# LDRC BULLETIN

1994 Issue No. 4  
October 31, 1994  
ISSN 0737-8130

## SYNOPSIS OF CURRENT MEDIA LIBEL AND PRIVACY LAW DEVELOPMENTS

### INTRODUCTION

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(As Reported in the LDRC 50-STATE SURVEY 1994-95)

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INTRODUCTION

LDRC has just published the eleventh annual volume of its 50-STATE SURVEY of current developments in media libel and invasion of privacy law. (For the convenience of those BULLETIN readers interested in obtaining the 1994-95 SURVEY, but who have not yet done so, an order form is appended to this BULLETIN.)

The 50-STATE SURVEY presents a thorough and wide-ranging compendium of libel and privacy law — in the new volume, covering developments through August 1, 1994. As always, the SURVEY is well indexed, new developments are highlighted and the status of key issues is charted. However, given its comprehensive approach, the 1000-plus page volume is most useful as a reference tool rather than a quick summary of recent developments. For this reason, and for the enlightenment of BULLETIN readers, in this issue we renew an annual feature of the BULLETIN discontinued some years ago, of summarizing the most newsworthy "key findings" of the 50-STATE SURVEY.

In Parts I and II below, we reproduce those brief sections of the SURVEY, written by our state preparers, summarizing the preparer's presentations of "significant new developments," in the states between July 1, 1993, and August 1, 1994 (Part I), and in the circuits between 1989 and 1994 (Part II). In Part III, LDRC staff has then prepared, based on the entire 50-STATE SURVEY, a status report — by issue — on key findings of the SURVEY, along with a brief summary of new cases reported on each issue reviewed. Part III, in effect, represents the state of the art on each of the issues summarized, through August 1, 1994, as compiled from the LDRC 50-STATE SURVEY 1994-95.

I. SIGNIFICANT NEW DEVELOPMENTS IN THE STATES,
July 1, 1993—August 1, 1994
(As Reported in the LDRC 50-STATE SURVEY 1994-95)

ALABAMA

The decision of Kelly v. Arrington, 624 So.2d 546 (Ala. 1993) ruled in effect that accusing a prosecuting attorney with what amounts to illegal and unethical conduct was not capable of a defamatory meaning as a matter of law. This very strong pro-defense case was a welcome sign after a decision earlier in 1993 which had allowed what appeared to be a weaker case to go to trial.

ARIZONA

In October 1993, the Arizona Court of Appeals adopted the Restatement's qualified privilege for communications made to public officials concerning matters that affect the discharge of their duties. Lewis v. Oliver, 843 P.2d 668 (Ariz. App. 1993) (adopting Restatement (Second) of Torts § 598 (1977)). In Lewis, the court held that a complaint made
to the superiors of a safety inspector of the Federal Aviation Administration was conditionally privileged. The court also held that an FAA inspector is a public official. Lewis, 873 P.2d at 675. The Lewis court, however, reversed the grant of summary judgment for defendant because it found four factors created a factual dispute over whether defendant acted with actual malice in complaining about plaintiff to his superiors: (1) defendant told a third person he was "out to get" the plaintiff; (2) defendant continued to accuse the plaintiff of perjury and abuse of office after defendant learned an FAA investigation had "exonerated" plaintiff of defendant's charges; (3) there was evidence of defendant's "past vindictiveness" to critics of his company; and (4) plaintiff knew that his company had a history of the same safety problems the plaintiff had reported. Lewis, 873 P.2d at 675-76. In May 1994, the Arizona Court of Appeals affirmed the dismissal of a defamation claim against two state agencies concerning allegations of child sexual abuse against a preschool director. Carroll v. Robinson, 874 P.2d 1010 (Ariz. App. 1994). The Court held that the state agencies and their employees were protected by a qualified governmental immunity for discretionary administrative actions. Id. For the second straight year, an Arizona appellate court has held that evidence of ill will can constitute actual malice. See Currier v. Western Newspapers, Inc., 175 Ariz. 290, 855 P.2d 1351 (1993) and Lewis v. Oliver, 873 P.2d 668 (Ariz. App. 1993). The dissents in both Currier and Lewis have noted that these cases conflict with New York Times v. Sullivan and its progeny. In his dissent in Lewis, Judge Edward G. Noyes, Jr. correctly noted that the Arizona Supreme Court in Currier misapplied Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989), to hold that evidence of ill will could constitute actual malice. "To say that evidence can be relevant to actual malice is not to say that it can be clear and convincing proof of actual malice. For our purposes, the proposition for which Currier cites Harte-Hanks is not nearly as instructive as other language directly from Harte-Hanks: 'It also is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term. Harte-Hanks, 491 U.S. at 666, 109 S. Ct. at 2685 (citations omitted).'" 873 P.2d at 678.

CALIFORNIA

In recent years, the California Supreme Court has accepted, for review, very few defamation or privacy cases against the media. The two cases it has reviewed resulted in decisions adverse to the media's position. In one, the Court adopted a negligence standard for private plaintiffs in defamation actions. Brown v. Kelly Broadcasting Co., 48 Cal. 3d 711, 742, 257 Cal. Rptr. 708, 711 P.2d 406 (1989). In the other, the Court held that, although a correction demand must usually be served on the publisher, service upon the editor is sufficient when the publisher has actual notice at or about the same time as the editor and if the publisher has delegated authority to the editor to respond to the notice. Freedom Newspapers v. Superior Court, 4 Cal. 4th 652, 842 P.2d 138 (1992). However, the Court has, for the most part, rigorously applied the privileges set forth in Civil Code § 47(b). See Moore v. Conliffe, 7 Cal. 4th 634, 29 Cal. Rptr. 2d 152 (1994), Rubin v. Green, 4 Cal. 4th 1187, 17 Cal. Rptr. 2d 828, 847 P.2d 1044 (1993), and Silberg v. Anderson, 50 Cal. 3d 205, 266 Cal. Rptr. 638, 642, 786 P.2d 365 (1990). But see Kimmel v. Goland, 51 Cal. 3d 202, 271 Cal. Rptr. 191, 793 P.2d 524 (1990).
COLORADO

In NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center, ___ P.2d ___, 18 BRIEF TIMES RPTR. 1213 (Colo. 1994), the Colorado Supreme Court reversed the Colorado Court of Appeals (857 P.2d 514) and reinstated the summary judgment for the defendant entered by the trial court. Holding that the defendant's broadcast contained no actionable statement of fact, the Supreme Court embraced the Milkovich test of (1) whether an issue is verifiable, and (2) whether a statement is susceptible to being understood as an assertion of actual fact. The Court also held that Colorado courts would continue to utilize the contextual factors that it had adopted in its pre-Milkovich decision, Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983), to determine whether a statement could reasonably be understood factually: first, the phrasing of the statement and use of terms of apparent fact; second, the entirety of the statement, not just the objectionable word or phrase, and the context in which it appears; third, all the circumstances surrounding the statement, including the medium through which it is disseminated and the audience to whom it is directed. In applying these factors, the Court added, a court should also consider whether the statement implies the existence of undisclosed facts which support it. The Court determined that the statements broadcast by the defendants concerning plaintiff's living will package, "I think it's a scam," "they will send in $29.95, and what they've got back is they've been taken -- is what it amounts to -- totally taken" were both non-verifiable and incapable of being understood factually, because this language merely reinforced the stated (nonverifiable) view that plaintiff's living will package was not worth paying $29.00 for, since the forms necessary for a living will could be obtained elsewhere at little or no cost. The Court emphasized that these statements were based on facts disclosed in the broadcast, with no suggestion they were based on undisclosed information, holding that Milkovich construes protection for statements that are "pure opinion because their factual premises are disclosed." The Court also took a narrow view of the doctrine of defamation by implication, and reversed the Court of Appeals insofar as it held that a jury was entitled to determine whether the defendants' broadcast carried a defamatory implication that the plaintiff lacked any expertise with regard to the forms being sold and that the package "was not worth paying anything for," or the implication that "everything in plaintiff's package worth paying anything for has been fully disclosed during the telecast." Significantly, the Court held that whether allegedly defamatory language is constitutionally privileged as non-factual in nature "is a question of law and a reviewing court must review the record de novo..." The Court also refused to find that the plaintiff was defamed by (1) the false statement that free forms were available from several hospitals, because these statements, even though false, were not defamatory to the plaintiff; (2) the failure of the defendant to describe each separate item in the plaintiff's package which it claimed had value, citing Janklow v. Newsweek, 788 F.2d 1300 (8th Cir. 1986). Three dissenters did not disagree with the majority opinion on the merits, but urged that the trial court should have permitted factual development through discovery (which the trial court had stayed) before ruling upon the motion to dismiss.

In Keohane v. Stewart, ___ P.2d ___, 18 BRIEF TIMES RPTR. 1231 (Colo. 1994), the Court reviewed a damage award in which a jury had found falsity and constitutional malice. The Court applied the (1) verifiability and (2) reasonable susceptibility criteria, as well as the
three contextual inquiries for determining the latter that were embraced in NBC Subsidiary v. Living Will Center. The Court held privileged two letters to the editor which chastised lenient sentencing of a sex offender by an unnamed judge in loose and colorful language that clearly implied bribery and cronyism. The Court reasoned that the statements in the letter were of and concerning the plaintiff and verifiable, but could not reasonably be understood as statement of fact, since the language of the letters indicated speculation and conjecture, the tone signaled invective and rhetorical hyperbole, and the context of the letters indicated that the thoughts expressed were the personal views of the writer based upon knowledge available to the general public. The Court emphasized that the letters appeared in the editorial section, "where intemperate and highly biased opinions" are common, and "absent credentials which make the author particularly credible, often times should not be taken at face value." However, the Court did find actionable as slander per se an oral statement by a city councilperson to a newspaper reporter, "Do you think he was paid off in cash or cocaine?", because this statement clearly implied that the judge had taken a bribe, and carried the reasonable implication that the speaker was basing the comment on firsthand knowledge unavailable to the general public. The opinion contained a statement identical to that in Living Will Center that whether a statement is a one of fact is an issue of law for the court. Finally, the Court recognized that actual damage was a required element of proof in a slander claim by a public figure, but held that the plaintiff had adequately shown actual damage in the form of emotional distress that the plaintiff claimed to have suffered over the fact that these words had been uttered, even though the sole hearer of the remarks disclaimed receiving any defamatory meaning from them.

