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In *New York Times Co v Sullivan*,[1] the United States Supreme Court extended First Amendment guarantees to defamation actions.[2] Many greeted the Court's decision with joy. Alexander Meikljohn claimed that the decision was 'an occasion for dancing in the streets.'[3] He believed that the decision would have a major impact on defamation law, and he was right. After the decision was rendered, many years elapsed during which 'there were virtually no recoveries by public officials in libel actions.'[4]

The most important component of the *New York Times* decision was its 'actual malice' standard. This standard provided that, in order to recover against a media defendant, a public official must demonstrate that the defendant acted with 'malice.'[5] In other words, the official must prove that the defendant knew the defamatory statement was false or acted in reckless disregard for the truth.[6] The Court adopted this standard because it felt that free and robust debate inevitably generates erroneous statements, and that some degree of error must be tolerated in order to provide 'breathing space' for free expression.[7]

In recent years, the actual malice standard has been the subject of much controversy. Libel litigation in the United States is on the increase,[8] and defamation awards have grown larger.[9] As Professor Richard Epstein of the University of Chicago Law School recently observed 'the onslaught of defamation actions is greater in number and severity that it was in the "bad old days" of common law libel, as is evidenced by data collected by the Libel Defense Resource Center, which shows a steady increase in defamation suits notwithstanding *New York Times*.'[10]

Not only has libel litigation continued, it has become increasingly expensive. The expense is due, in part, to the fact that the actual malice standard encourages plaintiffs to seek extensive discovery of editorial decisionmaking processes.[11] This discovery, which is the only way to determine whether the defendant acted knowingly or recklessly, is very expensive. In *Herbert v Lando*,[12] discovery lasted for eight years and cost CBS between $3 million and $4 million in legal fees.[13] Based on such statistics, some commentators have argued that the Court should provide even greater protection to newspapers and broadcasters including, possibly, a ban on libel suits by public officials.[14]

But there are opposing views. It is possible, for example, to argue that the *New York Times* decision provides too much protection to the media. British defamation law is significantly more restrictive than US law. Indeed, after the *New York Times* decision was rendered, English politicians considered whether to adopt a similar standard and declined to do so.[15] They felt that the actual malice standard was unnecessary, and they left in place existing law which allows plaintiffs more easily to recover against media defendants than in the United States.[16] As a result, British plaintiffs have been able to recover substantial judgments against newspapers and broadcasters. Nevertheless, the British press seems to be free and robust. England has plenty of newspapers, including tabloids and scandal sheets. Moreover, throughout Britain, there seems to be more concern about the need to control the press, in an effort to prevent 'irresponsible journalism,' than there is about the need for an actual malice standard.

The British situation raises questions about the need for an actual malice standard in the US. This question is not purely academic. If the standard is not necessary, then a strong argument can be made for eliminating it. Every defamation case involves tension between the national interest in free speech, and the state interest in providing redress to those who have been defamed.[17] The Supreme Court recognised the existence of these conflicting interests in *Gertz v Robert Welch, Inc*:[18] where it was said, '[W]e believe that the *New York Times* rule states an accommodation between [free speech concerns] and the limited state interest present in the context of libel actions brought by public persons.'[19] If the actual malice standard is not essential to insure 'breathing space' for free expression, then it should be eliminated.

In an effort to explore these conflicting views of the *New York Times* decision, this article compares how the British media functions under Britain's more restrictive defamation laws with how the US media functions under the actual malice standard. It does so based on interviews with reporters, editors, defamation lawyers, and others involved in the media in an effort to understand how they decide which stories to publish, and to gain some understanding of how libel laws affect editorial decisionmaking.

