcasters association has now joined with a tort reform coalition.

According to information received from NCSL since our contacts' report, no tort reform measures have been enacted this year, although bills have been introduced proposing reforms including a prohibition of punitive damages; and reducing Hawaii's non-economic damages cap to $250,000. It is unclear from the NCSL report whether this new, lower cap would apply to libel and the media.

IDAHO

According to LDRC's state contacts, Idaho has been considering major tort reform legislation sponsored by a local coalition. LDRC's contacts have not recently reported on this legislation. However, according to information received from NCSL, tort reform legislation has been enacted which: (i) sets a a $400,000 cap on non-economic damages which allows for adjustment according to average annual wage calculations; and (ii) permits the court to award attorneys' fees against the party or counsel who brings a frivolous or malicious action. It is unclear from the NCSL report whether these reforms would apply to libel and the media. However, while the precise language was not provided in the NCSL report, based on the patterns that such legislation has followed in other states, it is likely that at least the frivolous actions provision would apply to libel.

ILLINOIS

According to LDRC's contacts in Illinois, the sponsor of legislation that would have created a new cause of action for "restoration of reputation" (with declaratory, not monetary, relief) as an alternative to defamation, has abandoned efforts for its passage this past Spring. His decision, in part, seems to have been made in response to intense opposition by the media. Meanwhile, the House Judiciary Committee agreed to hold hearings on the topic of defamation law in general.
LDRC Bulletin No. 20

Indiana

LDRC has received no information from Indiana on tort reform. NCSL also has reported no consideration or enactment of any relevant tort reform legislation pertinent to the three priority issues identified by LDRC.

Iowa

According to LDRC’s state contacts, tort reform legislation was enacted in Iowa in 1986 which included: (i) certain non-dollar limits applicable to claims for punitive damages; and (ii) certain remedies for frivolous actions by litigious plaintiffs. Additional reforms have been recommended by an interim study commission, including a $200,000 cap on non-economic damages. The Iowa Newspaper Association submitted a position paper on tort reform and libel insurance issues with the study commission last year, citing LDRC data.

Kansas

According to LDRC’s state contacts, medical malpractice-only reform legislation, including a measure capping non-economic damages at $250,000 and total damages at $1 million, was enacted in 1986. The Kansas Association of Broadcasters has this year submitted testimony in favor of punitive damage limits based in part on LDRC data. LDRC has recently received additional information from its state contacts reporting the enactment of a punitive damages cap, presumably broad enough to extend to libel, with the amount to be based on the defendant’s "highest annual gross income during the preceding five years or $5 million," whichever is lower.

Kentucky

According to LDRC’s state contacts, tort reform is under consideration by an "Insurance and Liability Task Force" of the Kentucky Legislative Research Commission. Hearings are currently being held, but a final report is not expected until the end of the year. Local press and broadcaster groups have agreed to work together on this issue.

Louisiana

According to LDRC’s state contacts, serious consideration is expected to be given to tort reform this year by the Louisiana legislature. Last year, a proposed $150,000 cap on...
non-economic damages, potentially applicable to libel claims against the media, died in committee. Louisiana tort law generally does not permit the award of punitive damages. Media groups have not previously taken a position on tort reform, but are considering doing so in 1987.

MAINE

According to LDRC's state contacts, in 1986 Maine passed a medical malpractice-only reform bill without a damages cap. This year a state coalition, the Maine Liability Crisis Alliance, is pressing for a broader tort reform measure which would include a $250,000 cap on non-economic damages applicable to any civil action.

According to information received from NCSL since our contacts' report, the Maine legislature is considering major tort reform legislation, introduced as the Tort Reform Act. This proposal includes: (i) limitations of non-economic damages awards to $250,000 or the amount of economic damages, whichever is greater; (ii) limitations on punitive damages; and (iii) awarding of attorneys' fees to the party or counsel as a penalty for bringing a frivolous or malicious action. It is unclear from the NCSL report to what extent these reforms would apply to libel and the media and the precise language of these proposals was not provided in the NCSL report. However, based on the patterns that such legislation has followed in other states it is likely that at least portions of this legislation would be applicable to libel.

MARYLAND

LDRC has received no information from Maryland on tort reform. NCSL also has reported no enactment or consideration of tort reform legislation pertinent to the three priority issues identified by LDRC.

MASSACHUSETTS

LDRC has received no information from Massachusetts on tort reform. NCSL also has reported no enactment or consideration of tort reform legislation pertinent to the three priority issues identified by LDRC.
According to LDRC's state contacts, tort reform legislation passed last year included remedies for frivolous actions that may be applicable to libel claims and a medical malpractice package that included a $225,000 cap on non-economic damages. No media position has yet been taken on these issues.

MINNESOTA

According to LDRC's state contacts, tort reform legislation passed last year included: (i) a $400,000 cap on "intangible losses," applicable to all tort actions; (ii) certain non-dollar limitations on punitive damages also broadly applicable; and (iii) remedies for bad faith actions. Additional tort reform measures are pending this year, but primarily regarding issues of lesser concern to libel defendants. No media position seems to have been taken on any of these issues.

MISSISSIPPI

The Mississippi Broadcasters Association reports that the Mississippi Tort Reform Act was introduced in the state legislature. This proposed legislation would (i) limit non-economic damages to $250,000 or actual damages, whichever is greater; and (ii) limit punitive damages to twice the amount of economic damages. These reforms would be applicable to "personal injuries" and it is unclear whether or not libel would be covered. There is also a provision which would award costs and attorneys' fees against parties or attorneys who bring frivolous actions or make frivolous defenses. The language of this reform is broadly written to cover any civil action, presumably including libel, commenced or appealed in the state's courts.

MISSOURI

According to LDRC's state contacts, a tort reform bill was enacted in April which explicitly excludes libel (along with a list of other "intentional" torts) from coverage of a provision which, for other civil actions, allows credit to be given for previously paid punitive damages arising out of the same conduct. To LDRC's knowledge, only one other state (Alabama -- see page 2, supra.) has so explicitly declined to extend to libel a tort reform legislation considered during the last two years of intensive reform activity. In any event, this
particular exclusion would not appear to have any significant impact on the media in libel actions since such actions rarely, if ever, involve multiple punitive damage claims.

According to information received from NCSL since our contacts' report, legislation was introduced which would cap non-economic damages at $250,000 for claims against "business entities." It is unclear from the NCSL report whether these reforms would apply to libel and the media or whether this cap, if passed, would be subjected to a similar libel exclusion.

MONTANA

LDRC has received no information from Montana on tort reform. However, according to NCSL, legislation has been enacted which limits the amount of non-economic damages recoverable in personal injury actions. It is unclear from the NCSL report precisely how these limits are defined or whether this reform would apply to libel and the media.

