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TRENDS IN DAMAGE AWARDS, INSURANCE PREMIUMS AND THE COST OF MEDIA LIBEL LITIGATION

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One of the driving forces behind the "constitutionalization" of American libel law effected by *New York Times v. Sullivan* and its progeny was an economic concern that the imposition of large civil damage awards could have an undue "inhibiting" effect on the exercise of first amendment freedoms. This paper presents trend data on damage awards, insurance premiums, and the cost of libel litigation suggesting that, despite *Sullivan,* these potentially "chilling" economic effects remain perhaps the pre-eminent feature of media libel litigation in the United States today. A comparison of pre-*Sullivan* damage awards with current damage awards clearly demonstrates the drastic increase in potential liability which is outpacing even increases in key areas of nonconstitutional tort litigation. An analysis of insurance premiums for libel coverage shows that premiums have also risen dramatically over the past few years. Even more precipitous increases loom on the horizon accompanied by a severe shrinkage of the libel insurance market that could make coverage unavailable for large and small media enterprises. Finally, an assessment of the onerous and increasing costs of defending libel actions, the vast majority of which involve legally meritless claims, reflects the failure of *Sullivan* to make good on its promise to impede the adverse economic effects of civil libel litigation. Indeed, because of the unusual liability

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This paper was originally presented in June of 1986 and was thereafter reduced to final written form in July and August, 1986. Accordingly, the data it includes and assesses in great detail are limited to those available at that time. No effort has been made to include more recent data for purposes of publication. While developments since that time have generally not changed the fundamental patterns and basic conclusions reflected in the paper, the succeeding period has seen many new developments also pertinent to the economics of libel litigation. For example, on the negative side, in March, 1988 the U.S. Supreme Court let stand a $3 million damage reward, the first million dollar media libel award ever finally affirmed on appeal. On the positive side, the predicted libel insurance "crunch" has apparently now eased, riding yet another general cycle in the market for liability insurance. Although libel insurance costs remain high today, those high rates have apparently leveled off to some extent and the feared crisis in overall availability of libel insurance has not materialized.

standards and procedures applied in constitutional libel actions, media libel litigation has become substantially more, rather than less, expensive to defend than run-of-the-mill, non-libel tort actions.

My purpose here is to set the stage for analysis and discussion of the economics of current libel litigation. As the media's central clearinghouse for information on libel trends and developments, the Libel Defense Resource Center's (LDRC) previous studies have, over the past few years, helped to define the empirical terms of debate in the libel field. It is to be hoped that LDRC's often gloomy data have had at least some salutary effect in sharpening the debate over libel law and its operation —for good or ill—within our delicate but critically important American "system," as Tom Emerson put it, "of freedom of expression."[1]

In connection with the ongoing debate over the functioning of our current system of libel, lawyers for libel plaintiffs and those representing media libel defendants seem to be able to agree on only one thing: the costs are too high! And for every multi-million dollar pot of gold emanating from the libel jury room, there seems to be (or at least until now there has always been) a judgment of reversal or substantial modification looming at the end of the appellate rainbow.

This article presents data that should flesh out our understanding of the current operation of the libel system. It is eminently appropriate that, in assessing the state of American libel law, we address the *economics* of libel and that we begin with a focus on empirical data regarding libel litigation. Indeed, as noted, the "constitutionalization" of American libel law effected by *New York Times v. Sullivan* and its progeny was largely motivated by a distinctly economic concern, that the fear of large civil damage awards, even more than possible criminal sanctions, could have an undue "inhibiting," or "chilling" effect on the exercise of our constitutionally-guaranteed freedoms of speech and of the press.[2] Justice Brennan's historic opinion in *Sullivan* characterized the ultimate economic impact in these terms:

> Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.[3]

I. TRENDS IN DAMAGE AWARDS

A. Historical Perspective

In terms of dollars and cents *New York Times v. Sullivan* is also an apt starting point for an empirical tour of the libel landscape. The jury verdict

in *Sullivan* was $500,000—the full amount of the *ad damnum* clause in that action. Today, a libel plaintiff's *ad damnum* more often reads like a substantial chunk of the national debt. The "succession" of judgments over which Justice Brennan expressed such constitutional trepidation was, in addition to the $500,000 in *Sullivan*, an award of $500,000 in a second action and the pendency of three more actions seeking a total of $2 million in damages. In other words, just twenty-two years ago the spectre of damages totalling $3 million in five separate libel actions was perceived as possibly threatening the very survival of one of our great newspapers and certainly as foreboding the demise of freedom of expression.[4]

B. Current and Past Damage Awards Compared

The contrast between Justice Brennan's concerns of a generation ago and current experience could not be more stark. Today's *average* damage award in just a *single* media libel case, where a plaintiff's verdict is entered, comes very close to equalling the maximum total of *all* awards feared by Justice Brennan in the *five* related cases of *New York Times v. Sullivan*. I would not even venture to speculate on what the average total of *ad damnum* damages sought would be for five cases against a major media company in today's Alice-in-Wonderland litigation climate.

To put this contrast into perspective, in media libel actions since 1980 there have been approximately thirty damage awards in excess of a million dollars. Three of these have been in excess of $25 million.[5] The average for 81 initial damage awards between 1980 and 1984 was $2,043,702.[6] The experience with punitive damages is still worse. In 46 of the 81 cases, punitive damages were granted as a part of the award. In those cases, the average damage award was even higher than the $2 million figure just mentioned, with the punitive component alone averaging $2,680,620.[7] Of course, inflation has a lot to do with these high figures, but even adjusting for inflation, the data strongly suggest that Sullivan and subsequent cases, including *Gertz*,[8] have completely failed in their mission to put a brake on runaway damage awards that would threaten to chill freedom of expression.