I. The *New York Times* assumptions

The actual malice standard was based on a complex set of assumptions. In the *New York Times* decision,

the Supreme Court began by emphasising the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,' and recognised that such debate may well include 'vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'[20] Nevertheless, the Court concluded that freedom of discussion is critical to the effective functioning of the political process.[21]

The Court's decision was, no doubt, heavily influenced by the nature of the case before it. The *New York Times* case arose during the 1960s, and involved an advertisement complaining that public officials had acted in a racially discriminatory manner.[22] The Court readily concluded that the advertisement came within the scope of public debate: 'The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection.'[23]

The Court's decision to extend constitutional protection to defamation actions was revolutionary. Prior to the Court's decision, states had been free to define the nature and basis of defamation liability.[24] The *New York Times* decision did not deprive them of this power, but it placed constitutional limits on the scope of their power. The Court suggested that public officials must be willing to endure a level of criticism: just as judges must be 'men of fortitude, able to thrive in a hardy climate,'[25] 'surely the same must be true of other government officials, such as elected city commissioners.'[26] In addition, they must endure a certain amount of 'erroneous statement' about their conduct: a degree of error is 'inevitable in free debate'[27] and the Constitution must protect some of these errors in order to provide adequate 'breathing space' for free expression.[28]

Based on these assumptions, the Court held that, even though Alabama's libel law contained a 'defense of truth,' this defense was not enough. It did not provide sufficient protection for erroneous statements:[29] 'A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually 'unlimited in amount – leads to ... "self-censorship."'[30] The Court believed that, with a defense of truth, Alabama would deter false speech, but it might also deter true speech and dampen the vigour of public debate:

'Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wide of the unlawful zone." *Speiser v Randall, supra*, 357 US, at 526, 78 SCt at 1342, 2 LEd 2d 1460. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.'[31]

The Court then articulated the actual malice standard, holding that 'neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct' and 'the combination of the two is no less inadequate.'[32] In order to recover a plaintiff must demonstrate that the plaintiff acted with 'actual malice':

'The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'[33]

II. English defamation law

British defamation law is inconsistent with many of the fundamental principles articulated in the *New York Times* decision.

A. Standards governing damage awards against media defendants

Britain provides limited protection to the press and media when they criticise governmental officials. In order to recover, plaintiffs need only show that the press or media made defamatory statements that referred to them, or even that reasonable people would regard the language as referring to the plaintiff.[34] In theory, an additional requirement exists – that the statements must have been maliciously published. But this requirement is, in the words of a leading commentator, 'purely formal.' 'Though the word [maliciously] is usually inserted in the plaintiff's statement of claim, no one takes any notice of it at trial except for the purpose of inflating damages where there has been spite or deliberateness.'[35]

The media and press do have a privilege of fair comment.[36] But the scope of this right is severely limited; it protects only assertions of opinion, and not assertions of fact. This is an important distinction. If, for example, the press believes that the Government has been involved in illegal or improper conduct, proceeds cautiously in gathering its evidence, and accuses governmental officials of misconduct, it still might be held liable in defamation if its factual assertions are incorrect. Britain recognises privileges other than fair comment, but virtually all of them require that all reporting be fair and accurate.[37]

From time-to-time, those in the British press and media have called on British officials to adopt what they refer to as the 'Sullivan defense.' For example, following the announcement of a large defamation judgment against a media defendant, an editorial in *The Financial Times* pointedly argued that the Government should provide the press with greater protection:

'[T]he observer of the English libel scene may reasonably cast envious eyes across the Atlantic, for US law relating to libel suits is much more solicitous about

press freedom and less protective of the defamed than is English law. US laws require private plaintiffs to prove at least that the defendant publisher has been negligent with respect to the falsity of the word used ...

. . .

English law has so far made only a half-hearted attempt to cope with the problem of inaccuracies in reporting by newspapers. Section 4 of the Defamation Act 1952 is an exception to the rule that whoever libels another is strictly liable unless he proves the substantive truth of his statement, and incorporates the notion of unintentional defamation. But the provision is cumbersome in its phraseology and has in practice been resorted to very infrequently.

Without a more generous application of the principle that there should be no legal remedy if the libel is unintentional, the press in England will continue to be vulnerable to constant and expensive litigation. If, as is expected, the Court of Appeal sends the Private Eye case back for a fresh assessment of damages, it will at least give an impetus for reform of the libel laws, to the general benefit of publishing.'[38]

In another editorial in *The Financial Times*, a journalist argued that 'instead of resisting legislative proposals recently prompted and designed to protect the individual from the outcrop of irresponsible journalism, the Government would do better to ensure the proper balance between the public right to freedom of the press and the rights of the private citizens.'[39]