In Williams v. District Court, 866 P.2d 908 (Colo. 1993), the Supreme Court of Colorado held that interrogatories requesting the name, present address and telephone number, and gender of all persons with whom the plaintiff had, or attempted to have, sexual intercourse for the past five years, as well as the location of all such incidents was relevant to whether plaintiff’s reputation has been harmed by defendant’s publications of plaintiff’s allegedly improper sexual conduct with coworkers. In addition, the Court held as discoverable similar information regarding all employees of the defendant company whom the plaintiff had ever dated, and all individuals the plaintiff had dated within the past five years. However, the Court remanded the case because the trial court failed to determine whether a protective order was necessary according to the criteria set forth in Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

In Henderson v. People, P.2d, 18 BRIEF TIMES RPTR. 1006 (Colo. 1994), the Colorado Supreme Court held that a helicopter-pilot employee of a television station was acting as a "newsperson" under the Colorado Press Shield Law, C.R.S. § 13-90-119 (which applies in libel actions), and not as a police agent, while piloting a police officer over a suspected marijuana field. Moreover, the Court held that information regarding the helicopter’s flight path and altitude constituted "news information" under C.R.S. § 13-90-119(1)(b), and therefore this information was protected by the newsperson’s privilege and not subject to the criminal defendant’s subpoena. Finally, the Court held that the criminal defendant had failed to demonstrate that the privileged information "cannot be obtained through any other reasonable means," see C.R.S. § 13-90-119(4), in order to overcome the newsperson’s privilege because
the information in question was available from the police officer accompanying the newshour in the helicopter.

In Taylor v. Goldsmith, 870 P.2d 1264 (Colo. App. 1994), the Colorado Court of Appeals held that the one-year statute of limitations for actions in defamation, C.R.S. § 13-80-103(1)(a), begins to run from the time when the plaintiff knew, or should have known by the exercise of reasonable diligence, of the defamatory remarks, and not from the date of publication. The Court distinguished Spears Free Clinic & Hospital v. Maier, 128 Colo. 263, 261 P.2d 489 (1953), which had held that a claim for defamation accrued upon the date of publication, on the ground that C.R.S. § 13-80-108(1), which provides that a claim for relief for injury to reputation accrues on the date both the injury and its cause are known or should have been known in the exercise of reasonable diligence, has been enacted since the decision in Spears.

DISTRICT OF COLUMBIA

For several months it looked as if the District's generally favorable view towards media defendants in libel cases had shifted after the D.C. Circuit's decision in Moldea v. New York Times Co., 15 F.3d 1137 [22 Media L. Rptr. 1321] (D.C. Cir. 1994). The panel originally had ruled that the context of a publication -- a book review rather than "hard news" -- was irrelevant to the required analysis of whether the statements of opinion imply provably false facts. Only three months later, in a decision much praised by the media and savaged by its critics, the same panel reversed itself and decided that the context of publication is important in determining whether readers expect to find statements of opinion in what they read. Moldea v. New York Times Co., 22 F.3d 310 [22 Media L. Rptr. 1673] (D.C. Cir. 1994). The Court adopted the following standard for evaluating critical reviews: "The proper analysis would make commentary actionable only when the interpretations are unsupportable by reference to the written work." Id. at 315. Defendants in Braden v. New World Communications, Inc., 22 Media L. Rptr. 1065 (D.C. Super. Ct. 1993) were successful in imposing Rule 11 sanctions on a plaintiff after the grant of summary judgment. The Court found that the plaintiff had no basis in the current law for several of his arguments, and that he had not argued for an extension or modification of existing law. Hopefully this decision will signal a trend and deter unfounded cases.

FLORIDA

In Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Fianagan, 18 Fla. L. Weekly §595 (Fla. 1993), the Florida Supreme Court finally resolved the controversy over whether the statute of limitations for a private libel should begin to run when the defamation was discovered by the plaintiff or when it was "published". The Court settled the conflict by adopting the "publication" rule for all defamation actions. Two justices called for legislative reform of the Florida statutes to provide for a "discovery" rule and a statute of
repose, although they did not appear to believe such reform would be needed in cases involving media defendants. The Third District immediately followed the rule of law announced in Wagner, Nugent by affirming a summary judgment based on the two year statute of limitation having run from publication of the defamatory statement. Rodriguez-Diaz v. Norman, 19 Fla. L. Weekly D63 (Fla. 3d DCA 1993). The Florida Supreme Court also answered a question certified by the Eleventh Circuit U.S. Court of Appeals by ruling that Florida’s absolute privilege from defamation actions for statements and activity that occur in the course of a litigation extends to claims for tortious interference with a business relationship. Levin, Middlebrook, et al. v. United States Fire Insurance Co., 19 Fla. L. Weekly §347 (Fla. 1994).

Four decisions of the intermediate appellate courts reflect continuing confusion and disagreement over the role of various privileges available to libel defendants. In a very important and remarkably aggressive reading of the absolute privilege from defamation actions afforded public officials by Florida libel law, the Fourth District Court of Appeal, in Tucker v. Resha, 19 Fla. L. Weekly D699 (4th DCA 1994) held that highly defamatory statements alleging the plaintiff was connected to organized crime made by the Executive Director of the Department of Revenue to her staff and the Florida Department of Law Enforcement were privileged even though the Plaintiff had run against the Director’s husband for the presidency of the Florida AFL-CIO. The Appellate Court also certified to the Florida Supreme Court the issue of whether the privacy clause of the Florida Constitution could give rise to an action for money damages. Similarly Tookes v. City of Riviera Beach, 19 Fla. L. Weekly D606 (Fla. 4th DCA 1994) affirmed the dismissal by summary judgment of a defamation claim brought against a municipality where it was clear on the face of the complaint that the statements were privileged. But two cryptic opinions reversed dismissals of complaints for failure to state claims which had been granted because the statements appeared to be privileged Dunn-Lackey v. City of Riviera Beach, 18 Fla. L. Weekly D2662 (Fla. 4th DCA 1993); Jackson v. BellSouth Mobility, 18 Fla. L. Weekly D2436 (Fla. 4th DCA 1993). The opinions in each case are so elliptical that it is difficult to determine what the appellate panels had in mind. The former suggests that an allegation that managed employees were acting outside their scope of employment at the time they made the defamatory statement would be enough to defeat a motion to dismiss. The latter suggests that a motion to dismiss based on the business speech privilege can be defeated by an allegation of express malice. The lesson may be that summary judgments are safer vehicles for making claims of privilege than motions to dismiss. Of course, summary judgment proceeds after extensive merit discovery are also much more expensive. Finally, the Third District held in Time Warner, Inc. v. Gadinsky, 1994 WL 316337 (Fla. 3d DCA 1994) that memoranda from the author of an allegedly defamatory news article to his editors to help formulate the response to a retraction demand is privileged from discovery as work product.

GEORGIA

In Cox Enters. v. Thrasher, 264 Ga. 235, 442 S.E.2d 740 (1994), the Georgia Supreme Court reversed the latest of a number of Georgia Court of Appeals decisions holding that truth is a question of fact for the jury. Applying Philadelphia Newspapers v. Hepps, 475 U.S. 767
In 1986, the court unanimously held that a private figure plaintiff bears the burden of proving falsity and that plaintiff's ability to shoulder the burden is properly tested by motion for summary judgment. The court concluded that the subject of the overall article -- sexually transmitted diseases -- was of public concern and rejected the plaintiff's argument that her identity was not; (2) In Macon Telegraph Publishing Co. v. Tatum, 263 Ga. 677, 436 S.E.2d 655 (1993), the Georgia Supreme Court unanimously reversed a Georgia Court of Appeals decision affirming a $100,000 jury verdict for invasion of privacy. The newspaper had identified a woman who had shot and killed an intruder when he attempted to assault her sexually. Police admitted disclosing plaintiff's name but testified that they informed the newspaper that its publication would be illegal; (3) In Multimedia WMAZ v. Kubach, 212 Ga. App. 707, ___ S.E.2d ___ (1994), a badly divided Georgia Court of Appeals reversed itself twice before finally upholding a $500,000 jury verdict against a Macon television station for invasion of privacy. Although the station had promised plaintiff, who suffered from the AIDS virus, that his face would not be identifiable when he appeared on a live call-in show about AIDS, the station initially failed to adequately digitize plaintiff's face, which was briefly recognizable. In its ultimate decision, the court refused to find that plaintiff had waived his right to privacy by having informed as many as 60 people that he had AIDS prior to appearing on air.

HAWAII

In Kroll Associates v. City and County of Honolulu, 833 F.Supp. 802 (D. Haw. 1993), the court held that an investigative firm hired by the defendant city to investigate corruption within the city's municipal bus system was neither a general purpose nor a limited purpose public figure. With regard to the latter issue, the court found the plaintiff had not voluntarily thrust itself into a political controversy over the payment of a bill for the firm's services. In Calleon v. Miyagi, 1994 WL 175721 (Haw. Sup. Ct. May 10, 1994), the court held that the trial court erred in letting the jury decide whether defendant's alleged defamatory statements about plaintiff were privileged. According to the court, whether a defamatory communication is privileged is a question of law; the court must first decide, as a matter of law, whether the privilege attaches. If the court decides that issue in the affirmative, it must so instruct the jury and then let the jury decide whether the privilege has been abused.

ILLINOIS

While the Illinois Supreme Court has not issued a significant libel or privacy decision since Kolegas v. Heftel Broadcasting Corp., 154 Ill. 2d 1, 607 N.E.2d 201 (1992), the federal courts continue to be active in interpreting Illinois libel and privacy law. (1) In Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993), the Seventh Circuit Court of Appeals affirmed summary judgment on public disclosure of private facts and libel claims brought against the author and publisher of a history book which used the stories of "ordinary people"--such as plaintiff--to recount the African-American migration from the south to northern industrial cities. (2) In Desnick v. Capital Cities/ABC, 851 F.Supp. 303, 1994), the court cited Haynes in
affirming recognition of the incremental harm doctrine under Illinois law. (3) Interpretation of the Illinois Eavesdropping Act continues to be a source of judicial debate; in Samos v. United Exposition Service Company, 1993 U.S.Dist. LEXIS 16866 (N.D.Ill. 1993), the court notes a possible trend against the state and federal courts' "one party consent" interpretation of the statute, citing the Appellate Court's decision in People v. Herrington, 252 Ill.App.3d 63, 623 N.E.2d 760 (1993). (4) Finally, Illinois continues to be a leader in recognizing the sanctity of journalists' source material: on the heels of last year's People v. Palacio, 240 Ill.App. 3d 1078, 607 N.E.2d 1375 (1993) (holding the "special witness doctrine" applies to reporters), the Appellate Court in Cukier v. American Medical Ass'n, 630 N.E.2d 1198 (Ill. App. 1994) held the Illinois reporter's privilege applied to the editor of a medical journal, and refused to divest the editor and journal of the privilege.