NEBRASKA

According to LDRC's state contacts, a broad-based tort reform measure is now pending before Nebraska's unicameral legislature. The bill, which would enact a $250,000 cap on non-economic damages potentially applicable to libel as well as remedies for "unjustified" litigation, is supported by a reform coalition whose president is also head of the Nebraska Press Association. The Nebraska Broadcasters Association has recently reported that it continues to support and work with state press associations and the tort reform alliance, Project Justice.

NEVADA

LDRC has received no information from Nevada on tort reform. However, according to NCSL, pending legislation includes a provision to allow the award of attorney's fees against parties bringing frivolous actions. An additional proposal would create the presumption that punitive damages greater than triple the economic damages are excessive. While the precise language of this proposal was not provided in the NCSL report, based on the patterns that such legislation has followed in other states it is likely that these two provisions would be broad enough to apply to libel. A third proposal would cap non-economic damages at $250,000 or the amount of economic damages, whichever is greater. It is unclear from the NCSL report whether this provision would apply to libel and the media.
According to LDRC's state contacts, tort reform legislation was enacted in New Hampshire last year which included: (i) an $875,000 cap on non-economic damages, potentially applicable to libel; (ii) a provision outlawing punitive damages in all tort actions; and (iii) remedies for frivolous actions. Information received by LDRC indicates that recently-introduced legislation would change the non-economic damages cap enacted in 1986 from a flat figure to a flexible one calculated according to average wages and life expectancy, following Washington's model. Media groups have not yet taken a position on tort reform.

LDRC has received no information from New Jersey on tort reform. However, NCSL reports that proposed legislation would allow the award of costs and attorneys' fees against the filing of frivolous claims. While the precise language of this proposal was not provided in NCSL's report, based on the patterns that such legislation has followed in other states it is likely that this proposal would be applicable to libel.

According to LDRC's state contacts, tort reform was considered this year, and bills limiting the liability of officers and directors of not-for-profit organizations and modifying the rules of several liability were passed. However, a bill that would have confined punitive damages to an amount no greater than actual damages did not pass. A coalition of trade organizations supported these proposed bills. Media groups did not take a position on the issue.

According to LDRC's state contacts, New York enacted major insurance reform legislation in 1986 which also contained some tort reform provisions, including limited remedies for frivolous actions but no caps on damages. Media groups have yet taken no position on this issue.

According to LDRC's state contacts, North Carolina enacted major insurance reform in 1986, but rejected broad-based tort reform, including caps on non-economic and punitive damages that
had been recommended by a legislative study commission. While additional consideration may be given to tort reform in 1987, it is reportedly unlikely that reform legislation will be enacted. Media groups have not yet taken a position on tort reform.

NORTH DAKOTA

According to LDRC's state contacts, several bills regarding remedies for frivolous litigation are currently pending. Information received from NCSL since our contacts' report indicates that the legislature passed measures mandating the award of reasonable costs and attorneys' fees for frivolous actions. While the precise language of this legislation was not provided in the NCSL report, based on the patterns that such legislation has followed in other states it is likely that the legislation would apply to libel and the media.

OHIO

According to LDRC's state contacts, major tort reform legislation was passed in 1986 but was vetoed by the governor because of product liability provisions included in the bill. In 1987, a bill largely identical to last year's bill, but excluding product liability, was introduced to the legislature. The pending Ohio reform legislation includes a variety of measures dealing with punitive and non-economic damages broadly applicable to all tort actions, but which do not provide for caps on either type of damages; the bill would also create certain potentially useful remedies for frivolous litigation. Media groups have supported tort reform efforts through the local reform coalitions.

OKLAHOMA

According to LDRC's state contacts, Oklahoma enacted major tort reform legislation in 1986, including a provision limiting punitive damages to an amount no greater than actual damages, applicable to all actions other than contract, and remedies for frivolous actions. Additional reform legislation is being pressed, including a proposed $250,000 cap on non-economic damages potentially applicable to libel. The Oklahoma Press Association has taken a leadership role in working for tort reform.
OREGON

According to LDRC's state contacts, the Oregon legislature passed major tort reform legislation this year, including a $500,000 cap on non-economic damages. It is unclear whether this cap would be applied to libel. LDRC's state contacts also reported that Rule 11 of the Federal Rules of Civil Procedure have been incorporated into the Oregon Rules of Civil Procedure, so that remedies are obtainable against parties and counsel who bring frivolous actions. Rule 11 covered all civil actions, including libel.

PENNSYLVANIA

According to LDRC's state contacts, serious consideration of tort reform legislation in 1987 is reported to be likely since the governor had included tort reform on his campaign agenda. The Pennsylvania Newspaper Publishers Association is a member of a state coalition working on the tort reform issue.

RHODE ISLAND

LDRC has received no information from Rhode Island on Tort Reform. NCSL also has reported no enactment or consideration of tort reform legislation pertinent to the three priority issues identified by LDRC.

SOUTH CAROLINA

According to LDRC's state contacts, tort reform legislation proposed by a newly-formed tort reform coalition includes a $250,000 cap on non-economic damages and a provision making punitive damages less attractive by requiring that 95% of any award be paid over to the State. The South Carolina Broadcasters Association has been working in favor of tort reform as well as pressing for certain media-specific reforms, including a media retraction statute and media shield law.

According to information received from NCSL since our contacts' report, the legislature is considering insurance legislation which includes a measure that would award attorneys' fees against parties or counsel who bring frivolous actions. While the precise language of this proposal was not provided in the NCSL report, based on the patterns that such legislation has followed in other states it is likely that the proposal would apply to libel.
SOUTH DAKOTA

LDRC has received no information from South Dakota on tort reform. NCSL also has reported no enactment or consideration of tort reform legislation pertinent to the three priority issues identified by LDRC.

TENNESSEE

According to LDRC's state contacts, tort reform is expected to be given consideration in 1987, although the details of such proposals are currently sketchy. Media groups have not yet considered taking a position on reform issues.

According to information received from NCSL since our contacts' report, a Tennessee Tort Reform Act has been introduced which includes caps on punitive damages. It is unclear from the NCSL report whether this reform would apply to libel and the media.

TEXAS

LDRC has received no information from Texas on tort reform. However, NCSL's report reveals that Texas was quite active in tort reform this year, enacting legislation particularly concerned with damages. The measure provides for a punitive damages cap except for malicious and intentional torts. The cap is set at $200,000 or up to four times the actual damage award. It is unclear from the NCSL report whether this reform would apply to libel and the media. This legislation also provides for attorneys' fees and other remedies against frivolous actions. While the precise language of this legislation was not provided in the NCSL report, based on the patterns that such legislation has followed in other states it is likely that it would apply to libel.

UTAH

LDRC has received no information from Utah on tort reform. NCSL also has reported no tort reform legislation enacted which is pertinent to the three priority issues identified by LDRC.