But the British Government has generally been unresponsive to these pleas. In a 1991 report, the Supreme Court Procedure Committee reviewed British defamation law,[40] and considered whether England should adopt the *Sullivan* defence.[41] It did so at the prompting of the British media,[42] and it did so with full recognition that the *Sullivan* defence 'has led to a fundamental distinction between defamation law, as applied within that jurisdiction [the US], and its English counterpart.'[43] But the Committee decided not to recommend in favour of the *Sullivan* defence. In its view, adoption of such a defense would encourage 'irresponsible' journalism:

'Standards of care and accuracy in the press are, in our view, not such as to give any confidence that a "Sullivan" defence would be treated responsibly. It would mean, in effect, that newspapers could publish more or less what they like, provided they were honest, if their subject happened to be within the definition of a "public figure." We think this would lead to great injustice. Furthermore, it would be quite contrary to the tradition of our common law that citizens are not divided into different classes. What matters is the subject matter of the publication and how it is treated, rather than who happens to be the subject of the allegations.'[44]

In the Committee's view, 'the media are adequately protected by the defences of justification and fair comment at the moment, and it is salutary that these defenses are available to them only if they have got their facts substantially correct.'[45]

B. Damage awards

Because Britain does not have an actual malice standard, British politicians and public figures have been quite successful in their efforts to bring defamation actions against the press and media. In 1987, a senior conservative politician, Norman Tebbit, brought suit against the BBC for attributing to him the statement, 'Nobody with a conscience votes Conservative.'[46] He also brought suit against Mr Lawrence Knight, President of the National Union of Mineworkers, for making the same statement.[47] Against the BBC, Mr Tebbit received £2,000 plus costs.[48]

In 1986 five Conservative Members of Parliament brought suit against the BBC for allegations made in its *Panorama* programme.[49] The allegations linked the MPs to extreme racist groups that were allegedly trying to infiltrate the Tory Party.[50] In the programme, the BBC used pictures of the National Front, of Nazi regalia, and of music associated with fascism.[51] The BBC settled the suits. Two MPs received approximately £300,000 in damages and legal fees plus an apology.[52] The other MPs received undisclosed sums.[53]

Even though the suits listed above involved substantial sums, each seems relatively modest in comparison with Mr Jeffrey Archer's judgment against *The Star* newspaper. Mr Archer, a famous author and playwright, was also a Deputy Chairman of the Conservative Party.[54] *The Star* alleged that he had paid a prostitute £70 to have intercourse with him.[55] Mr Archer sued *The Star* and won £500,000. This amount was a record for a defamation action in Britain.[56]

But Mr Archer's record did not last long. A short time later, Mrs Sonia Sutcliffe was awarded £600,000 in a libel action against *Private Eye*.[57] This award included both compensatory and punitive damages. *Private Eye* alleged that Mrs Sutcliffe, the wife of the 'Yorkshire Ripper,'[58] had been paid £250,000 by *The Daily Mail* to publish an account of her married life with Mr Sutcliffe.[59] Interestingly, even though the story was inaccurate, *Private Eye's* counsel later alleged that it had some elements of truth. He claimed that Mrs Sutcliffe had been paid £25,000 by *The Daily Mail* in a roundabout way, although he failed to specify the motive for the payment.[60]

III. The effect of Britain's defamation laws

How do Britain's libel laws affect the press and media? Based on *The New York Times* decision, and its discussion of the need for an 'actual malice' standard, one might expect the British press to be fairly timid as compared to the US press. There is no 'breathing space' for errors. The threat, indeed the fact, of large judgments (e.g. the *Archer* and *Sutcliffe* judgments) should have a chilling effect on the

newspapers and broadcasters. But does the theory comport with reality?

A. At first glance: a robust media

At first blush, the British press and media seems to be remarkably robust. Britain has several recognised quality newspapers including *The Guardian*, *The Independent*, and *The Times*. Britain also has an array of popular tabloids including *The Daily Star*, *Daily Mirror*, *Sport*, *Sunday Sport*, *Sun*, and *News of the World*. Papers such as *The Daily Mail* and *Express* could be said to occupy an intermediate position leaning towards the quality end of the market.