C. Damages 1954–1964

Reported cases involving damage awards against medial libel defendants were divided into two periods: (1) the decade before *New York Times v. Sullivan*, 1954–1964; and (2) a somewhat longer period after *Sullivan*, 1964–1977.[9] Before *Sullivan*, there were 55 media libel cases that went

to trial (34 state cases, 21 federal). Of course, those 55 plaintiffs prevailed with an award of damages in 40 of the cases tried (26 state; 14 federal), or a defense loss rate of 73 percent.[10] (It is noteworthy that, despite *Sullivan*, the libel trial loss rate in the 1980s has actually been worse than the 73% pre-Sullivan rate, with three out of four trials lost by media defendants.)

The damage awards in those pre-*Sullivan* cases were averaged $128,933, including one multi-million-dollar award—$3 million-plus—in *Butts*,[11] a case well-known as a post-*Sullivan* precedent, but one whose initial damage award was actually entered prior to *Sullivan*. (The *Faulk* case, the only other million-dollar libel judgment during the period, is actually best viewed as a "non-media" action and was excluded from the sample.)[12] If *Butts* were excluded, the average initial damage award in the decade before *Sullivan* was less than $50,000 ($49,715).[13] Indeed, the *total* of the awards in the thirty-seven cases for which damage figures were available (again excluding *Butts*) was $1,839,468, or less for thirty-seven cases than a single average case in today's world of libel litigation. One can manipulate these figures in one final way by adjusting for inflation, which obviously explains some portion of the huge disparity from pre-*Sullivan* cases to cases in the 1980s. Using a rough U.S. Department of Labor CPI factor of 3.69 the pre-*Sullivan* decade damage figures can be converted into current dollar levels.[14] Even so adjusted, the average damage award in the decade prior to *Sullivan*, was $475,764, and the average excluding *Butts* was $183,448. Thus, the current experience, even corrected for inflation, is still somewhere between 400 and 500 percent greater than the decade before *Sullivan*.

D. Damages 1964–1977

The same analysis was performed for the post-*Sullivan* period, 1964–1977. The disparities are not quite as dramatic, but they are nonetheless of interest. In the 104 trials identified, plaintiffs secured 73 damage awards (48 state, 25 federal—defense loss rate of 70%).[15] During this period, there were two awards of $1 million or more. The average award, including the million-dollar judgments, was $180,597. Adjusting for inflation using a factor of 2.66,[16] the figure is $480,388, up only slightly from the pre-*Sullivan* decade. Adjusting for the pair of million-dollar awards has less of an impact, leaving a current-dollar adjusted average (net of mega-awards) of $356,449—but still between 200 and 400% lower than the current experience.

E. Libel Damages Contrasted with Medical Malpractice and Product Liability

The figures for malpractice and products liability damage awards, however, show that libel defendants are in fact worse off than defendants in those other two categories, themselves said to be experiencing a wild pattern of inflation and million-dollar awards.[17] It is also well to remember that the media's worst experience is in a category of actions where there are rarely if ever the kinds of "special" or out-of-pocket damages —often reflecting huge medical bills and lifelong impairment of physical health, earning capacity, and quality of life—that are characteristic of these other torts. Thus, 1980–82 data for medical malpractice cases showed an average award of $665,764,[18] compared to the libel average of $2 million-plus for the same period. Excluding million-dollar awards the medical malpractice average dropped to $238,032. In contrast, the adjusted libel average, excluding only mega-awards, was in excess of three-quarters of a million dollars. The story was the same regarding product liability cases for the same period. The product liability average was $785,651; the average, adjusted to exclude million-dollar awards, was $278,266—well below the media's libel experience.[19]

Unfortunately, systematic medical malpractice and product liability award averages do not appear to be available for twenty or thirty years ago. However, there are data for the last ten or a dozen years. As might be expected they confirm a dramatic increase in damage awards for these non-libel torts in the past decade.[20] Significantly for our purposes, however, the increase has not been nearly so dramatic as the media's experience in libel actions during that same period.

Thus, for the period of 1974–76, and using Jury Verdict Research data, the average medical malpractice award was $192,208; excluding million-dollar awards (there were only *eleven* during that early period), the average dropped to $147,078.[21] The average product liability award during the same period was $369,297; $171,373, when twenty-eight million-dollar verdicts are excluded. Averages for media libel during the same period, working with the cases referred to above, were $239,527 and, excluding the one million-dollar case during that period, $186,895. Thus, about a dozen years ago, media libel awards were comparable with or only marginally higher than the awards for these non-libel torts. Six years later, libel damages were approximately three times greater than damages for those other two torts.

To update these figures as much as possible, medical malpractice and product liability awards for 1983 and 1984, the two most recent complete

years available, were reviewed.[22] Again, not unexpectedly, non-libel damages showed a significant increase. In fact, overall the damage gap between these torts and libel seems to have shrunk somewhat. This shrinkage appears to be due largely to the stabilization of libel damages in the period 1980–84, at a heady $2 million average per verdict through 1984.[23] Medical malpractice damages increased from an average of $665,674 to $771,805 during the period from 1980–82 to 1983–84.[24] The medical malpractice numbers, excluding million-dollar verdicts, actually decreased slightly, from $238,032 to $235,900. Product liability experienced a much more dramatic increase, with the average going from $785,651 to $1,139,997. As with medical malpractice, product liability awards decreased somewhat when million-dollar awards were excluded (there were a whopping 176 million-dollar verdicts out of 710 cases reported), from $278,266 to $263,761.[25] But even with these increases in overall damage averages, the two non-libel torts still fall far short of the averages being experienced by media libel defendants both through 1984 and in the most recent cases as well.

In sum, it is well worth reflecting upon the remarkable disparities between the large awards being granted to libel plaintiffs for allegedly injured reputations and those awards being granted to plaintiffs in medical malpractice and product liability cases for concrete economic injury and severe physical debilitation. The damages being awarded in non-libel cases are being cited around the nation, with some success, in support of wide-ranging tort law reforms.[26] It would certainly seem, at least from these data, that media libel defendants have an equal, if not a superior, claim for law reform relief.