**LOUISIANA**

The Louisiana Supreme Court decided Sassone v. Elder, 626 So. 2d 345, 22 Med. L. Rptr. 1049 (La. 1993). Sassone is the most significant Louisiana defamation case in recent years. The Sassone court reversed an intermediate appellate decision that had rejected years of Louisiana precedent supporting a special rule favoring summary judgment in defamation case. Instead, Sassone strongly reaffirms the special burden that defamation plaintiffs face in opposing motions for summary judgment and explicitly distinguishes this burden from the lesser burden to be met by plaintiffs in ordinary civil actions. In Sassone, the Supreme Court also revisited the subject of implied defamation for the first time since 1981, when the Court held in Schaefer v. Lynch, 406 So. 2d 185, 7 Med. L. Rptr. 2302 (La. 1981), that there can be no implied defamation "where public officials and public affairs are concerned." The Sassone Court declined to decide whether there can ever be implied defamation "when a public figure and a matter of public concern are involved," but continued to narrow the scope of implied defamation. The Court held that an alleged defamatory inference is actionable only if it is "the principal inference that a reasonable reader or viewer will draw from the publication as having been intended by the publisher." 626 So. 2d at 354 (emphasis added).

The Louisiana Supreme Court granted writs to review a trial court's decision denying a newspaper's motion for summary judgment in a defamation case that presents several far-reaching issues. Romero v. Thomson Newspapers (Wisconsin), Inc., Docket No. 94-CC-1105 (La., writs granted, May 20, 1994). The case offers the Court an opportunity to decide, among other issues, the applicability and scope of the neutral reportage privilege in Louisiana; the applicability of the Rosenbloom standard as a matter of Louisiana constitutional law; and the relationship between fault and ordinary malice as a matter of Louisiana defamation law.

In a disturbing development reminiscent of Louisiana's brief lurch in 1992 toward a cause of action for "defamation of the dead," two intermediate appeals courts have permitted the spouse of a defamation plaintiff to go forward with a cause of action alleging loss of consortium. The Louisiana Supreme Court thus far has declined to review these decisions despite an amicus brief by the Louisiana Press Association requesting that it do so. Maurice v. Snell, 636 So. 2d
393 (La. App. 4th Cir. 1994), writ denied, -- So. 2d -- (La. 1994), following Melancon v. The Hyatt Corp., 589 So. 2d 1186 (La. App. 4th Cir. 1991), writ denied, 592 So. 2d 411 (La. 1992); Tatum v. State of Louisiana, 632 So. 2d 1236 (La. App. 1st Cir. 1994), writ denied, -- So. 2d -- (La. 1994). Louisiana law permits an action for loss of consortium not only by a spouse, but also by all other persons authorized to bring a wrongful death action -- i.e., children, parents, and siblings. See La. Civil Code, Articles 2315 and 2315.2. Potentially, then, the scope of the asserted action could be extremely broad.

MAINE

In reversing an award of punitive damages in a private figure slander case the Maine Supreme Court has held that under Maine law proof of reckless disregard is not sufficient and that a Plaintiff must also prove Defendant's subjective ill will or conduct so outrageous that ill will can be implied. Staples v. Bangor Hydro-Electric Co., 629 A.2d 601 (Me. 1993). By referencing both the constitutional standard of "reckless disregard" as well as Maine's common law requirement of actual ill will for recovery of punitive damages on tort cases, generally, the Maine Supreme Court suggests that two hurdles must be passed in recovering punitive damages in a private figure defamation action.

MARYLAND

While there have been no developments of singular significance, the courts generally have evidenced greater receptivity toward defamation claims, following the national trend.

MINNESOTA

Minnesota courts have continued to expand coverage of common-law privileges. See, e.g., Carradine v. State, 511 N.W.2d 733 (Minn. 1994) (statements made in an arrest report protected by absolute privilege, but not statements to the news media beyond the public record); (2) In Ruzicka v. Conde Nast Publications, Inc., 999 F.2d 1319 (8th Cir. 1993), the Eighth Circuit Court of Appeals held that an alleged promise that a subject not be "identified or identifiable" in a published article was sufficiently clear and definite to state a claim of promissory estoppel.

MISSISSIPPI

During its 1993 session, the Mississippi Legislature passed an agricultural products disparagement act, giving a cause of action for damages to producers of agricultural or aquacultural products.
MISSOURI

In Nazeri v. Missouri Valley College, 860 S.W.2d 303 (Mo.banc 1993), the Missouri Supreme Court abandoned the classifications of per se and per quod in the context of both libel and slander, holding that "[libel] plaintiffs need not concern themselves with whether the defamation was per se or per quod, nor with whether special damages exist, but must prove actual damages in all cases." Id. at 313. Consequently, "in defamation cases the old rules of per se and per quod do not apply." Id. The court also rejected duplicative claims of false light invasion of privacy, prima facie tort, intentional infliction of emotional distress and tortious interference with contract in a case involving traditional claims of defamation. The decision significantly affected one of the more traditional defenses to libel claims, e.g., the defense that the publication was not actionable per se coupled with the plaintiff's failure to plead special damages. Further, the decision could signal a reluctance on the part of Missouri courts to dismiss libel claims on the basis of non-actionability as a matter of law in cases where a plaintiff pleads libel by implication. Left unanswered are questions concerning the precise role of the trial court in determining as an initial matter whether a statement is defamatory and the future development of the innocent construction rule in Missouri. Defendants will no longer be able to secure dismissals of libel by implication claims on the previously-used basis that the publication was not defamatory per se and special damages do not exist. The authors suggest, however, that defendants continue to pursue motions to dismiss in appropriate cases asserting that the publication is not defamatory as a matter of law and that purported implications are simply not reasonable.

NEBRASKA

The Nebraska Court of Appeals held that the statute of limitations begins to run when publication is communicated to other persons. The court also recognized intentional emotional distress as a separate cause of action in a libel context. Vergara v. Lopez-Vasquez, 4 Neb. Adv. 676, 510 N.W.2d 550 (NCA 1993). (2) The Nebraska Supreme Court recognized that candidates running for public office, as public figures, must prove actual malice and falsity with clear and convincing evidence. Furthermore, alleged libelous statements during political campaigns are issues of public concern. Hoch v. Prokop, 244 Neb. 443, 507 N.W.2d 626 (Neb. 1993). (3) In Wheeler v. Nebraska State Bar Ass'n, 244 Neb. 786, 508 N.W.2d 917 (Neb. 1994), the Nebraska Supreme Court rejected the Milkovich fact-opinion test and adopted California's "totality of circumstances" test. The Nebraska Supreme Court also recognized that a corporate chairman's letter to shareholders is a qualified privilege. Young v. First United Bank of Bellevue, 246 Neb. 43, 1994 Neb. Lexis 131 (Neb. 1994).

NEVADA

On January 27, 1994, the Supreme Court filed its opinion reversing $4.2 million dollars in judgments rendered upon jury verdicts on libel and invasion of privacy claims against two animal welfare rights organizations. People for the Ethical Treatment of Animals, et al. v.
Under the Nevada Rules of Appellate Procedure, however, the opinion is not final until a remittitur is issued. The remittitur in this case has not been issued because of several petitions for rehearing. The case is significant in that it addresses the liability of a defendant arising out of the distribution of a videotape and libel by implication. The case also discusses the elements of the tort of intrusion and the tort of appropriation. The Court held that any alleged pecuniary gain by one of the animal rights organizations in referring to Berosini's celebrity for publicity and fund raising purposes is not and cannot be the personal injury kind of tort represented by the appropriation privacy tort.

**NEW HAMPSHIRE**

In *McNell v. Hueel, et al*, Civil No. 93-462-JD, 1994 WL 264200 (D.N.H.), the court held that a cause of action for libel accrues, for purposes of the three-year statute of limitations prescribed by RSA 508:4,II, on the date of first publication. The court also held that the "discovery rule" did not apply to the plaintiff's libel action because the allegedly defamatory news article was not "inherently secretive or confidential" and was "readily available to the public." Finally, the court held that it could not exercise personal jurisdiction over an out-of-state newspaper consistent with due process, where the paper had never been published or circulated in New Hampshire, and the paper's only contact was sending a reporter to New Hampshire to interview the source of the allegedly defamatory article.

**NEW JERSEY**

The New Jersey Supreme Court, in a non-media slander case, *Ward v. Zelikovsky*, No. A-48, 1994 N.J. Lexis 503 (June 20, 1994), ruled that name-calling "don't like Jews" and "bitch" was not defamatory unless the statements implied reasonably specific assertions of fact capable of objective proof of truth or falsity. The court discussed many issues of interest to media attorneys, including defamatory meaning, context, verifiability, innuendo, and damages. In *Turf Lawnmower Repair, Inc. v. Bergen Record Corporation*, 269 N.J. Super. 370 (App. Div. 1994), certif. granted, — N.J. — (1994), now accepted for review by the New Jersey Supreme Court, the Appellate Division held that a business serving the general public was subject to the New York Times rule of actual malice as a matter of state common law in a suit against a newspaper based on its consumer reporting. Other developments are reported in the pertinent sections of the survey. In *Costello v. Ocean County Observer, et al.*, No. A-107, 1994 N.J. Lexis 631 (July 20, 1994) the Supreme Court discussed in depth the fair report privilege, and the actual malice standard on a defendants motion for summary judgment.

**NEW YORK**

The Court of Appeals has made it clear that punitive damages are permissible in defamation cases but only if a plaintiff can show common law malice. *Prozeralik v. Capital*

**NORTH CAROLINA**

The North Carolina Court of Appeals held in Donovan v. Fiumara, ___ N.C. App. ___, 442 S.E.2d 572 (1994) that a statement that plaintiff was "gay" or "bisexual" was not slanderous **per se** or libelous **per se**.

**NORTH DAKOTA**

The ND Legislative Council's interim Judiciary Committee is considering introducing the Uniform Correction or Clarification of Defamation Act in the 1995 Legislature.

**OHIO**

Recently, the Ohio Supreme Court reversed a lower court decision holding that a police officer was not a "public official" for purposes of defamation. In that case, a police officer had testified in his individual capacity at his nephew's murder trial, concerning advice given to the nephew to cooperate with the murder investigation. The Supreme Court held that the police officer was a public official, and that the reported statements related to his fitness to hold his public office. Soke v. The Plain Dealer, 60 Ohio St. 3d 395, 632 N.E.2d 1282 (1994).