Britain also has *Private Eye* magazine, a satirical magazine which often takes on the British Royal Family, as well as politicians and others who might be regarded as members of the establishment. American National Public Radio has observed of it that, 'Reputations are rubbished with glee, official hypocrisy exposed with delight.'[61] NPR went on to state that: '[E]ven though it [*Private Eye*] still looks like it's laid out by badly hung-over undergraduates, it has become an institution, the gadfly buzzing the heads of state.'[62]

Despite Britain's restrictive libel laws, the British press frequently makes hard hitting allegations against British politicians and public figures. Illustrative is the following article that was published in *Private Eye*:

'The arrogant, picket line crossing Labour member for Sheffield Attercliffe, Clive Bates, is a 42-year old bachelor and pro-professional politician who, like so many MPs in the People's Party, has never had to endure the sweat of a job in the real world outside politics.'

In becoming a powerless backbencher, however, Bates has suffered a humiliating fall from grace after spending five years as leader of Sheffield city council. But that is nothing to the humiliation poll taxpayers have endured during his tenure as head of Britain's fourth-ranked provincial local authority.

Bates managed to achieve everything the Tories warned would follow a Labour general election victory: gross financial mismanagement engineered by a blundering executive setting high taxes with little return for the public, accompanied by the usual dollop of spineless but 'worthy' posturing. It was no coincidence that Sheffield hosted Labour's ill-fated Nuremburg victory rally nine days before it lost the general election.[63]

British newspapers such as *Private Eye* also publish accusations about non-politicians.[64] In the same issue, *Private Eye* published the following:

'Who is the most avaricious lawyer in London? Just when it seemed the Peter Carter-Fuck Award for Most Outrageous Costs Charged in a Libel Action would be snatched by Mr NA Chapman, a partner at Pukka solicitors Frere Cholmeley, the award's eponymous founder has bounded in with a late but devastatingly inflated bid.'[65]

Similarly hard-hitting articles can be found in other newspapers. In a recent article, *The Daily Mirror* claimed that a 'Devil-worshipping sex fiend dubbed the Mongol Warrior was being hunted last night over the murder of gentle barmaid Harvell.'[66]

The British tabloids give virtually unceasing attention to the British Royal Family often portraying it in an unfavourable light. For example, *The Sun* reported on a book about the marriage of Prince Charles and Princess Diana:

'The 158-page book by Andrew Morton is described as "shocking" because it tells the truth.'

Charles is portrayed as uncaring and unloving, both as a husband and as a father to sons William and Henry.

The book contains details of an alleged suicide attempt by the Princess, and fresh information about Charles's friendship with Camilla Parker Bowles.'[67]

Moreover, in publishing these allegations, some papers seem relatively unconcerned about the threat of defamation suits. National Public Radio described *Private Eye* as follows:

'While *Private Eye* has earned respect for its investigative journalism, it's also been roundly criticised for some fairly shoddy practices – among them, printing as fact gossip and rumour. Editor Ian Hislop frankly admits that he takes a rather cavalier attitude to the concept of fact checking.'[68]

Since the British press publishes fairly hard-hitting articles on a regular basis, it might seem that Britain's failure to adopt an actual malice rule has had no real effect on the British press. British newspapers may be subject to libel actions from time-to-time and they may end up on the wrong end of judgments or settlements, but they appear not to be profoundly affected by such judgments or settlements. On the contrary, they seem to carry on in a remarkably robust fashion, and to regard libel actions as a business hazard that must be accepted as a cost of doing business rather than as a significant restriction on their coverage.

Some British editors go so far as to suggest that the US press is, itself, far too timid. Ian Hislop, editor of *Private Eye*, flatly stated in a recent interview that:

Hislop: The Americans are always very keen on fact checking. I've had a lot of lectures on fact checking.
Goldfarb: What have they said?
Hislop: They say, 'You really should get a lot of interns and have them sit in a row and go through every piece and ring people up and say, is this true?' There is a problem in the area we work in – which is a fairly grey area, the area of printing stories which people don't want printed about themselves – is that they will say, 'No, it isn't true.'[69]

So, based on a preliminary analysis, one might question whether the *New York Times* decision was correctly decided. The British experience seems to indicate that an actual malice standard may not be necessary to a free press. Indeed, the British experience might suggest that, even without such a standard, the press can be fairly robust and aggressive.