II. COST OF MEDIA LIBEL LITIGATION

One could argue that there is a remedy to this parade of horribles. According to available data, the great majority of libel cases never get to the stage of plenary trial, much less to the moment of potential imposition of any damage award at all. Even putting aside for the moment abandoned and settled cases, all the available data indicate that more than 90 percent of seriously litigated media libel cases never go to trial.[27] Pretrial dismissals on the merits are granted with notable frequency in libel cases. A study of motions to dismiss and demurrers made from 1981 to 1983 found that, when made, two out of three such motions resulted in the complete dismissal of the action (including appeals) in favor of the libel defendant.[28] A more recent study of motions to dismiss in libel actions brought by public official plaintiffs from 1976 to 1984

showed similar results: more than 60 percent were granted.[29] Moreover, approximately 75 percent of motions for summary judgment are granted in favor of the libel defendant.[30] This high rate has persisted despite negative comments on the availability of summary judgment by the Supreme Court in dictum in two cases after 1979,[31] and the Supreme Court's most recent ruling on summary judgment in libel actions in *Anderson v. Liberty Lobby*.[32]

Even when libel cases do manage to slip through the pretrial net (and, despite the foregoing, this does appear to be occurring today with somewhat greater frequency) those cases that are lost at trial are, as previously suggested, still subject to an arduous appellate process that very much favors the libel defendant, both substantively and statistically. There is a 60 to 70 percent reversal rate on appeals from adverse judgments, with an additional 10% modification rate in cases that uphold the finding of liability but substantially reduce the initial damages awarded in the trial court.[33] Thus far, for example, no million-dollar media libel damage award has been upheld after all appeals have been exhausted. Indeed, in contrast to the average $2 million-plus initial damage award, the average of those few awards that are finally affirmed after all appeals has been below $100,000 over the past four or five years.[34]

So, if this is an accurate picture, what is the problem? Today, the greatest problem is probably the cost of litigation. The cost of successfully defending media libel claims is high and getting worse. It has been estimated that defense costs amount to an astonishing 80 percent or more of the dollars spent by insurers of the media in libel cases.[35] In contrast, general data on the civil justice system indicate that plaintiffs' attorneys fees range in cost between approximately forty and seventy cents for every dollar awarded in a final judgment, depending on the type of case.[36] Workers compensation cases generally yield lower liability costs, while cases involving automobile accidents, medical malpractice, and product liability generate higher costs.[37] These kinds of figures have been widely cited as demonstrating the tort system's gross inefficiency in compensating injured claimants. Yet if this is woeful inefficiency, then what is the 80%-plus figure for defense costs experienced in the libel field? Obviously, that figure represents a system that has almost nothing to do with compensation and almost everything to do with funding litigation—litigation that in almost all cases compensates only the attorneys involved.

Within a system of this kind an obvious goal should be to reduce the time and expense of disposing of cases that will not result in the imposition of liability. But here, too, although the statistics appear to show the outlook is promising that the lion's share of cases can be disposed of

prior to trial, even pretrial motion practice is expensive in libel actions and is getting more costly all the time. For example, while the media defense bar has managed to hold the line on summary judgment as a statistical matter, the tradeoff has been that more, and more costly, discovery is now generally required before a serious summary judgment motion can be made. Ironically, onerous and expensive discovery also appears to be a corollary of the special constitutional rules that apply in the libel field, at least as they have been interpreted by the Supreme Court. In particular, the court in *Herbert v. Lando* held that extensive discovery into the editorial process was a reasonable—indeed necessary—aspect of the development of a libel plaintiff's case on the issue of constitutional malice.[38] While it is difficult to quantify or generalize, there is little question that inquiry into the subjective state of mind of the journalist or publisher has substantially increased the extent, duration, and cost of libel litigation—not to mention its intrusiveness—even when that litigation can be disposed of on pretrial motion.[39]

Thus, paradoxically, while far more libel cases are disposed of "earlier" in the litigation process than other nonconstitutional torts, it appears that getting the average libel litigation dismissed prior to trial may well be more expensive, on average, than the trial (where necessary) and disposition of the average nonconstitutional tort action. The breadth of the inquiry required, the complexity of the legal standards and fact patterns, as well as the duality of the constitutional inquiry both into the truth or falsity of the underlying publication and into the fault or lack of fault in the manner of the publication have all lead to an explosion of litigation costs for both libel plaintiffs and defendants. And these costs are incurred whether the case is won or lost.

The threat of mega-damage awards surely has a significant impact on the costs of libel litigation. No evaluation of the downside risks of litigating even what may appear to be an obviously nonmeritorious claim can ignore the open-ended liability that could be imposed in almost any libel action should a libel claim get to a jury—particularly where noneconomic and punitive damages are sought. This, in theory at least, differentiates libel from other torts where concrete damages are measurable and predictable, at least within some meaningful parameters. The awareness of potentially huge risk—however unlikely the final affirmance of a huge award may be—surely filters down through all stages of libel litigation, affecting "nuisance" value, settlement value, and all aspects of litigation strategy.[40]

In terms of specific dollar costs of libel litigation, it is impossible to come up with meaningful "averages" when the nature, extent, and duration of such litigation can vary so widely from one case to the next.

The cost to defend two claims, each based on the identical legal standards and each theoretically involving the same potential for concrete damages—great, small, or nonexistent—can vary as widely as the minimal costs of reviewing a summons or complaint, thereupon abandoned, to the costs of retrying aspects of the Vietnam war and the practices and procedures of a major news network in a months-long libel trial—from almost nothing to millions of dollars.[41]

Reports place defense costs in the *Westmoreland v. CBS* action at $6 million; *Sharon v. Time, Inc.* at $5 million; and *Tavoulareas v. Washington Post* at $1.5 million, presumably with more yet to come.[42] But these are clearly extremes. In terms of averages, one representative from a leading insurance carrier has estimated that defense costs in the average litigated case (at least in larger cities) have perhaps doubled in the last four years from an estimated $75,000 to $150,000 or more—and these are cases that are most often favorably disposed of on the merits prior to trial.[43] This means that in the average case more is spent to win the case before trial than would be paid over in damages, after appeal, if the case were lost and the average affirmed award of less than $100,000 were collected.[44] Needless to say, the cost of litigating that case through a full plenary trial and necessary appeals will presumably far exceed the $150,000 average for pretrial disposition.