**PUERTO RICO**

In Rodríguez v. El Vocero, 94 JTS 13, **cert. denied** 114 S.Ct. ____ (June 27, 1994), the P.R. Supreme Court recognized a cause of action for emotional distress and mental anguish to the family members or third parties of a plaintiff named in a publication, although such "contingent" plaintiffs were not named or identified and therefore the allegedly libelous article was not "of and concerning" such coplaintiffs. Denial of review at this stage may be due to the stage of the case (denial of motion to dismiss; still a final adjudication has not been rendered). (2) In Garib v. Clavell, 94 JTS 36, the P.R. Supreme Court reversed a Superior Court judgment in favor of plaintiffs, holding that plaintiff doctor was a "public figure" in regards to AIDS treatment, and that editorial criticism contained "rhetorical hyperbole" which should not be understood or taken at face value, and therefore plaintiff could not establish defamatory meaning or actual malice. (3) In Parrilla v. Airport Catering Services, 93 JTS 66, the P.R. Supreme Court found for "private" plaintiff and imposed liability for defamation against a corporation which posted in a bulletin board false information to the effect that employees had been caught stealing company property. (4) Although workman's compensation laws are exclusive remedy for wrongful discharge, employer may be liable for defamation of the employee in the act of
discharging the employee. However, the employee lacks a cause of action based on intracorporate letter sent strictly to officials who had legitimate right to be informed. Aponte v. P.R. Marine Management, Inc., 830 F.Supp. 95 (D.P.R. 1993).

SOUTH CAROLINA

The United States Court of Appeals or the Fourth Circuit ruled that the regulation of newspapers distributed in newsracks must be considered under a First Amendment forum analysis. See Multimedia Publishing Company v. Greenville-Spartanburg Airport District, 991 F.2d 154 (4th Cir. 1993). The South Carolina Court of Appeals held that statements inferring impropriety or inadequacy in employment prevent a grant of summary judgment to the party making the statements. Moshtaghi v. The Citadel, 1994 WL 157764 (S.C. App. 1994) (per curiam). Finally, in City of Beaufort v. Baker, et al., 432 S.E. 470 (S.C. 1993), the Court affirmed the convictions of several "street preachers" for violating a municipal anti-noise ordinance declaring that the ordinance was constitutional because it served the narrow interest of controlling the level of noise in the business district.

TEXAS

(Tex. June 22, 1994), decided not to recognize the tort of false light invasion of privacy under Texas law. In failing to recognize such a cause of action, the Court reasoned that false light substantially duplicates the tort of defamation while lacking many of its procedural limitations. (2) In 1993, the Texas Legislature revised the Texas Civil Practices and Remedies Code to include a provision for interlocutory appeal of a denial of motion for summary judgment involving certain claims against electronic or print media. See Tex. Civ. Prac. & Rem. Code §51.014(6). (3) The Texas Supreme Court has recently required the bifurcation of trials -- one on liability to determine whether punitive damages are appropriate (all of the factors to be considered are set forth in this part of the trial) and, if they are appropriate, another to determine the amount of punitive damages. Transportation Ins. Co. v. Moriel, __ S.W.2d __, 37 S. Ct. J. 450, 62 U.S.L.W. 2548 (Tex. Feb. 2, 1994). The reason for this change in procedure, is to avoid the introduction of evidence of a defendant's net worth in the liability stage of the trial. (4) The Texas Court of Criminal Appeals sitting en banc has recently reaffirmed its stance of denying a reporter's privilege in Tex. ex rel. Healey v. McMeans, __ S.W.2d __, 22 Med. L. Rptr. 1705 (Tex. Crim. App. 1994).

UTAH

In West v. Thomson Newspapers, the Utah Supreme Court vacated the Court of Appeals' decision (835 P.2d 179 (Utah App. 1992)) and held that (a) a statement in an op-ed opinion column which implied a Mayor lied to voters in order to obtain their votes was protected opinion under the Utah Constitution; (b) an accusation that a Mayor repeatedly attempted to "manipulate the press" is not defamatory as a matter of law; and (c) declined to reach federal constitutional issues regarding actual malice and opinion-privilege analyses. 872 P.2d 999 (Utah 1994).

VIRGIN ISLANDS

In St. Surin v. Virgin Islands Daily News, 21 F.3d 1309, 22 Med.L.Rptr. 1545 (3d Cir. 1994), on appeal from the District Court of the Virgin Islands grant of summary judgment for the Defendants, the Court of Appeals for the Third Circuit held that, where a newspaper fabricated a statement by a federal prosecutor to imply that criminal charges would be brought against a public figure plaintiff, the district court erred in granting summary judgment for the defendants on the ground that the record before the court negates "actual malice". Thus, a genuine dispute of material fact exists as to whether the newspaper published its story about plaintiff with a reckless disregard for the truth of the assertion. (2) In Bussue v. Virgin Islands Daily News, Civ.No. 155/1991, St.T. & St.J. Supp. (D.V.I. January 10, 1994), the District Court of the Virgin Islands granted summary judgment for Defendants holding that, where a newspaper advertisement published plaintiffs' W-2 forms, with plaintiffs' names deleted but their physical addresses, social security numbers and annual salaries disclosed, no private facts about plaintiffs were revealed; and the information revealed would only be relevant if the reader had independent knowledge that would allow him or her to link the disclosed information to a particular individual. (3) In O'Neale's Transp., Inc. v. Marshall & Sterling, Inc., Civ.No.

WEST VIRGINIA

In *Harris v. Adkins*, 432 S.E.2d 549 (W.Va. 1993), the West Virginia Supreme Court of Appeals ruled that the right to petition the government guaranteed by Section 16 of Article III of the West Virginia Constitution is comparable to that found in the First Amendment and does not provide an absolute privilege for intentional and reckless falsehoods. See also *McDonald v. Smith*, 105 S.Ct. 2787 (1987). The *Harris* court refused to apply a standard of absolute immunity to a defendant accused of reading a defamatory statement about a city councilman at a public city council meeting. Instead, the *Harris* court applied the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), to protect the right to petition. *Harris* reversed the West Virginia Supreme Court's holding in *Webb v. Fury*, 282 S.E.2d 18 (W.Va. 1981), which guaranteed absolute immunity to defendants when exercising their right to petition. In *Maynard v. The Daily Gazette Co.*, No. 21815 (W.Va. July 20, 1994), the West Virginia Supreme Court of Appeals held that a statement of opinion about a matter of public concern which does not contain a provable false assertion of fact is entitled to full constitutional protection. *Id.* at 6-7. Under this standard, a newspaper editorial that criticized the director of a college athletic tutoring program for not caring about student athletes' academic progress, for being "part of the corruption of college athletics," and for garnering a basketball scholarship for his son was not defamatory.

WYOMING

In *Casteel v. The News-Record, Inc.*, 875 P.2d 21 (Wyo. 1994), the Wyoming Supreme Court held that Wyoming's statutory conditional privilege protected a newspaper from a defamation suit alleging inaccuracies in the reporting of a criminal defendant's plea agreement. The newspaper reported that the defendant admitted to taking indecent liberties with a minor, while in fact the defendant pleaded no contest to the charges. In affirming summary judgment for the defendant newspaper, the Wyoming Supreme court applied Wyo. Stat. 1-29-105 which provides that a publication is privileged if it is fair and impartial, unless it was published "maliciously" or the publisher "has refused or neglected to publish a reasonable written explanation or contradiction by the plaintiff." The Supreme Court held that the report was fair for purposes of the statute even if inaccurate, because the report had "qualities of impartiality and honesty, and was free from prejudice, favoritism and self interest." The court also noted that the newspaper had immediately published a correction of the story. (2) In *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211 (Wyo. 1994) the Wyoming Supreme Court held that disparaging and offensive statements about an ex-employee are not actionable per se unless they affect the plaintiff in some way that is particularly harmful to one engaged in his trade or profession. Statements that the ex-employee had been fired, that he was sneaky, lazy, good-for-nothing and would steal, among other disparaging comments, were not actionable in the absence of a particularly harmful effect on his trade or profession.
police concerning a potential crime. (3) KRAMER V. THOMPSON, 477 F.2d 666 (3d Cir. 1972) (N.Y.1971) (Doe v. Kelly, 11 S. C. 117 (1971)), in which the court held that a plaintiff did not possess a constitutional right of privacy over information that she reported to police under the First Amendment (2) SCOTT v. THE MORNING CALL INC., 496 F.2d 202 (3d Cir. 1974) (a case of First Impression concerning defamation statements made in the context of Blue Cross of Greater Pittsburgh v. 888 F.2d 94 (3d Cir. 1986) (Scitelli v. J., Cert. Den.<sup>ed</sup> 496 U.S. 1062, the most significant pronouncements were in: (1) SCF V. HEALTHCARE INC. The Third Circuit was called upon to address First Amendment concerns only rarely in the past five years. The Second Circuit issued an unprecendently small number of opinions relating to the Third Circuit

Update.

libel law during the last five years. There have been no significant developments since the 1989 Massachusetts courts exercise of jurisdiction on such a claim would be fundamentally

because the case is on constitutional law. The Third Circuit, in the context of the following decisions, and the responding to the reporter's questions, preempting an article for The Boston Globe, and the responding to the reporter's questions, relating to the course of action the reporter was taking to call in California, a reporter relating to the course of action the reporter was taking to call in California, whose only contacts for lack of personal jurisdiction. The defendant was a California company whose only contacts with

1994), the court affirmed the Massachusetts Federal district court's dismissal of a libel action

v. Thomson, 477 F.2d 666 (1973). The court affirmed the Massachusetts Federal district court's dismissal of a libel action


FIRST CIRCUIT

IDRC-50 STATE SURVEY 19.49-95

1989-1994 (as reported in the CCH-Publication's Report, 89-94)

II. SIGNIFICANT NEW DEVELOPMENTS IN THE CIRCUITS
(Becker, J.), in which the Court reversed the district court and held that the Pennsylvania Constitution prohibits a judge from enjoining future libelous speech, and that there was no authority under Pennsylvania law, as informed by the First Amendment, to compel a libel defendant to issue a retraction; and (4) *St. Surin v. Virgin Islands Daily News, Inc.*, 21 F.3d 1309 (3d Cir. 1994) (Hutchinson, J.), in which the Court reversed the district court and held that fact issues remained about whether an article published about a former Virgin Islands public official was false, and about whether the story, which was edited without identifiable bases for any of the changes, was published with a reckless disregard for its truth.

**FOURTH CIRCUIT**

In the last five years the Fourth Circuit has decided an increasing number of defamation cases, and, on the whole, has demonstrated a consistent tendency to protect defendants' constitutional rights, particularly in conducting realistic independent review of district court rulings on defamatory meaning and actual malice. For example, in *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir. 1991), the en banc Court spent several pages of its opinion detailing the facts alleged to support an actual malice finding and explaining why this evidence was insufficient to create a jury issue. Also, in *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993), the Court affirmed a dismissal of a libel claim for failure to allege actionable statements, including an individual analysis of 10 separate statements alleged to be defamatory. A dissent in *Chapin* criticized the majority, not without some persuasiveness, that the approach was more suited to a summary judgment appeal rather than appeal of a dismissal under Rule 12(b)(6). *Reuber* and *Chapin* certainly are the Circuit's most fruitful recent opinions, as well. *Reuber* also contains discussions about proper jury instructions on actual malice and application of the standard to the evidence, as well as application of the limited purpose public figure standard. *Chapin* also deals with the post-*Milkovich* fact/opinion distinction, discussion of the fair report privilege and discussions of what constitutes matters of public concern and the actual malice standard.