B. Probing deeper

But is this view of the British press accurate? Do British editors really feel free to make hard-hitting allegations? Or is the image of a free and robust press and media somewhat deceiving? In an effort to ascertain the impact of Britain's libel laws, we conducted extensive interviews with newspaper reporters, editors and defamation lawyers in both the United States and Britain.

The interviews suggested that the appearance projected by the British media is, at best, misleading. The British media frankly admits that defamation laws have a significant impact on its coverage. Every British editor and defamation lawyer we interviewed expressed serious concerns about the state of British law. A company solicitor felt that British law gave plaintiffs an 'easy run' by making papers 'guilty [of defamation] until proven innocent.'[70] One editor complained that even quite small errors could lead to judgments.[71] Thames Television's counsel suggested that defamation cases are high risk because juries almost always find against media defendants,[72] even though only the strongest cases are ever litigated.[73] Thames' counsel also complained that defamation cases often result in relatively large judgments. Although in Britain damages in personal injury cases are restricted to broadly conventional sums based upon previous awards no similar restrictions apply in defamation cases. This produces the anomaly that, even though a plaintiff who suffers personal injury might recover, say, £50,000 for a serious injury, the same person might receive as much as £500,000 if he or she is defamed. This situation is partly a reflection of the different ways the two types of action are dealt with in England procedurally. Personal injury cases are now invariably tried by a judge sitting alone with experience of litigation and with systematic access to information on earlier awards. In contrast, defamation is one of the few areas in civil law where juries are still the norm. Not surprisingly it has been commonly advocated over the years that even if the law of defamation is to be retained, the use of juries might be curtailed in the interests of costs and consistency.

British newspapers and broadcasters receive fairly large numbers of defamation complaints. Even quality newspapers, which are less inclined to sensationalise, regularly receive letters from solicitors regarding their coverage. These letters can average two or more per week.[74] If the paper or broadcaster feels that a statement was inaccurate, it will usually offer to retract the statement and may offer to pay a small amount of damages.[75] Some papers make such retractions in response to about one-third of the letters they receive.[76] Of course, some matters cannot be settled and result in litigation, something which occurs about ten per cent of the time.[77]

Two recent studies have cast further light on the operation of the law of defamation and the press, although they each deal with rather different aspects of the inter-relationship.

A survey of the law of libel by The Guild of British Newspaper Editors has been conducted in relation to regional newspapers.[78] The fact that 80 per cent of those replying to the Guild's questionnaire were weekly or bi-weekly publications, and that 38 per cent were papers that were distributed freely, indicates that it was concerned with a somewhat different segment of the market than is dealt with by the national dailies. One might surmise that it is an area where litigation was, if anything, less to be expected. Even so, although most respondents reported either no increase, or only a slight increase in the level of complaints received, a trend was noted of complainants being more likely to consult a lawyer in the first instance rather than approaching the newspaper directly. Interestingly the major source of complaint was said to be court reporting with the result that, although a majority had maintained their level of court reporting, approximately ten titles had chosen to reduce their coverage of this area. Thirteen titles, seven per cent of the sample, had received libel writs during 1991 although none proceeded to trial. Of the actions which were settled, the highest payment was £20,000. One quarter of those replying said that they sought pre-publication advice more frequently in 1991 than in previous years.

A recent survey by professor Soothill has examined the way the press itself reports libel cases.[79] He concludes that, 'the use of the libel laws seemed quite pervasive.' This may well be because of the paradox which he identifies that, 'the law of libel has a curiously symbiotic relationship with newspapers. In part, it helps to control newspapers but also, in spectacular cases, it helps to sell newspapers.'[80] The spectacular cases might also be expected to enhance public awareness of libel as well as raising or maintaining expectations of its utility to individuals.

In the past, at least one practical restraint on bringing a libel suit has been the high cost of doing so coupled with the unavailability of Legal Aid. This remains the case but to some extent this state of affairs may be outflanked by the decision in *Joyce v Sengupta*.[81] This case now makes clear that a plaintiff may instead bring an action for the tort of malicious falsehood, for which Legal Aid is available. It is not entirely clear what damages may properly be recovered in this action, and in particular whether the damages recovered could approach those available for defamation. Nevertheless, it is a decision which appears to open the door to more, rather than less, litigation against newspapers.