These huge average cost figures stand in stark contrast to the cost of litigating the average civil tort action. A Rand Corporation Institute for Civil Justice study estimated that the average expenditure per tort case filed in the federal court system was only $1740.[45] The average cost for a federal jury trial in all cases ranged from $8,000 to $15,000! Obviously, these numbers are minuscule compared to the average libel action.[46]

But is there any feasible method, short of abolishing the libel cause of action, for reducing libel defense costs? Certainly it is clear, whatever the rise in costs of pretrial disposition, that dismissals and summary judgments will remain a vital factor in keeping costs to a minimum. Earlier and more frequent dismissals would appear to be called for—even if only because experience has shown that extensive trials and appeals simply build up litigation costs without yielding the libel plaintiff any meaningful prospect of success on the merits. If so many cases are won by the media—either because of the lack of factual merit or because of the substantial legal burdens that must be overcome by the libel plaintiff—it seems ridiculous not to devise methods to assure that the money, time, and energy of all parties is not wasted on fruitless litigation.

The importance of efficiency is, of course, enhanced when constitutional considerations are taken into account. The Supreme Court's re-

cent ruling in *Anderson v. Liberty Lobby, Inc.*,[47] recognizing the need to enforce the heightened constitutional standards at early stages of a libel litigation, would appear to have sustained, if not strengthened, the present levels of availability of summary judgment in media libel actions. While the *Anderson* decision clearly represents a significant victory for the media, whether that decision will sufficiently avoid unnecessary litigation and attendant costs in the future remains to be seen.

Another proposal to reduce the costs of libel litigation has focused on a so-called "declaratory judgment" action, potentially obviating the need for an examination of state of mind issues and eliminating the threat of large damage awards.[48] I am not myself convinced that the creation of such an action is a wise approach in general, particularly to the extent that declaratory judgments would require courts to become deeply involved in the purported adjudication of the "truth" or "falsity" of varying perspectives on public, political, or historical events.[49] But even if courts were the proper forums for such inquiries, it is not clear to me that declaratory judgments would effect net cost savings as compared to the current system. Although litigating state of mind is hardly inexpensive, in many cases—perhaps most—adjudication of the underlying truth or falsity of events would be even more costly.[50] Currently such expense can in many cases be avoided altogether by focusing on state of mind, for unless the plaintiff meets its burden of proving fault there is no need to tackle the potentially more expensive issue of truth or falsity. An even greater potential danger of the declaratory judgment approach is the real possibility that many more claims would then be pursued—claims that would otherwise not have been filed, or that would have been quickly dismissed prior to trial for want of proof on the state of mind issue.

Apart from the substantive nature of the legal issues and the unique procedures that were intended to save time and money but now appear to be costing more, there are other aspects to the escalation of libel litigation costs that may be among the factors that distinguish the media defendant's situation from that of other litigants—for presumably, the general economics of legal practice and attendant rising costs are not simply limited to libel litigation. First, libel law is a rather arcane field. Often leading specialists are the most appropriate, if not the only appropriate, counsel. While specialization is often necessary, it is also costly. Top lawyers cost more—they are generally more senior in status, more in demand, and their hourly fees are higher.

In addition, for better or worse, the rigorous defense of libel claims—particularly those without any merit—has most often been seen by the media as being a matter of principle. Many media companies have felt

that libel cases should not be settled. To some extent this may represent an economically prudent step to avoid attracting claims filed solely for nuisance settlements. To a greater extent, however, it reflects the perception that libel defense involves more important principles than mere economics. Inevitably, it is more costly to litigate from principle than from practicality. I suppose product manufacturers are also unhappy to settle what they view as unmeritorious claims. But manufacturers *do* pay plaintiffs and one justification, at least, is that the plaintiff's broken finger is real and undeniable even if the manufacturer believes that the injury was not its responsibility, or believes that the plaintiff used its product recklessly.[51] Indeed, it will almost always be more economical to litigate with a view to securing the most propitious and low-cost result or settlement than to litigate solely with an eye toward vindicating the defendant organization as a matter of principle.

This pressure to defend principle becomes even greater—and even more costly—when the plaintiff's libel action is consciously structured so as to attack the defendant. Indeed, the Iowa Libel Study teaches that plaintiffs are most often seeking "vindication."[52] The other side of the vindication coin is proof of the *mal fides* of the media defendant. And, of course, *New York Times v. Sullivan* in a sense always requires precisely this proof of morally significant "fault." Few media companies are so thick skinned that they can ignore such a challenge and direct their energies solely to the minimization of litigation costs rather than to the defense of its journalistic honor. In the end, the kind of lawyer one wishes to engage to defend the integrity of the organization—and the cost of that lawyer and the litigation strategy he is likely to pursue—will certainly far exceed the cost of engaging another kind of lawyer hired solely to extricate the defendant for the least possible monetary award or settlement. With libel defense costs wildly escalating and libel insurers vigorously complaining, whether the media will continue to be able to afford—or be allowed to indulge in—the arguable luxury of litigating libel claims from principle remains to be seen.[53]

IV. TRENDS IN INSURANCE PREMIUMS

Whatever the risk of the imposition of huge damage awards, or the incurring of onerous defense costs, insurance has for many years acted as a safety valve. But this protection is now under very serious pressure; there are at present adverse trends in the general insurance market, for some of the very same reasons already discussed regarding special problems in the libel field.

There is little question that relatively low cost libel insurance has for many years represented an asset of great value to the media community in helping to provide a financial safety net for fearless and robust journalism. Insurance coverage of relatively modest cost has not always been universally available, but generally, up until the past few years, relatively low cost insurance has been widely available.[54] This, in turn, has served to soften somewhat the impact of the increasingly adverse trends outlined above.