**FIFTH CIRCUIT**

(1) In *Matthews v. Wozencraft*, 15 F.3d 432 (5th Cir. 1993), the Fifth Circuit rejected the plaintiff's claim that he was entitled to recover for the "fictionalization" of his life story under the privacy theory of misappropriation. The Court held that the misappropriation theory does not protect general incidents from one's life. (2) In *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325 (5th Cir. 1993), cert. dism'd, 114 S.Ct. 1587 (1994), a non-media, libel per se case, the Court held that "the Constitution imposes no minimum standard of fault" in cases involving private figures and matters of private concern. Accordingly, the Court held that in a private/private case, liability could be imposed without fault under Texas state law. The Court further found that punitive damages could be assessed in a private/private case without a finding of constitutional actual malice. (3) In *Cain v. Hearst Corp.*, 1 F.3d 345 (5th Cir. 1993), the Fifth Circuit certified to the Texas Supreme Court the question of whether "false light" invasion
of privacy exists in Texas. The Texas Supreme Court then rejected "false light." Cain v. Hearst Corp., 37 Tex. Sup. Ct. J. 1151 (June 22, 1994). (4) In Cinel v. Connick, 15 F.3d 1338 (5th Cir. 1994), the Court held that a former catholic priest could not recover for disclosure of private facts based on the publication of a videotape that showed him engaging in homosexual activity. The Court held that the tape involved a matter of legitimate public concern.

SIXTH CIRCUIT

Since the Sixth Circuit's 1988 decision in Harte-Hanks Communications v. Connaughton, 842 F.2d 825 (6th Cir. 1988), aff'd 491 U.S. 657 (1989), there do not appear to have been any decisions that reflect key developments in libel, privacy, or related actions. Perhaps the most significant development was the court's decision in Brooks v. American Broadcasting Companies, Inc., 932 F.2d 495 (6th Cir. 1991), in which the court reversed summary judgment for ABC finding that the question of whether or not a plaintiff is libel-proof is a question of fact for the jury and not one of law for the court.

SEVENTH CIRCUIT

The Seventh Circuit's two most significant defamation decisions during the past five years both resulted in victory for the defendants. Underwager v. Salter, 22 F.3d 730 (7th Cir. 1994); Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222 (7th Cir. 1993). Haynes was a suit brought against the author and publisher of a best-selling book of social and political history describing the migration of African-Americans to the North after World War II. The plaintiffs, whose lives were discussed in the book, claimed that the book defamed them and invaded their privacy rights. Haynes, 8 F.3d at 1226-29. The Seventh Circuit denied both claims, determining that the contested passages were substantially true and did not invade any privacy rights. Id. at 1229-35. In Underwager, two psychologists holding controversial beliefs about child abuse brought a defamation claim against several other child abuse specialists who had strongly criticized their research. Underwager, 22 F.3d at 732. As in Haynes, the Seventh Circuit held for the defendants, explaining that more discussion rather than higher damage awards would lead to better overall scientific understanding. Id. at 736.

EIGHTH CIRCUIT

NINTH CIRCUIT

The Ninth Circuit has seen significant developments in three areas since the 1989 Update: (1) the standard of appellate review to be applied to defamation verdicts; (2) the manner in which the Ninth Circuit will apply the Milkovich decision to what used to be the law of opinion; and (3) the development of the law of misappropriation as applied to the commercial rights of celebrities. Each of these developments is discussed in detail below. However, the three categories are characteristic of the Ninth Circuit’s general lack of a consistent First Amendment theme; these observers cannot detect any trend or commonality that would unify the three areas.

TENTH CIRCUIT

Tenth Circuit cases are not likely to be found charting new First Amendment principles. Perhaps most significant is the consideration given by the Court to the public/private nature of the speech at issue in addressing the public figure status of a plaintiff. See, e.g., Lee v. Calhoun, 249 F.2d 1162 (10th Cir. 1991).

ELEVENTH CIRCUIT

In Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110 (11th Cir. 1992), the Eleventh Circuit held that a magazine publisher could be liable for publishing an advertisement that, on its face, would alert a reasonably prudent publisher of a clearly identifiable unreasonable risk of harm to the general public. In Nadler v. Mann, 951 F.2d 301 (11th Cir. 1992), the Eleventh Circuit noted that a federal employee is not immune from liability for defamation when leaking information about a criminal investigation to the press. In Madara v. Hall, 916 F.2d 1510 (11th Cir. 1990), the court noted that an interviewee published in a magazine does not establish sufficient contacts with a state through the publication of his interview.

D.C. CIRCUIT

Despite the setback of the Supreme Court’s apparent criticism of Ollman v. Evans in Milkovich v. Lorain Journal Co., the D.C. Circuit has continued to be in the forefront of developing constitutional protections of free speech. In White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990), the court addressed the "hot topic" of defamation by implication, limiting liability to those cases in which a reasonable reader would understand that the publication "intends or endorses" the allegedly defamatory inference. Id. at 520. And in a rare turn of events, on petition for rehearing in Moldea v. New York Times Co., 22 F.3d 310 (D.C. Cir. 1994), a panel of the Court "overruled" its initial decision and concluded that a New York Times book review was not actionable as a matter of law because it contained only unverifiable statements of the reviewer’s opinion and statements that no reasonable juror could find to be false. In Moldea II, the court adopted a new standard of protection for critical reviews: "when a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work," the court announced, "that interpretation does not present a verifiable issue of fact that can be actionable in defamation." Id. at 312.
III. KEY ISSUE STATUS, As of August 1, 1994
(As Selected and Compiled from the LDRC 50-STATE SURVEY 1994-95)\(^1\)

BURDEN OF PROOF

During the last year, courts in Georgia, Ohio, and the Virgin Islands have had occasion to apply Philadelphia Newspapers v. Hepps, shifting the burden of proof of falsity to plaintiffs in cases involving either public official/figure plaintiffs or private figure plaintiffs but issues of public concern.\(^2\)

Overall, according to the 1994-95 50-STATE SURVEY, only Arkansas, Iowa, Kansas, Maine, Tennessee, Utah, Wisconsin, and Wyoming have yet to address the issue of burden of proof since Hepps, although obviously all these jurisdictions would be constitutionally required to impose upon plaintiffs the burden of proving falsity — at least in cases involving speech of public concern or plaintiffs who are either public figures or officials. Indeed, the Eighth Circuit Court of Appeals, applying Iowa law, has held that Hepps shifts the burden of proof of falsity to public-figure plaintiffs and private-figure plaintiffs on matters of public concern,\(^3\) and the Sixth Circuit, in a pre-Hepps case applying Tennessee law, has held that a private figure plaintiff must prove both falsity and negligent publication.\(^4\) Pre-Hepps decisions in Vermont and Virginia also require private figure plaintiffs to prove falsity even in cases involving speech of private concern.\(^5\)

Courts in Maine and Wisconsin have explicitly refused to extend Hepps to cases involving private figure plaintiffs and speech of private concern, however.\(^6\) According to the state reporters for the 50-STATE SURVEY, in Idaho\(^7\) and New Hampshire\(^8\) the burden of proof of falsity.

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\(^1\)The following review relies solely on the developments reported in the 50-STATE SURVEY and summarized in the Issue Status Tables presented at 842ff.


\(^3\)See Bagley v. Iowa Beef Processors, Inc., 797 F.2d 632 (8th Cir.) (en banc), cert. denied, 107 S.Ct. 1293 (1986).


\(^7\)LDRC 50-STATE SURVEY 1994-95 (KAUFMAN, H.R., ED.) 233 (1994).
truth probably remains on the defendant in such cases, although courts in these states have not yet been presented with the issue post-*Hepps*.

**COMMON LAW AND STATUTORY PRIVILEGES**

Fair report, fair comment, and other common law privileges have proven to be of continuing utility to the media in its coverage of events of significant public concern, both in states where post-*Sullivan* constitutional principles have still not been expansively developed and even in those that have also recognized constitutional principles.

According to the 1994–95 SURVEY, only Nevada has not yet recognized some such privilege. Forty-eight jurisdictions recognize a fair report privilege, 11 by statute, 9 29 by common law, 10 and 8 by both statute and common law. 11 Thirty-eight jurisdictions recognize a qualified privilege for fair comment, four by statute 12 and the remainder by common law. 13 An additional 21 jurisdictions recognize a qualified privilege to report on matters of public interest, all but one 14 by common law. 15

In decisions construing the fair report privilege, a federal district court in Georgia held that more than conclusory allegations of ill will would be required to defeat the fair report

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9 Id. at 495.


11 Alabama, Arizona, California, Kentucky, Louisiana, Ohio, Virgin Islands, and Wisconsin.

12 California, North Dakota, Oklahoma, and Texas.


14 North Carolina.

privilege, and a federal district court in Illinois found that the fair report privilege applied when a police press release supported the statements in the defendant's newspaper article. In three other new decisions reported from Georgia, courts have disagreed as to whether actual malice can defeat the fair report privilege for media defendants.

DAMAGES

Damages has remained an intractable issue in defamation, with defamation plaintiffs reporting significantly higher average awards than other personal injury plaintiffs. The limitation in Gertz v. Robert Welch, Inc. to recovery of "actual damages" absent a showing of actual malice — at least in cases involving speech of public concern — has not been effective in diminishing the size of damage awards. In part, this is due to the recognition in Gertz that actual damages are not limited to "out-of-pocket" losses but include such nebulous and potentially open-ended categories of recovery as "injury to reputation" and "emotional distress." Any limiting effects of Gertz were also undermined by the holding in Time v. Firestone that whether reputational loss was a prerequisite to recovery for emotional distress was a question of state law.

According to the 50-STATE SURVEY, state courts have in general failed to step into the breach left by Gertz. For example, at least six jurisdictions allow plaintiffs to recover damages for "emotional distress" without establishing a loss of reputation, while only two jurisdictions

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condition recovery for emotional distress on a showing of loss of reputation.  

During the past year, several courts have been receptive to claims for emotional distress. According to the 1994–95 SURVEY, the Supreme Court of Maine held that evidence of plaintiff's mental suffering was sufficient to support a substantial award in an action for slander per se. In Louisiana, the Court of Appeal actually increased a plaintiff's award from $500 to $5000 after determining that the trial court had erred in failing to award damages for the plaintiff's mental anguish. However, a Michigan court did hold that private individuals who prove only negligence are limited to recovery of "economic damages including attorney fees." 

No new cases were reported on the issue of presumed damages last year, although, according to the 1994–95 SURVEY, 26 jurisdictions continue to allow presumed damages in cases not controlled by Gertz.