VERMONT

According to LDRC's state contacts, a libel-specific reform bill was passed in 1986 that provided for the award of costs and attorneys' fees to the defendant in frivolous defamation
actions. More general tort reform is under consideration. A bill pending in Committee would limit punitive damages to twice the economic damages in all actions "for personal injury." Another provision would deal with frivolous claims in all civil actions. The Vermont Association of Broadcasters will probably join the local tort reform coalition in support of such measures.

VIRGINIA

According to LDRC's state contacts, major tort and insurance reform legislation passed the Virginia General Assembly during its 1987 session which adjourned on February 28. The Senate approved a $250,000 cap on non-economic damages which was changed in the House to a $350,000 cap on punitive damages, written broadly enough to apply to libel, and passed both Houses in that form. New remedies for "frivolous motions and pleadings" were also passed. LDRC provided its comments on tort reform issues to the Virginia Association of Broadcasters which worked with a local coalition, "Virginians for Law Reform."

WASHINGTON

According to LDRC's state contacts, major tort reform legislation was enacted in 1986 which included a sliding cap on non-economic damages based on a formula of life expectancy and average wage-earning capacity. Perhaps more so than in other states, these non-economic damage limits clearly apply to libel awards because, while defamation actions are not specifically mentioned in the bill which applies to actions "seeking damages for personal injury," the Senate defeated a floor amendment that would specifically have excluded actions for libel or slander. Washington has never permitted an award of punitive damages in any action. Some challenge to last year's legislation by the trial lawyers is expected in 1987. Media groups did not take a position on tort reform.

WEST VIRGINIA

Tort reform limited to medical malpractice claims, including a $1 million cap on non-economic damages, was enacted in 1986. According to LDRC's state contacts, this year a local reform coalition drew up a more broadly-based and comprehensive reform proposal which included: (i) a proposed cap on non-economic damages "not to exceed two and one-half times ... proven economic loss or $250,000, whichever is less" -- of uncertain application to libel; (ii) proposed limits on the award of punitive damages potentially broad enough to cover
libel, including a cap of either two times the compensatory award or $500,000, whichever is less; and (iii) certain unusual provisions for an award of costs and attorneys' fees in connection with punitive damages claims. LDRC provided detailed comments on the proposed legislation to the West Virginia Broadcasters Association.

According to information received from NCSL since our contacts' report, the West Virginia 1987 legislative session which, scheduled to adjourn on March 14, went into an extended session which finally ended on June 14. A major tort reform bill passed, which included a cap of $500,000 on non-economic damages of doubtful application to libel. The bill was vetoed by the governor, but the legislature overrode the veto.

WISCONSIN

According to LDRC's state contacts, medical malpractice-only reform legislation was enacted in 1986, including a $1 million cap on all damages. A special task force last year recommended to the State Insurance Commission to support more wide-ranging tort reforms including a $250,000 cap on punitive damage awards and a $500,000 cap on non-economic damages. The Wisconsin Newspaper Association is following the tort reform issue closely but keeping a generally low profile.

WYOMING

LDRC has received no information from Wyoming on tort reform. However, according to NCSL, the Wyoming legislature took the first step toward addressing damage awards by proposing an amendment to the State Constitution (which currently prohibits legislative limitations in civil tort actions) to enable it to limit damages in tort actions presumably including libel. If passed by the legislature, the public would have the opportunity to vote on the amendment in November 1988.
LDRC BULLETIN NO. 20

LDRC Tort Reform Project Publications List
(With Order Form)

LDRC Tort Reform Materials. As indicated, there are a variety of materials available from LDRC on or related to the issue of tort reform and libel. All of these are available to those working for tort reform at the state and local levels without charge. Here is a current list of the materials, with a code number that can be used in ordering them:

- Compilation of Tort Reforms Potentially Covering Libel Claims Enacted in 1986 (TR1)
- Time Incorporated paper for the American Tort Reform Association (ATRA) on Tort Reform and Libel (TR2)
- LDRC paper for the Gannett Center at Columbia University on libel damage awards, libel insurance premiums and libel defense costs (TR3)
- LDRC background paper on Tort Reform, Liability Insurance, Libel and the Media (TR4)
- Preliminary LDRC Report (1/30/87) on State Media Survey regarding prospects for tort reform in 1987 (excerpted from Update #1) (TR5)
- LDRC Analysis (1/30/87) of ABA Commission Report on Tort Reform (TR6)
- ATRA Compilation (1/27/87) of State Tort Reform Coalition Contacts (excerpted from Update #1) (TR7)
- LDRC "Model" Tort Reform Legislation Packet (with American Legislative Exchange Council proposed legislation on punitive damages, noneconomic damages and frivolous lawsuits) (excerpted from Update #2) (TR8)
- Henry R. Kaufman Remarks (1/8/87) to Wisconsin Newspaper Association on Tort Reform and Libel (TR9)
- LDRC Legislative Analysis -- Idaho (2/3/87) re Idaho Liability Reform Coalition (10/30/86) draft bill (TR10)
LDRC Legislative Analysis -- Nebraska (2/3/87) re L.B. 425 (TR11)

LDRC Legislative Analysis -- West Virginia (1/29/87) re Chamber of Commerce draft legislation (TR12)

LDRC Tort Reform Update #1 (February, 1987), including: LDRC State Tort Reform Survey; American Bar Association Report; National, State and Local Tort Reform Contacts; a report on American Legislative Exchange Council (ALEC) "Model" Legislation; LDRC Legislative Analyses; synopses of Wisconsin Newspaper Association Conference and LDRC Tort Reform Materials (with a report on the LDRC State Press and Broadcaster Association Survey on Tort Reform Prospects for 1987 (1/30/87) (Attachment 1) and American Tort Reform Association (ATRA) State Tort Reform Coalition Contacts (Attachment 2) (TR13)


Alliance of American Insurers, Recap of "Civil Justice enactments" during the 1986 Session of State Legislatures (1986) (10 pages) (TR15)


LDRC Legislative Analysis -- Ohio (2/27/87) re Sub. H.B. No. 1 (TR17)

LDRC Tort Reform Update #2 (March, 1987), including: Tort Reform and Libel: Status Report (annexed with a State-by-State Status Report as Attachment 2); American Bar Association Followup Report; report on LDRC "Model" Tort Reform Legislation Packet (annexed as Attachment 1); a report on the Alliance of American Insurers; synopses of LDRC Legislative Analyses and Tort Reform Materials (TR18)

LDRC State-by-State Status Report (March, 1987) of Survey on Tort Reform and Libel (excerpted from Update #2) (TR19)
ORDER FORM

<p>| | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>TR1</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR2</td>
<td></td>
<td>$20.00</td>
<td></td>
</tr>
<tr>
<td>TR3</td>
<td></td>
<td>$7.50</td>
<td></td>
</tr>
<tr>
<td>TR4</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR5</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR6</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR7</td>
<td></td>
<td>$1.00</td>
<td></td>
</tr>
<tr>
<td>TR8</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR9</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR10</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR11</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR12</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR13</td>
<td></td>
<td>$5.00</td>
<td></td>
</tr>
<tr>
<td>TR14</td>
<td></td>
<td>$20.00</td>
<td></td>
</tr>
<tr>
<td>TR15</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR16</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR17</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
<tr>
<td>TR18</td>
<td></td>
<td>$5.00</td>
<td></td>
</tr>
<tr>
<td>TR19</td>
<td></td>
<td>$2.50</td>
<td></td>
</tr>
</tbody>
</table>

Other LDRC Tort Reform Materials

(Items such as state bills, legislation, tort reform commission reports, etc. -- these are available for a charge of $.25 per page for photocopying and $2.50 for postage and handling.)