Moreover, although the insurance industry has previously experienced cyclical crises, the crisis in libel insurance is a new phenomenon. The last major insurance downturn, in the mid-1970s, is reported to have had no significant impact on the libel insurance market. That was an era when the number of libel claims was still relatively small; when the era of mega-damage awards had not yet arrived; and, perhaps most importantly, when American libel law was still perceived as quite favorable to the media defendant. In the 1970s libel litigation was not yet viewed as a serious risk by those writing and reinsuring media coverage.

No more. The crunch is upon us, and we are now in danger of careening to the other extreme. A significant erosion in the availability and affordability of libel insurance is currently threatened. And unfortunately those hardest hit by these new insurance trends are likely to be the smaller organizations, the offbeat, and the anti-establishment media, as well as outspoken individuals and nonmedia, nonprofit organizations —precisely the targets whose existence is the most tenuous, whose ability to survive is the most fragile, and who are most likely to be the lightning rods for libel litigation with either the intent, or at least the effect, of chilling freedom of expression.[55]

An informal review of current trends in insurance premiums shows, not unexpectedly, substantially increasing costs, substantially diminishing coverage, and other adverse changes in the way libel insurance is being written. More frighteningly, the spectre of unaffordability or even total unavailability for an increasing number of media entities—may be close at hand.

What is perhaps the most economical libel insurance currently on the market has been available over the past few years. It is obtained through certain group programs available under the auspices of media trade associations to their members. Two of the leading programs offer such insurance coverage to small and weekly newspapers and to small television and radio broadcasters.[56] Similar coverage is also available to public broadcasters and their independent producers. Since 1984 these inexpensive association policies have experienced increases in excess of 100 percent. New treaties are currently being negotiated for these

policies. Predictions are that this new round of negotiations will lead to increases of at least 50 percent, and it is even possible that such group programs may be cancelled.

If the situation is tenuous for those lucky enough to qualify for group coverage, it is far worse for those who must deal individually in the current insurance market where the cost of insurance coverage is generally far greater. Although it is difficult to generalize, it is fair to say that on average most individual media companies have experienced a 200 to 300 percent increase in their insurance premiums during the same period.[57] In many instances, the premium increases have been far more substantial.

Despite higher premiums, libel insurance coverage has actually contracted while premium rates have been rising. This is the result of a number of factors, including a reduction in the number of companies writing libel insurance and in what apparently is a radical contraction of the reinsurance market for libel. As a result of the current crisis, the leading libel insurance carriers are reported to have made or to be contemplating dramatic alterations in policy. Lloyd's of London is said to have begun rejecting new business altogether and to be renewing only certain preferred clients. In the United States, the number of companies writing libel insurance has also dwindled over the past several years. A recent development was CNA Insurance's complete withdrawal from the media-related market, which briefly left Employers Reinsurance Corporation the sole surviving predominant insurer for publishers and broadcasters. The Safeco Insurance Company has now come in to replace CNA in underwriting media-type risks through Media Professional Insurance, but Safeco is currently reported to be imposing conservative risk limits. Chubb, once among the leaders writing insurance for publishers and broadcasters, is reported to now restrict its business to producers, distributors, and cable television operators. The Seaboard Surety Company, once a major source of advertising insurance, is reportedly providing only moderate coverage to publishers and broadcasters. The Fireman's Fund is reported to be continuing to provide coverage to producers and broadcasters, but is said also to be affected by reinsurance difficulties. American International Group (AIG) is reported to have implemented significantly more demanding approval criteria. Finally, Mutual Insurance Ltd. of Bermuda, one of the leading players in the field, which writes much of the coverage for the nation's leading newspapers, is also reported to be adopting modified underwriting criteria, utilizing experience-rated renewal and 20 percent participation (co-insurance) clauses, while declining to renew certain policies where an adverse loss record anticipates too great a risk.[58]

As mentioned, one fundamental element of the present insurance crisis is the inability of underwriters to reinsure the risks they cover. The higher cost of reinsurance necessarily forces premiums upward. Absent reinsurance capacity, primary coverage may also be substantially restricted. The U.S. General Counsel for Bermuda's Mutual Insurance Company, for example, has been quoted as acknowledging a severe shrinkage in the libel reinsurance market, thus restricting the amount and type of coverage that the libel insurers can offer.[59] Ann Heavner, a specialist in media coverage at Johnson & Higgins, a leading insurance brokerage firm in New York, recently even suggested the dire possibility that as of January 1, 1987, reinsurance for libel policies might become almost entirely unavailable, sending insurance companies' maximum capacities drastically downward and potentially forcing several to stop doing business altogether.[60] Whether or not such a total catastrophe ultimately occurs, it is certainly clear that the libel insurance market is, at the present time, experiencing its greatest crisis and it is difficult to envision precisely how these fundamental problems will be resolved.

As a result of these troubling market trends, other aspects of libel insurance have also been severely affected. Deductibles for libel coverage have sharply increased at the same time that limits have sharply decreased. Where once $10 or $20 million in excess could readily be obtained for relatively low marginal cost, now it is said to be difficult to obtain more than $1 million in coverage, and it is a real struggle to obtain levels of $5 or $10 million; the additional premiums for such excess can be staggering.[61] In this era of potential multi-million-dollar litigation costs, and threatened multi-million-dollar damage awards, the availability of such excess may no longer be a luxury but a pressing necessity for full protection. Where once deductibles might have fallen in the $10,000 to $20,000 range for larger media entities, today those same companies may be required to accept deductibles of at least $75,000 or $100,000 per claim.[62] With defense costs continuing to rise, deductibles of this size have serious implications. Although the average defense cost has been estimated to be $150,000, the somewhat lower American Society of Newspaper Editors estimates would mean virtual self-insurance as the majority of companies are required to accept $100,000 deductibles.[63] While a number of the specialized carriers still insure 100 percent of defense costs, as noted above at least one major carrier has already introduced a 20 percent co-insurance feature and other carriers are aggressively seeking ways to reduce defense costs—an effort that may well be economically justified, but that in the long run could have a greater impact on how libel cases are defended than any substantive ruling by the Supreme Court.