It is therefore difficult in the light of all of this not to believe that the law of defamation has had and will have a dramatic effect on the functioning of British newspapers and broadcasters. Mr Hislop, who expressed such flippancy about fact checking, has been seriously affected. As noted earlier, *Private Eye*, suffered a £600,000 judgment in the Sonia Sutcliffe case. Following the judgment, Mr Hislop expressed concerns about the ruinous nature of the judgment in an interview with Morning Edition:

Bob Edwards: *Private Eye* has a circulation of about 200,000.

Mr Hislop: That's right.

Bob Edwards: 'Can you begin to afford this kind of settlement?

Mr Hislop: No, obviously not.[82]

Nevertheless, Mr Hislop expressed optimism that his readers would help bail him out:

Bob Edwards: You're trying to raise the money to cover this, aren't you, right now?

Mr Hislop: Yes, and we are desperately trying to get our readers to cough up.

Bob Edwards: And how's that going?

Mr Hislop: Well, there's a lot of money coming in, which is very good news. I am hopeful we're going to raise it and I am hoping that we will win our appeal on the grounds that this is a perverse award. But I'm not sold on the fact that the law will bail us out. I have very little confidence in the law. I have a feeling that our readers might be more reliable than the workings of the legal system.[83]

At present, *Private Eye* continues to publish.

The threat of defamation actions affects day-to-day news coverage. As a rule, the media finds that the most efficient way to avoid retractions and damage settlements is by acting with extreme caution. Newspapers and broadcasters can insure themselves against defamation losses, but few find it feasible to do so.[84] Insurance is often expensive,[85] and usually carries a very high deductible or excess.[86] So, all publishers find that the best way to protect themselves is through careful reporting.

But the thoroughness of the review process is startling. Most newspapers and broadcasters have teams of lawyers who review each day's paper or programme for material that might be defamatory. *The Guardian*, for example, has several lawyers who review each day's paper before it is published.[87] *The Times* has an in-house staff of three solicitors who perform this task, and also employs a barrister who comes in during the evening to make spot checks.[88] Thames Television has two lawyers who spend up to seventy per cent of their time on defamation issues.[89] These two lawyers cannot review all programmes, but they try to review as many as they can, and they make a special point of reviewing high-risk investigative programmes.[90]

If a lawyer flags an article as potentially defamatory, a secondary review process is then triggered. At most newspapers, editors (and sometimes lawyers) meet with reporters who wrote the story in an effort to determine the basis for allegations.[91] Throughout the process, the focus is on legal sufficiency.[92] Counsel for News International stated that he focuses on three basic issues: (1) Is the statement true? (2) Can he prove it? (3) Is the person mentioned likely to file suit?[93] Other organisations use similar criteria.[94]

All media organisations indicated that, as a matter of journalistic ethics, they did not want to print or broadcast anything that is untrue. But all stated that they were not able to publish everything that they believed was true. Most focused on whether, if their organisation was called on to account for a story, it would have legally admissible evidence with which to defend itself.[95] At Thames Television, one of the solicitors meets with the editor and reporter in an attempt to determine the basis for any allegations that are made. This is a cooperative process under which the solicitor tries to understand and accommodate the needs of programme makers.[96]

But the process is also pragmatic. Editors consider whether, even if evidence is admissible, the sources are willing to go 'into the box' and testify. Editors might be reluctant to rely on evidence learned from a source that they cannot expose,[97] or who is likely to go 'wobbly.'[98] Editors will also consider whether information was learned under the 'lobby system,' and is therefore deemed to be off the record.[99] Editors might also consider whether the subject of the article is someone who is likely to sue.[100] Some individuals are particularly litigious. As to these individuals, editors are less inclined to take risks.[101]

After considering this melange of factors, editors decide whether to publish. This decision is often a 'team' decision involving the editor and the reporter as well as, perhaps, the head of the department.[102] This process can produce a variety of results. Although editors sometimes decide to scrap a piece,[103] this option is rarely chosen.[104] More commonly, editors try to save a piece by rewriting or altering in a way that will limit their exposure.[105] In rewriting a piece, editors may delete segments that are not legally supportable,[106] present the subject in a more balanced fashion,[107] or change a statement of fact to an opinion in order to make the statement a 'comment' and thereby invoke the privilege of fair comment.[108]

Even though few stories are scrapped, Britain's defamation laws take an inevitable toll on political reporting. Editors will print allegations against public officials, but they rarely do so except when there is strong supporting evidence.[109] One editor referred to the Wilbur Mills' tidal basin incident that occurred in the United States.[110] He suggested that the facts in that case were so strong that, had a similar incident occurred in Britain, it would have been widely reported and commented on. Indeed, the British Wilbur would probably have been the subject of much derisive comment.