Enclosed is my check for $_______ covering all items ordered.

(Sorry, LDRC cannot bill you.)

Name ____________________________________________
Association/Company __________________________________________
Address __________________________________________
City/State/Zip __________________________________________
Telephone __________________________________________

Send orders with payment to:
Libel Defense Resource Center
404 Park Avenue South, 16th Floor
New York, New York 10016
SUPREME COURT REPORT -- Part I:
LDRC Update: End of 1986-87 Term Report

The Supreme Court's actions in libel (privacy) cases from December 9, 1986 through July 7, 1987 as reflected in 55 United States Law Week (U.S.L.W.), Issue No. 23 (12/9/86) through 55 United States Law Week, Issue No. 50 (6/23/87), are as follows:

I. Media Defendants -- Unfavorable Decisions Left Standing (5)

Lee Enterprises v. Sible, 729 P.2d 1271, 13 Med.L.Rptr. 1738 (Mont. 1986), cert. denied, 55 U.S.L.W. 3851 (6/23/87, No. 86-1638) (Montana Supreme Court had held, in a libel action where the jury entered a verdict for the defendant, that trial court erred in jury instructions in public figure libel action which essentially equated "reckless disregard" with having serious doubts about truth and remanded the case for a new trial).


Phoenix Newspapers, Inc. v. Boswell, 730 P.2d 186, 13 Med.L.Rptr. 1785, 55 U.S.L.W. 2399, cert. denied, 55 U.S.L.W. 3730 (4/28/87, No. 86-1428) (Arizona Supreme Court had affirmed the Court of Appeals reversal of trial court judgment for defendant, finding Arizona retraction statute, which limited plaintiff's recovery to special damages against media defendant when retraction is published, incompatible with Arizona Constitution Article 18, section 6. According to the Court of Appeals, the state constitution provides for an unabrogated right to recovery for injury to reputation and emotional distress, as well as bodily injury. Arizona Supreme Court agreed, and found recovery under the state constitution not limited to common law negligence actions).

Thoroughbred Racing Association v. Capra, 787 F.2d 463, 12 Med.L.Rptr. 2006 (9th Cir. 1986), cert. denied, 55 U.S.L.W. 3425 (12/16/86, No. 86-238) (Ninth Circuit had reversed the district court's grant of summary judgment for defendant racing association in an invasion of privacy action holding
that a reasonable jury could find that the racing association's press release, revealing true identities of a family under federal witness protection, was not newsworthy.

WKRG-TV, Inc. v. Wiley, (unpublished opinion), cert. denied, 55 U.S.L.W. 3569 (2/24/87, No. 86-945) (Alabama Supreme Court had held that TV station does not have a First Amendment right to repeat false statements made at a public meeting on a matter of public concern even when defendant does not concur or espouse defamation).

II. Media Defendants -- Favorable Decisions Left Standing (11)


Della-Donna v. Gore Newspapers Co., 489 So.2d 72, 12 Med.L.Rptr. 2310 (Fla. D.C.A. 4th 1986), cert. denied (2/23/87), 55 U.S.L.W. 3569 (2/24/87, No. 86-929) (Florida Court of Appeals had found attorney who served as a trustee governing disbursement of $14.5 million gift, and who voluntarily placed himself in the center of the public controversy surrounding it, a limited public figure, and affirmed Florida circuit court's grant of summary judgment for defendant).

Faloona v. Hustler Magazine, Inc., 779 F.2d 1000, 13 Med.L.Rptr. 1353 (5th Cir. 1986), cert. denied, 55 U.S.L.W. 3569 (2/24/87, No. 86-959) (Fifth Circuit had affirmed district court's grant of summary judgment on the ground that sexually explicit magazine's publication of nude
photographs of children, as part of legitimate review and excerpt from serious educational text, did not constitute public disclosure of private facts or commercial appropriation).

Fisher v. Copley Press (unpublished; appeal dismissed summarily) [summarized in 55 U.S.L.W. 3482], 55 U.S.L.W. 3472 (1/13/86, No. 86-799) (California Court of Appeals had found public official plaintiff failed to comply with requirements of state retraction statute and that sufficient evidence was presented for a reasonable jury to find that allegedly defamatory statements were true).

Guccione v. Hustler Magazine, Inc., 800 F.2d 298, 13 Med.L.Rptr. 1316 cert. denied, 55 U.S.L.W. 1316 (2/24/86, No. 86-1093) (Second Circuit had reversed judgment for plaintiff in the amount of $1 compensatory and $1.6 million punitive damages, and trial court's denial of defendant's motion for judgment n.o.v. and new trial, holding that libel claim failed as a matter of law because the statement at issue was substantially true and because this public-figure plaintiff was "libel-proof" with respect to an accusation of adultery).

Kerr v. El Paso Times, 706 S.W.2d 797 (Tex. Ct. App., 8th District), cert. denied, 55 U.S.L.W. 3643 (3/24/87, No. 86-1192) (Texas Court of Appeals had reversed District Court judgment for plaintiff awarding actual and exemplary damages, finding as a matter of law that article appearing in newspaper's editorial section that contained reference to U.S. Attorney's "cheating" during trial was a statement of opinion protected by the First Amendment since the word "cheating" has several colloquial meanings, and because no particular act of cheating was identified).

Machleder v. CBS, Inc., 801 F.2d 42, 13 Med.L.Rptr. 1369 (2nd Cir. 1986), cert. denied, 55 U.S.L.W. (2/24/87, No. 86-931) (Second Circuit had reversed million-dollar false light privacy judgment against media defendant on the ground that the broadcast portrayal of plaintiff refusing to be interviewed was neither "substantially false" nor "highly offensive," as a matter of law).

McCoy v. Hearst Corp., 42 Cal.3d 835, 231 Cal.Rptr. 518, 727 P.2d 711, 13 Med.L.Rptr. 2169, cert. denied, 55 U.S.L.W. 3746 (5/5/87, No. 86-1336) (California Supreme Court had reversed jury verdict awarding compensatory and
punitive damages, finding the record taken as a whole did not support finding of actual malice because, in public official's defamation action, neither investigatory failures, negligence, nor proof of publisher's ill will or lack of objectivity, will necessarily deprive even defamatory falsehood of privileged status).