The rising costs of libel insurance could perhaps be dismissed or at least discounted if this issue were simply a matter of increased but still affordable costs for insurance coverage. However, the issue may be rapidly becoming one of outright unavailability of coverage, either because carriers are refusing to write policies for certain kinds of media entities and risks, or because cost increases have become so dramatic that they are simply not affordable, particularly to smaller or economically marginal operations, but also to some of the largest entities as well. Right now the data are incomplete, with scattered but troubling reports of unavailability. It is unclear whether this suggests continued general availability, or a failure of reporting more widespread instances of unavailability.

CONCLUSION

The major conclusion that must be drawn from all of the hard economic realities outlined above can be briefly stated: The more than twenty-year-old promise of constitutionally guaranteed protection from the unduly chilling *economic* effects of libel claims remains today decidedly unfulfilled. It remains to be seen whether—and if so, how—the economics of libel litigation can be brought more closely into line with that constitutional mandate for the protection of First Amendment rights, now or in the future.

NOTES

1. T. Emerson, The System of Freedom of Expression (1970).

2. 376 U.S. 254 (1964). Justice Brennan put it this way in *Sullivan:* "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." *Id.* at 277. In subsequent opinions, the potentially chilling effect of the cost of libel on publishers was specifically articulated. *See* e.g., Time, Inc v. Hill, 385 U.S. 374, 389 (1967) (citing Speiser v. Randall, 375 U.S. 256 at 526): "Fear of large verdicts in damage suits . . . even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone' . . . and thus 'create the danger that the legitimate utterance will be penalized.' " The Court echoed this economically based concern four years later in *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 52–53 (1971): "The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." Even in the ultimately unfavorable decision of the Court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), its concern over the chilling effect of excessive damage awards was reiterated: "The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily

compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.* at 349.

3. 376 U.S. at 278 n.18.

4. See *id.*

5. LDRC Bulletin no. 4, part 1, August 15, 1982 [hereinafter LDRC Damages Study no. 1] at 11, 16; LDRC Bulletin no. 11, August 15, 1982 [hereinafter LDRC Damages Study no. 2] at 29.

6. LDRC Damages Study no. 2 at 14, 18. All averages computed for LDRC Studies, including this paper, are "mean" averages. A "median" average would not, in our view, meaningfully present the data. However, all of LDRC's published damages studies included detailed cases and damages lists which would make possible the development of median and other alternative methods of analyzing these data.

7. *Id.* at 18.

8. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). While the *Gertz* case cut back on the number of claims that would be subject to the constitutional limitations imposed by *Sullivan*, it did purport to define certain limits on damages applicable even to non-*Sullivan* libel actions, including the requirement that *Sullivan* standards be met before punitive damages could be imposed.

9. Lists identifying each of these cases, including initial and final award, can be found in LDRC Bulletin no 17, July 31, 1986 at 6–16.

10. LDRC Damages Study no. 2 at 6, 10. For one period, in the early 1980s, the media's libel loss rate at trial was approaching 90%. See LDRC Damages Study no. 1 at 5.

11. Curtis Publishing Company v. Butts, 388 U.S. 130 (1967).

12. Faulk v. Aware, Inc., 35 Misc 2d 302, 231 N.Y.S.2d 270 (Sup. Ct. N.Y. County 1962), rev'd 19 A.D. 2d 464, 244. N.Y.S. 2d 259 (1st Dep't 1963), (*aff'd* 14 N.Y. 2d 899, 252 N.Y.S. 2d 95 (1964). According to the New York Court of Appeals, the chief publication found to have defamed the plaintiff was a "News Supplement" to Aware, Inc.'s own Membership Bulletin. Aware served as a consultant to various organizations for the stated purpose of identifying the "political backgrounds" of radio and television performers. This type of internal publication of information, developed under contract to various clients, is hardly a typical "news media" type of publication.

13. The average final award for 1954–1964 after appeal was $29,153.89. Adjusted for inflation, that figure becomes $107,577.85. See *infra* note 14.

14. The factor was obtained by dividing the CPI number for April 1986 by the average CPI number for the years 1954–1964, as listed in the Historical Table of U.S. City Average CPI Numbers for All Items.

15. The average final award for 1964–77 was $18,613.14. Adjusted for inflation, the amount becomes $49,510.95. See *infra* note 16."

16. This factor was obtained by the method described *supra*, note 17, using the average CPI number for the years 1964–1977.

17. LDRC Bulletin No. 9, January 31, 1984. The data used for these comparisons were developed by Jury Verdict Research, Inc. (JVR) and published in JVR's *Injury Valuation Reports, Current Award Trends*, No. 270 (1983).

18. *Id.* at 26.

19. *Id.*

20. A more detailed report of this comparison data will also be published in a forthcoming LDRC Bulletin.

21. Jury Verdict Research, No. 270, *supra* note 17, at 18-19.

22. More details on this updated data will also be published in a future LDRC Bulletin.

23. Incomplete but more recent libel data, covering 1985 and part of 1986, actually

shows a modest *decrease* in the average libel damage award based upon interim LDRC reports covering news trials in the period 1984–85. *See* LDRC Bulletin no. 13 at 45–46 and No. 16 at 46–48. For the 13 verdicts therein reported, the overall average was "only" $1,480,192. Excluding one award of only $10,001 against a student newspaper, the overall average was $1,602,708. Although the overall average was down, this should not be read as suggesting a significant amelioration in the media's libel experience. The reason for the downturn is that during this recent period there were no distorting eight-figure verdicts. Excluding such "mega-verdicts," the average figures are actually up again very significantly, from three-quarters of a million to the figures just mentioned. In sum, these interim figures for new libel cases show a marked and troubling trend toward damages consistently above a million dollars (7 of the 13 recent awards exceeded $1 million), albeit without the small number of grotesquely huge awards experienced in the earlier years of this decade.

24. When LDRC had initially reported these data, only partial figures were available for 1982. Now completed data for the 1980–82 period indicate that the medical malpractice average verdict was a slightly higher $783,652; $240,346, excluding million-dollar verdicts, while the updated products liability average for the same period was actually a lower $772,444 average award; $271,164, excluding million-dollar verdicts. Jury Verdict Research, *Injury Valuation: Current Award Trends*, No. 304, at 18–19 (1986).