However, a very different picture emerges when British editors are asked about a case like Watergate. That case was slow developing, and was initially based on inside sources who were unwilling to be named. In some instances, sources were unknown even to the reporters themselves, and were unwilling to be publicly revealed. Thus, it was difficult for editors and publishers to produce legally admissible evidence substantiating their allegations of misconduct. Nevertheless, the Watergate story was published in the United States. Would the same type of story have been reported in England? British editors and defamation lawyers uniformly stated that, without legally admissible evidence, they would have been unable to print such allegations.[111] Even *The Sun* newspaper, one of the tabloids, suggested that it would have been 'reluctant to run' such a story.[112] Moreover, if a libel suit had been brought, news sources might have 'dried up.' The sources, who in the case of Watergate were governmental insiders,

might have feared retaliation and refused to provide further information. As a result, the investigation might not have continued to conclusion and the full extent of the scandal might never have been revealed.

The 'chilling' effect of British defamation law is also dramatically revealed by the case of Robert Maxwell, the British publishing magnate who died mysteriously off the coast of the Canary Islands in 1992. Following his death, it was discovered that he had suffered serious financial reverses. In addition, he had looted his companies thereby causing major losses to British pensioners. Some suggested that Maxwell's financial problems would have come to light earlier except for Maxwell's litigious nature which caused the British press to be reluctant to make allegations against him.[113] As a result, the extent of Maxwell's problems did not come to light until after his death.

British editors and lawyers flatly stated that they were well aware of Maxwell's litigious nature,[114] and that they were careful about their reporting on him.[115] One defamation lawyer stated that the British media was 'scared' of Maxwell because he used the libel laws 'savagely.'[116] Another lawyer indicated that he routinely demanded proof that 'one hundred percent' of all allegations made against Maxwell were accurate.[117] Mr Alistair Brett, Company Solicitor for the London *Times*, flatly stated that Mr Maxwell was quick to serve defamation writs, and that he would do so if the newspaper got so much as a word wrong.[118]

British editors confirmed that Maxwell's litigious nature affected their reporting on him.[119] Repeatedly, the media indicated that Maxwell's threats had a chilling effect which prevented them from publishing allegations that could not be easily proved in court. Publishers would make allegations against Maxwell when they had strong evidence to support their allegations. But, when the media lacked compelling proof, it would not publish. Thus, the media withheld items that would have been aired against someone who was less litigious.[120] For example, editors were much more willing to print allegations against Rupert Murdoch, another British publishing magnate who is less litigious.[121] The net effect is that many things that were known about Maxwell went unreported, including his financial reverses.[122]

Of course, some papers may regard defamation judgments as simply a cost of doing business, and therefore may engage in more robust reporting despite the threat of liability.[123] Perhaps these papers sensationalise, even though they know that they are taking risks, in order to gain a competitive advantage. They hope that they can net enough additional revenue to pay defamation claims and still make a profit.[124] The tabloids, themselves, suggest that such claims are ridiculous. Thomas Crone, the Legal Manager for News International which owns *The Sun*, claims that the risk of defamation actions is simply too great.[125] In addition, he claimed that it is difficult to predict which stories will produce major circulation increases. There are fantastic stories which produce no significant increase in sales.[126]

Britain's defamation laws do, however, have one positive effect: they encourage newspapers and broadcasters to make sure that their reporting is even-handed. Because they fear the possibility of liability, British editors tend to check and recheck their stories. In addition, they tend to rewrite articles to make sure that their coverage is balanced.[127] For example, *The Guardian* appears to be particularly careful about balance. If there is contrary information, it is often placed closer to the beginning of the piece rather than at or near the end.