Wanless v. Rothballer, 115 Ill.2d 158, 13 Med.L.Rptr. 1849 (Ill. 1986), cert. denied (6/16/87), 55 U.S.L.W. 3837 (6/16/87, No. 86-1740) (Illinois Supreme Court had affirmed reversal by Illinois Appellate Court of judgment awarding compensatory and punitive damages due to plaintiff's failure to present clear and convincing evidence by which actual malice could be found).

III. Non-Media Defendants -- Unfavorable Decisions Left
Standing (1)

Iowa Beef Processors, Inc. v. Bagley, 797 F.2d 632, 13 Med.L.Rptr. 1113 (8th Cir. 1986), cert. denied, 55 U.S.L.W. 3569 (2/24/87, No. 86-956) (Eighth Circuit had refused to grant Iowa Beef Processors absolute immunity based on common law privilege extending to statements made in the course of legislative proceedings, and had allowed damages for tortious interference with future employment, even though libel was not proved).

IV. Non-Media Defendants -- Favorable Decisions Left
Standing (1)

Bagley v. Iowa Beef Processors, Inc., 797 F.2d 632, 13 Med.L.Rptr. 1113 (8th Cir. 1986), cert. denied, 55 U.S.L.W. 3569 (2/24/87, No. 86-921) (Eighth Circuit (en banc) had reversed trial court's libel judgment against the defendant and remanded on the grounds that plaintiff had the burden of proving the falsity of the statements and defendant's fault. The Court found that the punitive damages awarded by the jury did not reasonably indicate a finding of falsity and to recover presumed or punitive damages, plaintiff would have to prove defendant's actual malice by clear and convincing evidence).
V. Media Defendants -- Review Granted, Unfavorable Decision Below (1)

Hustler Magazine, Inc. v. Falwell, below, Falwell v. Flynt, 797 F.2d 1270, 55 U.S.L.W. 2098, 13 Med.L.Rptr. 1145 (4th Cir. 1986), review granted, 55 U.S.L.W. 3661 (3/30/87, No. 86-1278) (Fourth Circuit had upheld the jury verdict against media defendant on the ground that District Court finding that a literal finding of knowing falsity or reckless disregard for truth is not required in an action for intentional infliction of emotional distress and that the jury's finding that the publication constituted intentional or reckless misconduct which proximately caused injury to the plaintiff was sufficient).

VI. Petitions Filed But Not Yet Acted Upon (4)

Non-Media Defendants -- Unfavorable Decision Below (1)

International Brotherhood of Teamsters, Local 690 v. Caruso, 107 Wash.2d 524, 730 P.2d 299, cert. filed, 55 U.S.L.W. 3714 (4/21/87, No. 86-1619) (Washington Supreme Court (en banc) had affirmed Superior Court's judgment for plaintiff on the ground that where the jury found that defendant acted with malice, the jury instruction which wrongfully suggested that defendant had the burden of proving non-abuse of qualified privilege was harmless error).

Media Defendants -- Unfavorable Decisions Below (2)

Blatty v. New York Times Co., 42 Cal.3d 1033, 728 P.2d 1177, 232 Cal.Rptr. 542, 13 Med.L.Rptr. 1928 (Cal. 1985), 55 U.S.L.W. 2360, cert filed, 55 U.S.L.W. 3794 (5/8/87, No. 86-1803) (California Supreme Court had reinstated dismissal of a claim for "intentional interference with prospective economic advantage," and closely related causes of action, on the ground that such claims are subject to First Amendment requirements and that plaintiff's action, based on exclusion from a bestseller list, fails under the First Amendment because the publication was not "of and concerning" the plaintiff).
Montgomery Publishing Co. v. Gant, 521 A.2d 920 (Pa.), cert. filed 5/28/87, 55 U.S.L.W. 3855 (6/23/87) (Pennsylvania Supreme Court had affirmed, without opinion, appellate court's reversal of summary judgment for the defendant which determined that under the state's defamation statute falsity is presumed and defendant has the burden of proving truth and that plaintiff did not admit to truth of any reasonable inferences that might have been drawn from the defendant's article).

Media Defendants -- Favorable Decision Below (1)

President Reagan's seriatim nominations of Judges Robert H. Bork, Douglas H. Ginsburg and finally Anthony M. Kennedy, to fill the seat of retired Justice Lewis F. Powell on a closely-divided Supreme Court, were opposed or at least questioned by civil liberties and civil rights groups representing many different constituencies. These groups saw confirmation of one or another of these nominees as potentially tipping the current precarious balance on the Court, thereby threatening a reversal of developing constitutional protections in a variety of fields. Among other issues, some of these opponents expressed concern over the nominees' views on First Amendment matters. In order to evaluate these concerns, LDRC has systematically undertaken to analyze the records of each nominee as regards libel and related issues.

It is clear that Judge Bork's approach to a variety of highly controversial issues in the field of individual and civil liberties could reasonably have been viewed as threatening a significant change in current Supreme Court doctrine had his ascension to the Court lead to a shift in the Court's current balance on those issues. However, LDRC's review of Bork's record on the District of Columbia Circuit Court of Appeals, and of his other pertinent scholarly writings and testimony before the Senate Judiciary Committee, suggests that no adverse change in the Court's current approach toward media libel matters would likely have ensued. Indeed it is fair to suggest, as elaborated below, pages 62-67, that Judge Bork's votes on the Supreme Court in this area -- the concerns of civil liberties groups notwithstanding -- might well have been more favorable to the pro-First Amendment position on those issues than the votes of Justice Powell.*

* In assessing the potential impact of any of President Reagan's nominees to replace Powell on the Supreme Court it is, needless to say, necessary to bear in mind where Justice Powell stood on libel and related issues. Powell was, of course, the author of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), a 5
As to the ill-fated candidacy of Judge Ginsburg, his nomination was never even formally presented to the Senate Judiciary Committee. To the extent that it remains of even passing interest, Ginsburg's record on libel and related matters is notably sparse and does not appear to deal with any significant media libel issues. In his brief tenure on the D.C. Circuit, Ginsburg has written only one opinion touching only tangentially on claims of defamation and invasion of privacy. In *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826 (D.C. Cir. 1987), a non-media case primarily involving an employment dispute, Ginsburg held that plaintiff's defamation and invasion of privacy claims related to his job performance and were therefore properly subject to arbitration under the terms of an employment contract. Ginsburg also joined an opinion ordering additional discovery on the issue of the District of Columbia's long-arm