On the issue of punitive damages, during the past year the highest courts of Maine and New York both held that plaintiffs must establish common law as well as constitutional malice in order to recover punitive damages. In another positive development limiting punitive damages, the Texas Supreme Court recently required bifurcation of trials in cases seeking punitive damages — with evidence of defendant's net worth not introduced until the initial jury has determined that punitive damages are appropriate. On the negative side, however, in a nonmedia defamation case a New Jersey appellate court last year upheld a punitive damage award of $25,000 supported by an award of general and special compensatory damages of only $1.

According to the 1994–95 SURVEY, seven states currently preclude any recovery of

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23See Lege v. White, 619 So.2d 190 (La. App. 3d Cir. 1993).


punitive damages in defamation cases. In addition, 36 states impose some type of limitation on the availability of punitive damages through their common law, and 25 states limit punitive damages by operation of their retraction statutes.

DEFENDANTS’ REMEDIES

As the cost of defending even meritless suits continues to increase, the issue of pursuing counterclaims or other types of sanctions against unsuccessful libel plaintiffs has become increasingly relevant. The 1994–95 SURVEY reports new cases from the District of Columbia and Louisiana in which courts awarded sanctions against plaintiffs who had brought frivolous defamation claims. In Braden v. New World, the superior court for the District of Columbia imposed Rule 11 sanctions upon plaintiff and his attorney for claiming (1) that a conceded public figure lost that status immediately upon termination of his position as co-host of a television program, (2) that a public figure need not prove actual malice if the issue is one of private concern, and (3) that reliance on a single unnamed source constituted actual malice. In Long v. Alot, a Louisiana appellate court awarded the defendant sanctions on the grounds that the allegedly defamatory statements were not even contained in the claimed publication.

According to the 1994–95 SURVEY, 49 jurisdictions provide some type of remedy for a wrongful civil suit, and 15 jurisdictions have specifically applied such remedies in the libel context.

Despite the theoretical availability of remedies for aggrieved libel defendants, it should be noted that, as a practical matter, such sanctions are not always effective. According to the 1994–95 SURVEY, the reporters in eight jurisdictions felt that the remedy provided under their

29Massachusetts and Oregon prohibit punitive damages in cases involving the First Amendment; Louisiana, Nebraska, Puerto Rico, and Washington do not allow punitive damages in any cases; and New Hampshire proscribes punitive damages but allows an enhanced recovery in tort cases in which the defendant has acted with malice or wanton disregard for the plaintiff’s rights.

30Alabama, Arizona, California, Connecticut, Florida, Idaho, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, and Wisconsin. See also LDRC Overview on Damages, supra, note 19, at 33-35 (reviewing state law on punitive damages following Gertz); LDRC’s Retraction Survey and an Overview of Its Key Findings, 1992-93 LDRC BULLETIN 3:1 (1993).


33Only Guam, Montana, New Jersey, and Wyoming have no relevant provisions. The statute in New Mexico is limited to criminal prosecutions.

34California, Colorado, District of Columbia, Florida, Georgia,
state law is either severely limited or of questionable utility. One reason may be the relatively high substantive and procedural hurdles involved in establishing a claim for abusive litigation. For example, in one new case reported in the 1994–95 SURVEY, the Supreme Court of Rhode Island held that plaintiffs in a malicious prosecution action must prove malice and lack of probable cause by "clear proof."\(^{36}\)

**DISCOVERY/SHIELD PRIVILEGE**

In cases reported in the 1994–95 SURVEY from the past year, courts in Georgia and Texas reached differing conclusions as to the scope of discovery in media libel actions. In restricting discovery to material involving the issue of actual malice, a federal district court applying Georgia law observed that "overly broad, largely unnecessary and abusive discovery is in and of itself an intolerable burden on free speech."\(^{37}\) Similarly, in considering the defendant's assertion of a "fair report" privilege, a Georgia state court restricted discovery to a videotape of the broadcasts and the government report on which the broadcasts were based for purposes.\(^{38}\)

On the other hand, during the past year the Texas Court of Criminal Appeals reaffirmed its position that in criminal trials there is no editorial privilege exempting the media from discovery.\(^{39}\) According to the SURVEY reporter for Texas, this position conflicts with that of the Texas civil appellate courts, which recognize a qualified privilege for unpublished materials or material obtained through confidential sources.\(^{40}\) Finally, in another newly reported case, the third circuit held that a federal district court had abused its discretion by granting defendants' summary judgment motions while plaintiff's Rule 56(f) applications were still pending and key discovery was outstanding.\(^{41}\)

Overall, according to the 1994–95 SURVEY, four jurisdictions refuse to permit discovery of editorial matter or process in libel cases\(^ {42} \) and 12 others impose limitations on such

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35District of Columbia, Hawaii, Ohio, South Carolina, Tennessee, Texas, Utah, and Virginia.


40See 1994-95 SURVEY, at 717.


42Illinois, New Jersey, Oregon, and Wisconsin.
discovery. Of the remainder of jurisdictions that have addressed the issue, three impose no limitations on discovery of editorial matter and three others are reported as likely to follow *Herbert v. Lando* in permitting such discovery.

On the related issue of the reporters shield privilege, several new decisions reported in the 1994–95 SURVEY applied the privilege to bar discovery. The Supreme Court of Colorado held that information protected by the newsman's privilege is not subject to a criminal defendant's subpoena when the defendant has failed to demonstrate that the information cannot be obtained through any other reasonable means. An Illinois appellate court and a Wisconsin federal court similarly applied the privilege when the party seeking disclosure failed to establish an absence of other sources.

In a federal case reported from the D.C. Circuit, the Court — stating that it would "set an unfortunate precedent if a reporter or a newspaper were subject to discovery whenever a source becomes legally entangled with the object of the newspaper's attention" — granted a protective order in favor of a third-party reporter. It reasoned that (1) mere possession of proprietary documents did not inescapably lead to the conclusion that the reporter had unlawfully converted documents, (2) sharing copies of these documents and asking for comments was a "newsgathering" activity, and (3) there was no showing that the information was otherwise unavailable. In another federal case, a Colorado district court held that the First Amendment protects reporters unless the information sought is centrally relevant and is otherwise unavailable, without deciding whether Colorado's shield law applies in federal court.

In two decisions reported from Minnesota, one media defendant was ordered to comply with a subpoena that sought production of unpublished photographs that did not identify any news sources and another was precluded from introducing evidence at trial regarding

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43Georgia, Idaho, Iowa, Louisiana, Maine, Maryland, Massachusetts, Ohio, Oklahoma, Pennsylvania, Texas, and District of Columbia.

44Connecticut, New Mexico, and New York (federal court).

45Colorado, New Hampshire, and Wyoming.


confidential sources who were shielded from discovery.\textsuperscript{51}

In a mixed decision involving application of the shield privilege in a libel action, the Ninth Circuit held that the Arizona shield law does not protect investigative book authors, but that \textit{Branzburg v. Hayes} does provide authors with a qualified privilege from civil subpoenas for interview tapes and notes.\textsuperscript{52}

Overall, according to the 1994-95 \textsc{Survey} only Alaska, North Carolina, South Carolina, Wyoming, and Puerto Rico lack shield protections of one kind and degree or another in either their statutory or common law. Although the Supreme Judicial Court of Massachusetts has declined to promulgate rules that would establish a qualified shield privilege, trial courts in Massachusetts have applied the privilege in certain circumstances.\textsuperscript{53} At least 19 of the 48 jurisdictions with shield protections have explicitly recognized their application in the libel context.\textsuperscript{54} Libel is specifically excluded from the coverage of shield statutes in Oklahoma, Oregon, Rhode Island, and Tennessee, however, and under common law in Idaho a reporters shield has been held not to apply in the libel context. Moreover, Connecticut, Hawaii, Minnesota, and New York have all imposed sanctions of one kind or another for the failure to disclose sources in the libel context.

\textbf{EAVESDROPPING}

For the first time, the LDRC 50-STATE \textsc{Survey} has canvassed state and federal statutory and common law on the subject of electronic eavesdropping.

According to the 1994-95 \textsc{Survey}, with the exception of Tennessee, Vermont, and Wyoming, all jurisdictions surveyed provide criminal penalties for eavesdropping, and 33 jurisdictions provide a civil cause of action.\textsuperscript{55}

In 31 jurisdictions conversations may be recorded with the consent of only one party to


\textsuperscript{52}See Shoyn v. Shoyn, 4 F.3d 189 (9th Cir. 1993).

\textsuperscript{53}See 1994-95 \textsc{Survey}, at 387.

\textsuperscript{54}Arkansas, Colorado, Connecticut, Kentucky, Illinois, Kentucky, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Dakota, Utah, Vermont, Washington, and District of Columbia.

Another six jurisdictions allow taping with one-party consent if related to
law enforcement activities or if crimes are threatened against the party recording.

Only the Colorado statute provides an express exclusion for media activities by permitting
"a news agency, or an employee thereof, [to use] the accepted tools and equipment of that news
medium in the course of reporting or investigating a newsworthy event."

Responses to this new category suggest that, for the present at least, eavesdropping
statutes are primarily being applied in the area of criminal prosecutions against nonmedia
offenders. According to the 1994-95 SURVEY, only Florida, Illinois, and Maryland have
common law involving application of eavesdropping statutes in the media context.

**INDEPENDENT APPELLATE REVIEW**

In 1989, in *Harte-Hanks v. Connaughton*, the Supreme Court reaffirmed the principle of
independent appellate review, first articulated in *New York Times v. Sullivan* and reiterated in
*Bose v. Consumers Union*, which requires state and federal appellate courts to essentially
examine *de novo* a trial court finding of actual malice. The Supreme Court has not fully
resolved whether this more rigorous standard of review applies to all findings of fact or only the
ultimate conclusion of actual malice, or whether it must be applied to issues other than actual
malice, such as negligence (for *Gertz* plaintiffs), truth/falsity (under *Hepps*), or defamatory
meaning.

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56Arizona, Arkansas, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois (by case law, despite
statutory requirement of all-party consent), Indiana, Iowa, Kansas (by case law), Kentucky, Michigan (by case law),
Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma (by case law),
Oregon, Rhode Island, South Dakota, Texas, Utah, Virgin Islands, Virginia, West Virginia, and Wisconsin.

57Alabama, Colorado, Massachusetts, and Pennsylvania.

58California and Washington.

59C.R.S. § 18-9-305.