25. *Id.* Interestingly, however, million-dollar awards, as a percentage of current libel awards, are significantly more frequent than in these other two categories. The most recent figures indicate that between 1982 and 1984, million-dollar verdicts accounted for 21% and 23% of medical malpractice and products liability awards respectively, whereas 32% of libel damage awards reported for the same period were in excess of a million dollars. The percentage has been even higher for the most recent libel cases where 7 of 13 surpassed a million dollars. *Id.* at 18–19.

26. *See, e.g.*, Tort Policy Working Group, U.S. Department of Justice, U.S. Department of Commerce, and the Small Business Administration, *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (hereinafter *Working Group Report*), Feb. 1986, at 35–42 (analysis of growth of civil tort damage awards from 1975–1985) and at 66–69 (proposal, *inter alia*, to limit "non-economic" damages in such actions); Sidley & Austin, *The Need for Legislative Reform of the Tort System* (hereinafter *Sidley & Austin Report*), May 1986 at 32–40 (description of growth of economic, noneconomic and punitive damages; proposal to limit jury discretion in awarding damages and to institute legislative limitations on awards for pain and suffering).

27. *See, e.g.*, Bezanson, "Libel Law and the Press: Setting the Record Straight," 71 *Iowa L. Rev.* 217, 218 (1985) a comprehensive report of the findings and supporting data of the "Iowa Libel Project" will be published in a forthcoming book); Franklin, "Suing Media for Libel: A Litigation Study," 1981 *Am. Bar. Found. Research Journal* 795 (1981).

28. LDRC Bulletin No. 8, September 30, 1983, at 2.

29. LDRC Bulletin No. 16, March 15, 1986, at 15.

30. LDRC Bulletin No. 4, Part II, October 15, 1982, at 2; LDRC Bulletin No. 12, December 31, 1984, at 1–37.

31. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9 (1979), elevated to the text in Calder v. Jones, 465 U.S. 783, 791 (1984).

32. See Anderson v. Liberty Lobby, Inc., 471 U.S. 477 U.S. 242 (1986). 54 U.S.L.W. 4755 (June 25, 1986). The media's concerns over the previous negative intimations by the Supreme Court regarding the availability of summary judgment have now been at least diminished by the Court's most recent statement on the issue. Justice White, writing for the 6–3 majority in *Anderson*, rather blithely dismissed the notorious footnote 9 of

Hutchinson, stating that footnote 9 was "simply an acknowledgement of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.' " *Id.* at 256 n. 7.

33. LDRC Damages Study No. 1 at 7; LDRC Damages Study No. 2, at 19–21. A recent study of appellate review in all civil actions indicates that the reversal rate of plaintiff's awards is relatively high in all cases—over 50% according to the Study—although not nearly so high as in libel actions. The highest reversal rates, according to that Study, are found in actions raising constitutional issues. This data would appear to be consistent with the LDRC findings concerning libel appeals. Schnapper, *Appellate Review of Civil Jury Verdicts*, Yale Law School (unpublished study) (October 1985). Indeed, regarding libel, when the special constitutional standard of "independent" appellate review is found to govern, the reversal rate is even higher than in other libel actions. LDRC Bulletin No. 11, November 15, 1984, at 2.

34. LDRC Damages Study No. 2, at 23.

35. Lankenau, "Living With the Risk of Libel," *Folio Magazine*, November 1985, at 171; Greenwald, "Libel Cover Crisis Puts the Press on the U.S. Media," *Business Insurance*, March 10, 1986, at 19; Newsom, "Insurance," *Presstime*, March 1985, at 19.

36. *See, Sidley & Austin Report, supra* note 26.

37. *Sidley & Austin Report* at 40 n. 69.

38. 441 U.S. 153 (1979). One remand from the Supreme Court, after several additional years of litigation the district court in *Herbert* granted defendant's motion for summary judgment in part, 596 F.Supp. 1178 (S.D.N.Y. 1984), *reh'g denied*, 603 F. Supp. 983 (S.D.N.Y. 1985). On appeal the Second Circuit ruled that summary judgment should have been granted as to all claims and dismissed the action, 781 F.2d 298 (2d Cir. 1986). The Supreme Court then denied *certiorari*, 54 U.S.L.W. 3823 (U.S. June 16, 1986) (No. 85-1685).

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

40. The onerous costs associated with libel litigation may also be affecting settlements, for "nuisance value" or otherwise. Systematic information regarding the size of libel settlements has never been available. Many settlements in all civil actions are specifically denominated as confidential and even settlements that could be revealed are not widely or regularly reported. Nonetheless, there is some evidence to suggest that the size of settlements has increased over the past few years in response to these economic factors. *Compare* Franklin Study I [Marc A. Franklin, *"Winners and Losers and Why: A Study of Defamation Litigation,"* 1980 A.B.F.RES.J. 455] (noting the relative infrequency of settlement in libel suits) *with* Franklin Study II [Franklin, Suing Media for Libel: A Litigation Study, 1981 *Am. Bar Found. Research Journal* 795, 798 (1981)] (acknowledging a higher settlement rate among suits brought involving smaller dollar amounts). Since Franklin's studies there have been at least a few publicized settlements for substantially higher figures. *See, e.g.*, "Dow Jones Settles Libel Suit for $800,000," *Editor & Publisher*, June 16, 1984 at 20; *The New York Times*, Sept. 26, 1984, C22, (ABC's $238,000 settlement of libel suit against the "20/20" news magazine program); *The Washington Post*, June 5, 1982, at A8, ($1.25 million settlement paid by ABC to Synanon just before submission of case to jury after four-month trial, despite reports that defense was winning the trial).