Footnote continued --

to 4 decision not wholly favorable to the media, with current Justices Marshall, Blackmun and Rehnquist joining Powell (Blackmun filed a concurring opinion) and with Brennan and White dissenting, Brennan on the grounds of his plurality opinion in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) and White because he opposed broad constitutionalization of state libel law. In *Cantrell v. Forest City Publishing*, 419 U.S. 245 (1974), Powell joined with the majority in upholding a false light defamation action under the standards laid down in *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), Powell voted with the majority in overturning a Georgia statute imposing civil liability for truthfully publishing the name of a rape victim that is part of a public record, but filed a separate concurring opinion arguing that *Gertz* required constitutional recognition of truth as a complete defense to a libel action. In *Herbert v. Lando*, 441 U.S. 153 (1979), Powell voted with the unfavorable majority position but again filed a separate concurring opinion, arguing that in a libel action by a public figure trial courts should carefully consider First Amendment interests in weighing and supervising the plaintiff's discovery requests. Powell joined the unfavorable majority decisions, without separate opinion, in *Hutchinson v. Proxmire* ("non-media" action), 443 U.S. 111 (1979) (including notorious footnote 9 regarding summary judgment) and in *Wolston v. Readers Digest*, 443 U.S. 157 (1979). Powell also joined in the Court's unfavorable jurisdiction rulings in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984) (per Rehnquist, J., unanimous decision,

In his twelve years on the Ninth Circuit Court of Appeals, Judge Kennedy has amassed a far more extensive record of judicial opinions than Judge Ginsburg, or even Judge Bork, who has served on the D.C. Circuit since 1982. However, Judge Kennedy has decided few libel cases and, in contrast to Judge Bork, those cases have not broadly illuminated the probable direction of Kennedy's libel opinions on the Supreme Court should -- as now appears a certainty -- his nomination be confirmed. In large part this is reflective of Judge Kennedy's conservative judicial style -- his cases are almost always decided on a tight, narrow reading of the applicable law and are based on careful adherence to precedent, with little of the wide-ranging commentary often employed by Bork. Consequently, it is difficult to reach a firm conclusion as to whether Kennedy's confirmation might or might not shift the current balance on the Court, in terms of First Amendment and libel issues. Nonetheless, what limited evidence exists regarding Judge Kennedy's positions on libel and related matters commands consideration -- see pages 67-71, infra.

---

Footnote continued --

Bork and Libel

As noted, Judge Bork's judicial record on libel issues has consistently been highly favorable from the media's point of view. Indeed, although Bork has written only two major libel opinions on the Court of Appeals, those two opinions adopt an approach exceptionally protective of First Amendment interests on a wide range of key substantive and procedural issues in the libel field. Without apparent reservation, Bork accepted all of the applicable constitutional doctrines developed by the Supreme Court in the libel field from New York Times v. Sullivan to Bose v. Consumers Union.

Beyond his general acceptance of these governing doctrines, Bork has also recognized and expounded upon the overriding need for expansive protections in the libel field due to the many practical problems that arise in such litigation -- including those documented by LDRC in its various empirical studies -- that may hinder the protection of First Amendment rights and that may "chill" the free and vigorous exercise of those rights. Indeed, perhaps surprisingly for someone generally viewed as an advocate of "judicial restraint," Bork has passionately argued against a "crabbed interpretation" of the First Amendment. As regards libel, Bork has urged that the protections of Sullivan be "evolved" and "expanded" where necessary to ensure protections that are sufficient in today's circumstances and that will assure the continued effectiveness of constitutional doctrines in preventing the "chilling effects" of libel litigation. In fact, in his leading opinion, Bork went so far as to suggest that, in light of recent developments, Sullivan and its progeny have not been sufficiently protective and that Sullivan itself should be further expanded in order to prevent the abridgement of First Amendment rights in this field.

The discussion that follows reviews Judge Bork's libel opinions and views; a following section then reviews those of Judge Kennedy. This discussion does not examine Bork's arguably less favorable attitudes toward other First Amendment-related issues, such as freedom of information or obscenity, except to the extent they portend certain limitations on his willingness to protect the media's First Amendment interests with regard to libel and closely related issues, such as privacy, emotional distress, etc.

Judge Bork has ruled on four libel cases in his five-year tenure on the Court of Appeals. He wrote the majority opinion in three
of those cases and also wrote a very important concurring opinion in one other case. Of these four libel cases, two involved rather narrow procedural issues not highly relevant to an assessment of Bork's broader views on significant substantive libel issues.* The other two of Bork's libel cases are of far greater significance, addressing as they do a virtual laundry list of the key issues of concern to the media today in the libel field.

The first of these two cases, and by far the lesser known, is McBride v. Merrell Dow, Inc., 771 F.2d 1460, 9 Med. L. Rptr. 2225 (D.C. Cir. 1983). In McBride, writing for an unanimous panel, Bork sustained the district court's order summarily dismissing two counts of an alleged defamation as "frivolous," but he reversed and remanded a third count, that had also been dismissed by the lower court. Bork held that summary judgment on that count deprived the plaintiff of an opportunity to prove his claim that the alleged defamation was a "deliberate falsehood" under the "actual malice" test in New York Times v. Sullivan.

Despite this failure entirely to dismiss the defamation claims in McBride at the summary judgment stage, Bork's opinion was nonetheless quite favorable on a number of key issues, including the dangers of libel litigation, the need for summary judgment, and the importance of limiting and controlling discovery. In McBride, Bork rejected as "frivolous" and "verging on the preposterous" a damage claim for describing an attorney linked to the plaintiff as "flamboyant." Such a claim, Bork held, could not be construed as defamatory. The publication of these and other remarks made by the plaintiff before a government investigatory panel, was also not actionable, according to Bork, as no claim was asserted that sought to prove the reporting was inaccurate. The reporting, Bork added, might have been

* These two procedural cases, not discussed further herein, were Moncrief v. Lexington Herald-Leader, 807 F.2d 217, 13 Med. L. Rptr. 1762 (D.C. Cir. 1986) (federal district court in District of Columbia did not have personal jurisdiction, under the District's long-arm statute, over a publisher who sent allegedly libelous newspaper articles into the District), and McLaughlin v. Bradlee, 803 F.2d 1197 (D.C. Cir. 1986) (collateral estoppel barred relitigation of decided issues involved in the fourth in a series of lawsuits arising from same series of events).
protected nonetheless under a separate District of Columbia statute immunizing from liability the reporting of official proceedings.

Finally, even as to the claim Judge Bork reinstated, his approach to subsequent proceedings on remand sought to assure that this claim would not be used by the plaintiff to "harass the press or coerce them into settlement." To this end, Bork suggested that the lower court dispose of claims -- particularly frivolous ones involving "public officials" or "public figures" -- in summary proceedings by "limiting discovery initially to the extent feasible to sustain summary judgment because of the potential threat to First Amendment freedoms." 9 Med. L. Rptr. at 2230.