60See Shevin v. Sunbeam Television, 351 So.2d 723, 3 Med. L. Rptr. 1312 (Fla. 1977) (Florida wiretapping
statute requiring all-party consent does not unconstitutionally infringe upon media's right to gather news); State v.
of phone conversation, for purpose of news gathering, without consent of other party constituted illegal
wiretapping); Labunski v. American Broadcasting Companies, Inc., No. 87 C 4209 (N.D. Ill. 1988) (reporter
transmitting conversation to receiver in van is covered by statute); Benford v. ABC, 554 F. Supp. 145 (D. Md.
1982) (expectation of privacy decided on a case-by-case basis).

61For a more comprehensive review of this and other issues involving independent appellate review, see *Ten
Years of Independent Appellate Review*, 1994 LDRC BULLETIN 2:1-21 (1994) (reviewing appellate cases from *Bose*
through 1994).
Most courts have been reluctant to extend independent appellate review beyond the issue of actual malice. According to the 1994-95 SURVEY, Michigan has applied independent appellate review to the issue of falsity, Minnesota to the issue of negligence, and West Virginia to the issue of defamatory meaning.62

However, this past year the Puerto Rico Supreme Court applied independent appellate review to the issues of truth, defamatory meaning, and "of and concerning," as well as actual malice.63

INVASION OF PRIVACY

The 50-STATE SURVEY covers developments regarding the four traditional branches of invasion of privacy law, namely false light, publication of private facts, intrusion, and misappropriation. Perhaps most significant of the number of important new cases reported in the 1994-95 SURVEY was the decision of the Texas Supreme Court, in Cain v. Hearst Corporation,64 adding Texas to the growing list of jurisdictions that decline to recognize a cause of action for false light invasion of privacy. The Court's rationale was that false light substantially duplicated the tort of defamation but lacked many of its procedural limitations.

In another potential limitation on actions for invasion of privacy, in the past year a federal district court — recognizing a split of authority among the Illinois Courts of Appeal — concluded that the Illinois Supreme Court would not recognize a cause of action for intrusion.65 And in another recent decision, an appellate court in Minnesota dismissed a suit on the grounds that Minnesota has yet to recognize any action for invasion of privacy.66

Of course, even when invasion of privacy actions are recognized under state law, plaintiffs still face significant constitutional barriers to the viability of their claims. For example, public figures bringing suit for false light must establish publication with actual malice. In a new case reported in this year's SURVEY, a Georgia appellate court dismissed a false light claim because the public figure plaintiff was unable to demonstrate actual malice.67

62See 1994-95 SURVEY, at 407, 425, 803; see also Ten Years of Independent Appellate Review, supra, note 61, at 17-18 (discussing other cases).

63See Garib v. Clavell, 94 JTS 36 (1994).

64 — S.W.2d —, 1994 WL 278365 (Tex. June 22, 1994).


Another impediment to invasion of privacy suits is the privilege to report on matters of public interest. During the past year, courts in Georgia, Massachusetts, Pennsylvania, and Texas dismissed claims based on publication of assertedly "intimate" facts on the grounds that the material reported was of legitimate public interest or concern. In Anonsen v. Donahue, a Texas appellate court broadly construed the First Amendment privilege as encompassing "all matters giving information to the public for purposes of education, amusement or enlightenment."69

In another appellate decision reported from Texas, however, the court held last year that the public interest privilege does not apply when the information is secured unlawfully. And in a 5-4 en banc decision, a closely divided Georgia Court of Appeals upheld a jury verdict against a television station that had failed to adequately digitize (and thus disguise) the face of the plaintiff, who suffered from the AIDS virus, despite the obvious public interest in AIDS and the fact that, prior to his appearance on the program, the plaintiff had informed as many as 60 people that he had AIDS.71

In a misappropriation case decided this past year, the Fifth Circuit held that invasion of privacy claims receive the same level of constitutional protection as applies to libel claims. Another misappropriation suit was dismissed on statutory grounds by a federal district court in California because publication for the purpose of news dissemination is a protected usage under California's right of publicity statute. Similarly, although a federal district court in Tennessee found that the defendant's usage violated the Tennessee misappropriation statute, it recognized a news exception, noting that the statute covered only unauthorized uses of another's name or likeness "as an item of commerce for purposes of advertising products, merchandise, goods, or  


72See Matthews v. Wozencraft, 15 F.3d 432, 22 Med. L. Rptr. 1385 (5th Cir. 1994) (holding that Texas law does not recognize a cause of action for appropriation of one's life story and that if it did there would be an exception for biographies and fictionalized biographies).

services. 74

Overall, according to the SURVEY, currently 25 jurisdictions expressly recognize all four privacy torts 75 and 22 jurisdictions recognize one or more of the four branches of privacy 76 (expressly including privacy claims of one kind or another against the media in 16 of these jurisdictions 77).

However, a number of jurisdictions have expressly rejected one or more branches of the privacy torts — six states have rejected false light claims, 78 six states have rejected actions for publication of intimate facts, 79 and two states have rejected claims for intrusion. 80 Moreover, according to the SURVEY, many jurisdictions that recognize one or more of the four branches impose a variety of restrictions on its availability. For example, 20 of the 30 jurisdictions that recognize an action for false light require proof of actual malice and/or that the publication be highly offensive, 81 24 of the 35 jurisdictions that recognize the tort of publication of intimate facts require that the revelation be highly offensive and/or provide a newsworthiness defense, 82 10 of the 41 jurisdictions that recognize an action for intrusion require proof of highly offensive conduct or provide a newsworthiness defense, 83 and eight jurisdictions have case law explicitly recognizing the constitutionally based requirement of a newsworthiness defense to


76 Alaska, Hawaii, Illinois, Indiana, Massachusetts, Missouri, Mississippi, Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

77 Hawaii, Illinois, Indiana, Mississippi, Missouri, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

78 Massachusetts, New York, North Carolina, Texas, Virginia, and Wisconsin.

79 Nebraska, Nevada, New York, North Carolina, Tennessee, and Virginia.

80 New York and Virginia.

81 Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Maryland, New Jersey, Oklahoma, Oregon, Pennsylvania, Tennessee, Utah, and Virgin Islands.

82 Alabama, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Iowa, Idaho, Illinois, Louisiana, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Virgin Islands, and Wisconsin.

83 Arizona, California, Connecticut, Delaware, Indiana, Iowa, Kansas, Mississippi, Virgin Islands, and Wisconsin.
misappropriation actions.64

NEUTRAL REPORTAGE

A constitutionally based privilege for neutral reportage may be an additional solution to the chilling effect of libel actions on the media. According to the 1994-95 SURVEY, in 13 jurisdictions at least one court has recognized the doctrine of neutral reportage,65 and only four jurisdictions have explicitly rejected the privilege.66 An additional nine jurisdictions have recognized related principles that might lead to adoption of neutral reportage or provide similar protection under the common law.67

In new cases reported in the 1994-95 SURVEY, a New Jersey Supreme Court justice (in a concurring opinion) suggested that the fair report privilege is analogous to the doctrine of neutral reportage.88 And, according to the state reporter for Wyoming, a case reported during the last year establishes a qualified privilege for neutral reportage.89

OPINION

During the past year there have been several important decisions construing the scope of the protection to be afforded statements of "opinion" in the wake of the Supreme Court's rejection, in Milkovich v. Lorain Journal, of a "wholesale exemption" for anything that might be considered opinion. By and large, these decisions have been favorable to libel defendants and took, by one means or another, an expansive approach to the definition of protected opinion.

In West v. Thomson Newspapers,90 the Utah Supreme Court held that statements of "opinion" are independently protected under state constitutional law, and adopted the four-part Ollman test to distinguish between statements of facts and expressions of opinion. The Utah

84Alabama, Alaska, California, Illinois, Kentucky, Massachusetts, New York, and Ohio.


86Kentucky, New York (state court), South Dakota, and Virgin Islands.

87Arkansas, Delaware, Hawaii, Iowa, Louisiana, Michigan, Nebraska, New Jersey, and South Carolina.


90872 P.2d 999 (Utah 1994).
Supreme Court also looked to New York state’s approach, in Immuno A.G. v. Moor-Jankowski.\textsuperscript{91}

Also, according to the SURVEY reporter for Louisiana, the decision in Sassone v. Elder\textsuperscript{92} may be read as holding that the Louisiana state Constitution requires broader protection of opinion than the First Amendment, as construed in Milkovich.

In other post-Milkovich decisions last year, both Colorado and Nebraska applied a contextual analysis to distinguishing fact from opinion.\textsuperscript{93} In Wheeler v. Nebraska State Bar Association, the Nebraska Supreme Court rejected the Milkovich approach and looked to California’s "totality of the circumstances" test, analyzing the objectivity and verifiability of a statement on the basis of the language used and the context in which the statement was made.\textsuperscript{94} According to the 1994-95 SURVEY, however, in both NBC Subsidiary (KCNC-TV), Inc. v. Living Will and Keohane v. Stewart, the Colorado Supreme Court concluded that its multifactorial contextual approach was consistent with Milkovich.\textsuperscript{95}

In Crowley v. Fox Broadcasting Co.,\textsuperscript{96} a federal district court in Maryland also applied the Ollman test to distinguish opinion from fact, examining the language and verifiability of the statement and the specific and broader social context in which it was made.

Courts in both New Jersey and West Virginia have also recently adopted a contextual analysis.\textsuperscript{97} In Ward v. Zelikovsky, the New Jersey Supreme Court held that nondefamatory name-calling or vituperation can be in the form of opinion, not intended to be understood as implying statements of fact. The court discussed Milkovich to the effect that opinion is defamatory only if it implies underlying facts that are in fact false. In Maynard v. The Daily Gazette Co., the West Virginia Supreme Court held that a statement of opinion involving an issue of public concern that does not contain a provably false assertion of fact is entitled to full constitutional protection.


\textsuperscript{92} 626 So.2d 1234 (La. 1993), as discussed in 1994-95 SURVEY, at 335.

\textsuperscript{93} See NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center, — P.2d — (Colo. 1994); Keohane v. Stewart, — P.2d — (Colo. 1994); Wheeler v. Nebraska State Bar Ass’n, 244 Neb. 786, 508 N.W.2d 917 (Neb. 1994).

\textsuperscript{94} Citing Baker v. Los Angeles Herald Examiner, 42 Cal.3d 254, 228 Cal.Rptr. 206, 721 P.2d 87 (Cal. 1986).

\textsuperscript{95} See 1994-95 SURVEY, at 86.


The D.C. Circuit, in *Moldea v. New York Times Co.*, vacated its earlier opinion and affirmed the district court's grant of summary judgment. Whereas the initial panel decision had refused to afford any significance to the fact that the alleged defamation had appeared in a book review, on rehearing the court concluded that it had been "short sighted" in failing to take into account the evaluative nature of reviews. Although it held that there is no per se exemption from defamation for all statements included in a review, it confined actionable defamation in reviews to statements "wholly unsupportable" by reference to the work under examination.

Finally, last year the Missouri Supreme Court rejected a defense of protected opinion, citing *Milkovich*.