41. The difficulties in estimating average costs, or specifically predicting costs in any single action, are greatly compounded by the varying and uncertain motivation of libel

plaintiffs in pursuing their claims. *See generally*, Bezanson, *supra* note 27. It is reasonably safe to predict that an injured patient in a medical malpractice action, although she may also wish a measure of revenge for injury, is generally seeking measurable damages and, at least assuming the predictable recovery is sufficient, will have an attorney willing to stay the course through to a settlement or judgment on the merits. A libel plaintiff may often be seeking "vindication" or revenge, or simply positive publicity, wholly unrelated to any real injury and uncertainly related to the likelihood of sustained litigation through to a final judgment.

42. Lankenau, *supra* note 35, at 171. In addition to these estimated defense costs, it is known that William Tavoulareas, as a libel plaintiff, had spent as much as $2 million as of the entry of the jury verdict in his action against the *Washington Post*. *The New York Times*, June 2, 1983, at A20. Mr. Tavoulareas recently indicated, at the conference at which this paper was first presented, that his expenses have now risen to $3 million, with additional court proceedings still likely.

43. A recent study by the American Society of Newspaper Editors estimated that the average costs for all newspapers engaged in libel and privacy litigation over a three-year period was $95,852. The average three-year defense costs for large newspapers, with a circulation above 400,000, was $541,967. Weber, *Editors Surveyed Describe Half of All Libel Cases as 'Nuisance' Suits, ASNE Bulletin*, Jan. 1986, at 38. Although the ASNE study represents an ambitious effort to estimate costs and the frequency of litigation among a broad sample of newspapers, unfortunately its figures are difficult to use in assessing per-case defense costs. The data obtained involved costs per newspaper over a three-year time span rather than on a case-by-case basis. Moreover, an unknown number of editors indicated that they had not included in their estimates defense costs that had been paid by their insurance companies, the inclusion of which would presumably dramatically increase the cost figures in those cases where insurance was available.

44. *See supra* notes 33–34 and accompanying text.

45. Kakalick, *Costs of the Civil Justice System Court Expenditures for Processing Tort Cases*, Rand Corporation Institute for Civil Justice at 56–57 (1982).

46. *Id.* at 65–66.

47. See *supra* note 32.

48. *See, e.g.*, H.R. 2846, 99th Cong., 1st Sess. (1985); Franklin, *The Plaintiff's Option Libel Reform Act;* Lockyer, Senate Bill 1979 (California).

49. The argument that courts often are called upon to consider difficult, or controverted, issues regarding "truth" and "falsity" is correct, but misses the point. In libel declaratory judgment actions, of the kind proposed, the issue of truth or falsity would represent not simply one subsidiary finding leading toward a judgment based, *inter alia*, on that finding and others; rather it would be the ultimate finding in the action. I am aware of no other circumstance where the courts are engaged in making findings respecting truth or falsity for their own sake, particularly where such findings involve complex public, political, or historical events where "truth" is a relative and potentially changing concept, yet where a court judgment, with its *res judicata* effect, is expected to be a singular and binding event.

50. *See, e.g.*, comments of George Vradenburg, General Counsel of CBS, Inc., at "The Cost of Libel: Economic and Policy Implications" conference sponsored by the Gannett Center for Media Studies and the Center for Telecommunications and Information Studies, Columbia University Graduate School of Business, June 13, 1986: "The bulk of the cost of litigation, the high-price[d] suits, are truth/falsity suits. The actual malice suits tend to be low-cost suits." Transcript of Proceedings, Part II, at 43.

51. Even in statutory litigation, such as workers compensation—where the central

factor is proving physical injury —actual damage suffered is basically ascertainable and thus a dollar value might more easily be affixed to the injury sustained. While it is true that pain and suffering related to physical injury has a certain open-ended potential, the value of a reputation in libel actions has generally proven to be even more nebulous and open-ended.

52. Bezanson, *supra* note 27, at 217, 221, 226.

53. Potential insurance-related constraints on principled libel litigation, some of which have already been adopted, are noted in the section below. These include insurance-carrier control over the selection of counsel, the imposition of shared defense costs and/or the imposition of strict litigation budgets. *See also* note 56, *infra*.

54. Heavner, "Developments in Obtaining Insurance, Changing Terms, and Market Restrictions," *P.L.I.: Media Insurance and Risk Management* at 113–115 (1985); Worrall, "Libel Policy Deductibles and Limits," *P.L.I.: Media Insurance and Risk Management* at 149–156, 158 (1985).

55. Although the plight of publishers with regard to libel insurance has been briefly noted in at least one insurance and tort reform study (*see, e.g., Working Group Report, supra* note 26 at 9) the problems facing the media have not generally received as much attention as those confronting other professions and industries. Nevertheless, the need for reform affecting the media is acute. One example of the practical plight of one segment of the media was recently cited in *The New York Times*, June 23, 1986, at C11 (discussing the rising costs of liability insurance for book publishers, and the inability of at least one maverick publishing house to acquire libel insurance coverage).

56. Such group programs are currently being written for the National Newspaper Association (covering smaller and weekly newspapers) and the National Association of Broadcasters (radio and television stations).

57. Greenwald, *supra* note 35, at 1; Newsom, *supra* note 35, at 16.

58. *See* Greenwald, *supra* note 38 at 19; Heavner, *supra* note 54 at 117–19; and Heavner, "Libel Insurance: Notes for the Practitioner," *P.L.I. Libel Litigation*, at 42, 43 (1986). The information in this and the following paragraph is based solely on the secondary sources cited here and *infra*, notes 59 and 60.

59. Radolf, "Libel Rates Are Expected to Increase," *Editor and Publisher*, April 26, 1986 at 19 (quoting Paul O'Brien, U.S. Counsel for Mutual Insurance Company of Hamilton, Bermuda, Ltd.).

60. Address by Ann. L. Heavner, P.L.I.: *Libel Litigation* (June 20, 1986).

61. Greenwald, *supra* note 35 at 19.

62. For other sources expressing concerns over the dramatic increase in libel insurance deductibles, *see* Greenwald, *supra*, note 35 at 1, and Garbus, "The Cost of Libel Actions —Pressure Not To Publish," *New York Law Journal* 12 (July 17, 1986) at 1, col. 3.

63. See *supra* note 43.