The second of Judge Bork's major libel opinions, Ollman v. Evans, 750 F.2d 970, 11 Med. L. Rptr. 1433 (D.C. Cir. 1984) (en banc) (concurring opinion), and the case that was widely cited as indicating Bork's generally favorable approach from the media's point of view is, upon analysis, even more favorable to the media than perhaps previously recognized on a host of key issues -- including not only constitutional standards for the protection of opinion, but also the "chilling effect," damages, and the proper role of judge and jury in media libel actions. Thus, among other points, Bork's concurring opinion in Ollman touched favorably upon at least the following issues:

1. Bork expressed strong criticism of defendant's $1 million compensatory damage claim and $5 million punitive damage claim as disproportionate to any alleged injury and as "capable of silencing political commentators forever." 11 Med. L. Rptr. at 1454.

2. Bork expressed concern that the trend in tort law favoring compensation for injuries has shifted to libel law, and that the "chilling effect" of a surge in libel claims and the inflation of damage awards could well lead to an undesirable form of self-censorship. Id. at 1456.

3. Bork reaffirmed the principle in Sullivan and its progeny that the press must be free to enter into political commentary and criticism of government officials or public figures without fear of defamation actions. Id. at 1454.

4. Bork argued for an expansive view of "public figures" to include anyone who places themselves into a
"political arena" in which "heated discourse is to be expected," Id. at 1460, and suggested that those who step into such an arena must be willing to bear criticism, disparagement, and even wounding assessments. Id. at 1453.

Bork criticized the judiciary's failure categorically to reject libel claims in actions involving political disputes as inconsistent with the First Amendment, where the purpose of the suit is to punish the press or is based largely on factors such as compensation for psychological anguish. Id. at 1454.

Bork said that Sullivan did not go far enough in protecting the media from new threats to press freedom and that close judicial scrutiny is necessary to insure that cases involving speech or writing "essential to a vigorous First Amendment" do not reach the jury if they involve issues "inherently unsuceptible to accurate resolution by a jury" such as balancing in the First Amendment. Id. at 1456.

Bork further questioned the role of juries in libel actions by suggesting that certain libel cases be kept from the jury altogether and where a questionable jury verdict has been reached, he strongly reaffirmed the need for strict appellate review. Id. at 1456.

Bork acknowledged the need to extend established First Amendment values to respond to new challenges and new circumstances not foreseen by the constitutional framers. Id. at 1455.

Bork suggested that even where statements might have been made with actual malice, they may still be protected as opinion by the First Amendment if they appear in a context that should alert readers that they are not to be treated as factual allegations, such as those appearing within the "Op/Ed" pages of a newspaper, which often contain highly controversial expressions or opinions. Id. at 1467.

Despite this superior record in the libel cases Bork actually decided as a member of the Court of Appeals, some critics have questioned Bork's earlier academic writings on general First
Amendment theory, which suggested a notably more narrow view of the scope of First Amendment protection beyond a quite limited range of "core" political activities. Thus, in perhaps the most extreme statement of his "minimalist" First Amendment theory, Bork wrote that only "explicitly political" speech should be accorded constitutional protection and that there was no principled basis for protecting any other form of expression, including that which is scientific, educational, commercial, or literary, or even those forms of political expression that advocate the violation of laws or the forcible overthrow of the government, even if such reasoning departs drastically from decades of constitutional interpretation.*

Nonetheless, LDRC's careful analysis of this early theory, contrasted with Bork's later statements on the same issues, including his judicial opinions and his testimony during the current Senate confirmation hearings, suggest that whatever lingering effects might arguably remain from Judge Bork's early theories have not in any way been visible in his judicial opinions on libel issues and, based on the strength of those opinions, would not appear likely to affect his rulings in the mainstream of future media libel actions.

In only one area are there any potential lingering effects of Bork's early writings articulating a narrow ambit for First Amendment protection that might have portended some potential problems for the media's First Amendment interests. This would not likely have been felt in core libel cases such as those that would most directly affect the media in its normal operations, but could potentially have been evidenced in certain fringe areas as one moved farther and farther away from the core of establishment media and public expression. Thus, for example, Bork at his confirmation hearings continued to express his inclination broadly to deny First Amendment protection to pornography and obscenity. This includes support by Bork for such marginal obscenity cases denying constitutional protection as F.C.C. v. Pacifica, 438 U.S. 726, 2 Med. L. Rptr. 1465 (1978) (upholding an FCC order that restricted the time of day which a radio station could broadcast "indecent" language); and criticism by Bork of such cases as Cohen v. California, 403 U.S.

---

* Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, No. 1 (1971).
Bork thus placed obscenity and pornography outside the sphere of constitutional protection as they are "not central to a democratic government" and are intended only for an individual's "gratification," and are thus subject to regulation or prohibition by a simple legislative majority who "foresees its continued availability as affecting the quality of life for those who do not want it," 47 Ind. L. J. at 29. As a result, despite his highly favorable views on core libel cases, it is not entirely clear how Bork would have come out in deciding, for example, issues on the fringe between libel and pornography. The case of Falwell v. Hustler, 796 F.2d 1148, 13 Med. L. Rptr. 1145 (4th Cir. 1986), if Bork had been confirmed, would have represented an excellent litmus test of whether Bork's favorable views on core libel issues would have been expanded to protect all speakers from the "chilling effects" of libel or related tort claims or, on the other hand, whether Bork's less protectionist views as to fringe First Amendment activities would somehow have carried back to limit libel protections in ways that could have been harmful to more establishment media.

Kennedy and Libel

The opinions of Judge Kennedy, spanning 12 years on the Court of Appeals, also touch upon a number of the issues of direct concern to the media such as slander, newsgathering rights, and emotional distress. These opinions, carefully drawn and narrowly tailored to answer only the question before the court, suggest Kennedy is much more the practitioner of "judicial restraint" than was Bork. Though most of Kennedy's decisions on issues relating to the media, as detailed below, have held for the media, his reliance on precedent and on disposing of issues on a case-by-case basis, coupled with the fact that most of his cases involved issues as to which the Supreme Court had already set forth clear rules, does not offer a clear indication of either his current views or his probable future positions in this field.

Judge Kennedy has written only one media libel opinion in twelve years on the Court of Appeals. In that case, Church of Scientology v. Adams, 584 F.2d 893, 4 Med. L. Rptr. 1986 (9th Cir. 1978), Kennedy affirmed the dismissal of an action for libel against a media defendant for failure to establish personal jurisdiction. The result of that case was favorable.
from the media's point of view. However, in Church of Scientology Judge Kennedy questioned the "soundness" of the then-developing doctrine of special First Amendment protection for the media from the imposition of out-of-state personal jurisdiction. Such protections had been recognized by the Fifth Circuit in a line of cases, but had also been rejected or not considered in other Circuits. In questioning this new First Amendment-based doctrine, Kennedy's rationale was notable not only in its rejection of additional protection for the media, but also in its foreshadowing of the dichotomy between so-called "procedural" and so-called "substantive" First Amendment protections later developed by the Supreme Court in Calder v. Jones, supra, where Justice Rehnquist argued that:

"to reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws."

According to Judge Kennedy, in strikingly similar language six years earlier:

"We observe that first amendment protections are better developed in the context of substantive defenses on the merits rather than at the initial jurisdictional stage of a defamation proceeding." 4 Med. L. Rptr. at 1990.