Overall, according to the 1994-95 SURVEY, statements of "opinion" are afforded some protection in all jurisdictions other than South Carolina, which has not yet considered the issue. Eight states independently protect opinion under their state constitutions while 17 states follow *Milkovich* in affording no global protection to statements of opinion.

**OTHER TORTS**

In addition to defamation and invasion of privacy, the 50-STATE SURVEY covers a variety of related torts that may be asserted against the media, including *inter alia* both intentional and negligent infliction of emotional distress, and prima facie tort.

By asserting claims for these related torts, plaintiffs often seek to avoid the various constitutional protections applicable in the defamation context. Decisions published during the last year and reported in the 1994-95 SURVEY make clear that courts continue to look upon such "end runs" with disfavor.

**Intentional Infliction of Emotional Distress**

During the past year, courts in Georgia and Missouri dismissed claims for intentional infliction of emotional distress that were based upon a published defamation, reasoning that the

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98 *22 F.3d 310, 22 Med. L. Rptr. 1673, vacating on rehearing, 15 F.3d 1137, 22 Med. L. Rptr. 1321 (D.C. Cir. 1994).*

99 *See Nazari v. Missouri Valley College, 860 S.W.2d 303 (Mo. 1993).*

100 *At 833ff.*

101 *Indiana, Iowa, Michigan, New York, Oregon, Utah, Vermont, and Virginia.*

Claims for intentional infliction of emotional distress were dismissed by courts in North Dakota and Utah on the basis of privileges applicable in defamation actions. And an Ohio appellate court explicitly held that all First Amendment protections appropriate in the defamation context also apply to claims for intentional infliction of emotional distress brought by a public figure against a media defendant.

In other new cases reported in the 1994-95 SURVEY, a Nebraska court recognized intentional infliction of emotional distress as a separate cause of action in a libel context, although it dismissed the claim as based on insufficiently egregious facts. However, a Louisiana court found sufficiently outrageous conduct in a nonmedia case to state an action for intentional infliction of emotional distress in a male law professor's "intentional long-term campaign of verbal bullying, ridicule, and humiliation," including calling his student a "slut" in class.

Overall, according to the 1994–95 SURVEY, the tort of intentional infliction of emotional distress is generally recognized in 50 jurisdictions — that is, all jurisdictions with the exception of New Jersey, which specifically rejects such a cause of action, and Guam, Puerto Rico, and West Virginia, which have not yet addressed the question. However, only in 28 of the 50 jurisdictions that recognize intentional infliction of emotional distress has the tort been applied to media defendants.

**Negligent Infliction of Emotional Distress**

In cases decided during the last year involving the tort of negligent infliction of emotional distress were dismissed by courts in North Dakota and Utah on the basis of privileges applicable in defamation actions. And an Ohio appellate court explicitly held that all First Amendment protections appropriate in the defamation context also apply to claims for intentional infliction of emotional distress brought by a public figure against a media defendant.

Overall, according to the 1994–95 SURVEY, the tort of intentional infliction of emotional distress is generally recognized in 50 jurisdictions — that is, all jurisdictions with the exception of New Jersey, which specifically rejects such a cause of action, and Guam, Puerto Rico, and West Virginia, which have not yet addressed the question. However, only in 28 of the 50 jurisdictions that recognize intentional infliction of emotional distress has the tort been applied to media defendants.

In cases decided during the last year involving the tort of negligent infliction of emotional distress were dismissed by courts in North Dakota and Utah on the basis of privileges applicable in defamation actions. And an Ohio appellate court explicitly held that all First Amendment protections appropriate in the defamation context also apply to claims for intentional infliction of emotional distress brought by a public figure against a media defendant.

Overall, according to the 1994–95 SURVEY, the tort of intentional infliction of emotional distress is generally recognized in 50 jurisdictions — that is, all jurisdictions with the exception of New Jersey, which specifically rejects such a cause of action, and Guam, Puerto Rico, and West Virginia, which have not yet addressed the question. However, only in 28 of the 50 jurisdictions that recognize intentional infliction of emotional distress has the tort been applied to media defendants.
distress, an Oklahoma court refused to recognize such a claim when brought by a public figure plaintiff,109 and, in a nonmedia case, a North Dakota court held such claims barred by the successful invocation of a defamation privilege.110 A federal court in North Carolina, however, denied defendant's motion for summary judgment in a case arising from publication of false biographical information in a class reunion directory.111 And in perhaps the most troubling case on this issue reported during the last year, the Supreme Court of Puerto Rico refused to dismiss an action for negligent infliction of emotional distress brought by the family of a party who was allegedly defamed.112

Overall, according to the 1994–95 SURVEY, the tort of negligent infliction of emotional distress is recognized in 17 jurisdictions.113 However, in more than half of these jurisdictions the tort has been rejected or not yet considered in the media context — Michigan has expressly refused to recognize negligent infliction of emotional distress as applied to media defendants and in 10 other jurisdictions the tort has only been applied to nonmedia defendants.114

**Prima Facie Tort**

In the only newly reported case on prima facie tort during the past year, the Supreme Court of Missouri held that the tort "is not a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort for claims that are not otherwise salvageable under traditional causes of action."115 The court also rejected the use of prima facie tort as a basis for untrue statements, holding that defamation is the proper remedy for such claims.

Overall, according to the 1994–95 SURVEY, the overwhelming majority of jurisdictions either do not recognize prima facie tort or define it in such a fashion as to severely limit its

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113 Alabama, California, Connecticut, District of Columbia, Florida, Idaho, Massachusetts, Michigan, Minnesota, Missouri, North Carolina, Ohio, South Carolina, Texas, Vermont, Virginia, and Wisconsin.

114 District of Columbia, Idaho, Massachusetts, North Carolina, Ohio, South Carolina, Texas, Vermont, Virginia, and Wisconsin.

115 See Nazere v. Missouri Valley College, 860 S.W.2d 303, 315 (Mo. 1994).
operation. Only five jurisdictions potentially recognize this tort, and of these, Missouri and Pennsylvania reject its application in cases in which claims are available under any of the traditional tort categories, and in New York plaintiffs must establish that the defendant was motivated solely by common law malice, and newsworthiness demonstrates a motive other than malice. Although the California Supreme Court has not yet addressed the issue, an appellate court specifically rejected prima facie tort as a cause of action.

PRIVATE FIGURES UNDER GERTZ

According to the 1994-95 SURVEY a total of 47 jurisdictions have defined their applicable fault standard in the nearly twenty years since the Court held, in Gertz v. Robert Welch, Inc., that the Constitution does not permit the imposition of liability without some degree of "fault" in defamation cases involving private figure plaintiffs (at least when the speech is on matters of public concern). Overall, the vast majority of jurisdictions do not impose a fault standard more demanding than the minimum required under federal constitutional law — 42 jurisdictions permit liability upon a showing of mere negligence, with only three requiring plaintiffs to establish actual malice, and one applying a standard more demanding than negligence but less demanding than actual malice.

In decisions reported from the past year in the 1994-95 SURVEY, the Louisiana Supreme Court specifically declined to address the question of whether the actual malice standard should

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120 According to the 1994-95 SURVEY, only Alaska, Louisiana, Montana, Nebraska, Nevada, North Dakota, and South Dakota have yet to definitively establish a fault standard.


122 Colorado, Indiana, and New Jersey.

123 New York (gross irresponsibility).
be applied in an action by a private individual against a media defendant involving speech of public concern, although the issue may be reached in a case currently pending. In another newly reported case, an appellate court applying the New York state Gertz standard of "gross irresponsibility" held that the defendant newspaper's "conclusory assertion" that it had relied on a police officer's statements was insufficient to support its motion for summary judgment in light of the policeman's affidavit denying the accuracy of the statements attributed to him. Finally, a federal court, applying Ohio law and addressing that state's requisite standard of proof, held that the plaintiff must establish negligence by clear and convincing evidence.

**STANDARD FOR NONMEDIA VERSUS MEDIA DEFENDANTS**

Whether nonmedia defendants may assert the same constitutional privileges available to media defendants remains — at least technically — an open question in the U.S. Supreme Court. Among lower court cases reported from the last year, two federal courts applying Wisconsin law reached differing conclusions as to whether public figures must prove actual malice against nonmedia defendants. In a new appellate decision from North Carolina, the court applied the New York Times standard in a case involving a nonmedia defendant. And in other newly reported information, the Texas reporter notes that the Texas Supreme Court has for some time required a public official plaintiff to prove actual malice against a nonmedia defendant.

Overall, according to the 1994–95 SURVEY, the great majority of jurisdictions that have considered the issue do not distinguish between media and nonmedia defendants in applying the

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132 See 1994-95 SURVEY, at 711.
rules announced in *Gertz*. That is, at least in cases involving speech of public concern, currently 26 jurisdictions, either explicitly or implicitly, require private-figure plaintiffs to prove some level of fault as a prerequisite to the recovery of compensatory damages, regardless of the status of the defendant. By contrast, only six jurisdictions have either explicitly or implicitly refused to extend such protection to nonmedia defendants, with the remainder either having not yet addressed the issue or having divided authority in their lower courts.

In addition to the 26 jurisdictions that decline to distinguish between media and nonmedia defendants in *all* cases involving speech of public concern, another 14 jurisdictions refuse to distinguish between media and nonmedia defendants on the issue of actual malice, which may arise either when the plaintiff is a public figure/official or when a private-figure plaintiff seeks presumed damages or punitive damages in a case involving speech of public concern.

**Summary Judgment**

According to the 1994–95 Survey, the majority of jurisdictions continue to endorse the application of summary judgment in defamation cases: 30 jurisdictions favor summary judgment, 17 are neutral on the question, and only 5 disfavor summary judgment in the libel context.

In a new decision reported in the 1994–95 Survey, the Louisiana Supreme Court reaffirmed that state's longstanding practice of "applying a different standard for summary judgment in defamation cases" because otherwise the threat of unmeritorious actions would lead to an "inordinate amount of self-censorship which could significantly infringe upon their

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132 Arkansas, Kentucky, Minnesota, Oregon, Vermont, and Wisconsin.

133 Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, North Carolina, Oregon, Pennsylvania, Rhode Island, Texas, and Wyoming.


136 Alaska, Maryland, Michigan, New Hampshire, and New Mexico.
constitutionally protected freedom."¹³⁷ In another case decided last year, a Pennsylvania appellate court noted the critical nature of summary judgment in the First Amendment context: "[f]or the stake here, if harassment succeeds, is free debate."¹³⁸ And a Maryland federal court, although reported in this year's SURVEY as being reluctant to take the actual malice determination from the jury, nevertheless granted the defendants' motion for summary judgment because the plaintiff failed to produce clear and convincing evidence on this and other issues.¹³⁹