Whether Church of Scientology signals that Judge Kennedy will place himself within the Rehnquist camp, in a grudging approach to a range of First Amendment libel issues, is simply impossible to say. However, this opinion must be considered of concern at least to the extent that it represents -- as did Calder and related Supreme Court developments -- a lost opportunity to expand First Amendment protections for the media in the libel field. Given Kennedy's limited record on libel issues, it must remain to be seen just how expansive or regressive Judge Kennedy will be when presented with the opportunity as a Supreme Court Justice affirmatively to move constitutional libel law in one direction or another on a range of issues currently undecided.

The only other defamation case in which Kennedy has written an opinion is Koch v. Goldway, 817 F.2d 507 (9th Cir. 1987), a non-media slander action in which the Ninth Circuit affirmed grant of the defendant's motion for summary judgment. The case is of significance for its discussion of the issue of
constitutional protection for "opinion." In Koch, the plaintiff was a prominent opponent of rent control and the defendant was the former mayor of Santa Monica. On a nationwide 60 Minutes broadcast plaintiff had linked defendant with "communists." Defendant, in a talk before a small number of persons in someone's home, responded in kind by sarcastically linking plaintiff to a Nazi war criminal of the same name.

In analyzing plaintiff's claim, Judge Kennedy began by accepting that the controlling issue was whether defendant's statement was one of fact or opinion. Demonstrating the cautious nature of his analytical technique, Kennedy first considered whether the case could be determined under state law before adverting to constitutional principles. He found, however, that California cases had treated the state's fair comment doctrine as largely superceded by Gertz's constitutional protection for opinion. Following this approach, and accepting the Ninth Circuit's pre-existing line of opinions under Gertz, as well as those of other Circuits, Judge Kennedy read the alleged defamation pragmatically in context and found that the statement was clearly opinion, also citing Greenbelt, Pring and the Restatement. According to Kennedy, no one could have believed that defendant was stating as a fact that plaintiff was the Nazi war criminal. Thus, according to Kennedy, "[t]he law of defamation teaches" that even a "vicious slur" must be "endure[d by society] without redress from the courts. Base and malignant speech is not necessarily actionable." In the same fashion, Judge Kennedy affirmed summary judgment on the related intentional infliction of emotional distress claim, since even "reprehensible" commentary, "rudeness and bad taste . . . are not so uncommon in American politics that the statement reached the level of conduct necessary to state a claim for . . . emotional distress." This latter holding is worth noting, given the pendency of the Falwell v. Hustler case before the Supreme Court.

In addition to the two libel and slander opinions which he authored, Judge Kennedy sat on two other panels which considered defamations claims, but both were asserted in the non-media context and both were disposed on grounds unrelated to significant issues of defamation law. In Rhinehart v. Stauffer, 638 F.2d 1169 (9th Cir. 1979), Judge Kennedy joined a panel decision upholding dismissal of an individual's private defamation claim as frivolous under Federal Rule 11, based on the failure of plaintiff's lawyer to discuss the case with his client or make any preliminary investigation of the merits of the claim. In La Montagne v. Craig, 817 F.2d 556 (9th Cir.
1987), a private libel claim between a merchant marine officer and the ship's chief engineer was dismissed for lack of federal admiralty jurisdiction.

In the non-defamation area, perhaps the two most significant First Amendment opinions authored by Judge Kennedy, involving the media, were in the areas of "prior restraints" and "access." In Goldblum v. NBC, 584 F.2d 904, 4 Med. L. Rptr. 1718 (9th Cir. 1978), Kennedy vacated a district court's orders requiring NBC to produce a film for court inspection prior to broadcast and jailing NBC's counsel for contempt for refusing to turn over the film. As Judge Kennedy noted:

"The express and sole purpose of the district court's order to submit the film for viewing by the court was to determine whether or not to issue an injunction suspending its broadcast. Necessarily, any such injunction would be a sweeping prior restraint of speech and, therefore, presumptively unconstitutional." 4 Med. L. Rptr. at 1720

Kennedy found that the underlying claim for an injunction, based essentially on alleged adverse pretrial (and pre-parole) publicity, was frivolous and that the order was void. "A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech." Finally, in language made more significant in light of the pending prior restraint/contempt issues in In re Providence Journal, 55 U.S.L.W. 2377, 13 Med. L. Rptr. 1945 (1st Cir. 1986), Kennedy noted:

"A broadcaster or publisher should not, in circumstances such as those in this case, be required to make a sudden appearance in court and then to take urgent measures to secure appellate relief, all the while weighing the delicate question of whether or not refusal to comply with an apparently invalid order constitutes a contempt." Id.

Kennedy's major access decision was CBS v. U.S. District Court, 765 F.2d 823, 11 Med. L. Rptr. 2285 (9th Cir. 1985). In that case CBS sought to obtain access to documents that had been sealed in connection with aspects of the DeLorean criminal trial, specifically a motion by a key government witness to reduce his sentence. In a brief but significant opinion Judge Kennedy appears to embrace the underpinnings of the Supreme Court's recent line of access and open courtroom decisions:

"We begin with the assumption that the public and the press have a right of access to criminal proceedings and documents filed therein. The right of access is grounded
in the First Amendment and in common law and extends to documents filed in pretrial proceedings as well as in the trial itself." 11 Med. L. Rptr. at 2286

And Kennedy continued:

"The interest which overrides the presumption of open procedures must be specified with particularity, and there must be findings that the closure remedy is narrowly confined to protect that interest." Id.

Finally, Kennedy eloquently stated the underlying principles at stake in ordering the requested access:

"The penal structure is the least visible, least understood, least effective part of the justice system; and each such failure is consequent from the others. Public examination, study, and comment is essential if the corrections process is to improve. Those objectives are disserved if the government conceals its position on so critical a matter as the modification of a felony sentence in a celebrated case.

"In the matter presented here, the interests asserted by the defendant and the government do not override the presumption of openness that is at the foundation of our judicial system." Id. at 2287.

Conclusion

It is an ironic but inescapable conclusion that it is Robert Bork, the nominee defeated for his perceived regressiveness on civil rights and civil liberties issues, who of President Reagan's three nominees had the clearest record of likely support for the First Amendment, at least in the area of media libel and related claims. This is not to say that Anthony Kennedy might not turn out to be favorably inclined to the media's positions in this field -- indeed, there is evidence which suggests he may. And it is certainly not to say that Kennedy's record provides a basis for concluding that his accession to the Court will somehow tip the balance on libel in an adverse direction. It is simply that Bork had a proven favorable record on libel issues -- and a judicial record of aggressive leadership in this area. On the other hand, Kennedy's record here, as in many areas, is sparse and thus must leave media pundits and headcounters in a state of uncertainty as to his likely future course on these issues as an Associate Justice of the United States Supreme Court.