C. Exploiting privileges

Because of their fear of defamation suits, British newspapers and broadcasters have become remarkably adept at finding ways to get material into print. They report freely on the British Royal Family which never sues for defamation. They also report fairly freely on cabinet ministers who, by custom, cannot sue for defamation without first gaining clearance.[128] Of course, this custom provides publishers with only a limited reprieve. Once ministers relinquish their cabinet posts, they are free to sue regarding defamatory statements made while they were in office.[129]

The British media also takes advantage of various privileges including the absolute privileges for accurate reporting of parliamentary debates and judicial proceedings.[130] Indeed, many hard-hitting pieces are carefully sculpted pieces based on statements rendered in privileged contexts.[131]

The British media's tendency to base allegations on testimony heard in courts or in parliament is somewhat disturbing. Obviously, it is desirable for the media to report what transpires in these two contexts. But, in a free society, one would prefer to have a more robust media that does its own investigations, and reports freely about it. Obviously, Britain does have investigative journalists. However, as the Watergate and Maxwell examples suggest, Britain's press reports less freely.

To its credit, the British press is remarkably adept at manipulating and taking advantage of the various privileges. When newspapers gain information about a scandal, but feel that they do not have enough legally admissible evidence to support their allegations, they sometimes ask an MP to raise the matter during 'question time.'[132] The press is then free to report on the question and the response, if any. If the paper feels strongly enough about a matter, they might ask an MP to schedule a matter for an 'early day motion' – a motion suggesting that a matter has troubling implications and should be investigated.

But, despite the British press' resourcefulness, it is unable to report on many matters of public interest. The press must have sufficient evidence of wrongdoing before it can ask an MP to ask a question or file an early day motion. Of course, part of the problem is that some of the most important allegations seem fairly preposterous in the beginning. This was true of Watergate until a sufficient mass of proof was developed. But how is the proof to be developed under England's system? Without sufficiently credible support, MPs might be reluctant to ask

questions for fear that they might not be taken seriously.

IV. Comparison to the US

Once the British interviews were complete, we then interviewed US editors, reporters and defamation lawyers in an effort to find out whether they functioned differently from their British counterparts.

A. The doomsday scenario

Although we believed that US newspapers and broadcasters would be much more relaxed about the possibility of defamation suits, there was reason to suspect that our belief was wrong. In recent years, much has been written about US defamation law. Many complain that, despite the actual malice standard, US defamation law has a very stifling impact on speech. They point to the fact that libel litigation continues unabated,[133] and indeed seems to be on the rise.[134] As one commentator noted, 'an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicised libel actions brought by well-known figures who seek, and often receive, staggering sums of money.'[135]

Moreover, even though there were virtually no recoveries in the first years after *New York Times* was decided, that situation has now changed.[136] Anthony Lewis recently observed that 'publishers are not dancing in the streets today.'[137] He offers several examples:

'Last July [July, 1982] a jury in Washington, DC awarded over $2 million to the president of the Mobil Oil Corporation, William Tavoulareas, for a *Washington Post* story stating that he had "set up his son" in a shipping management firm that did business with Mobil. Carol Burnett, the actress, won $1.6 million from the *National Enquirer*. A former Miss Wyoming won $26.5 million from *Penthouse Magazine*, reduced by the trial judge to $14 million, but the entire award was set aside on appeal. Newspapers in San Francisco and Oklahoma City and Alton, Illinois, have faced judgments in the millions.[138]'

The current situation is aggravated by the fact that, even plaintiffs who do not necessarily expect to prevail in libel actions, nevertheless file such actions. There are many reasons. Libel plaintiffs are often motivated by non-economic factors such as the hope of clearing their names.[139] In addition, in some cases, economic factors do exist. Plaintiffs bring suits hoping to gain modest settlements from defendants who wish to avoid the cost of litigation.[140]

Because the threat of litigation continues to exist, one might speculate that US libel laws force editors to engage in a degree of self-censorship.[141] Obviously, any litigation can be expensive. But libel litigation is particularly expensive. The actual malice standard encourages plaintiffs to seek extensive discovery of editorial decisionmaking processes; a process that can take years and cost millions of dollars to complete.[142] In addition, defendants lose many defamation cases at the trial court level. Even though they win most of these cases on appeal, they must bear the cost of the appeal.[143] Moreover, the number of judgments that are sustained on appeal has increased.[144]

Because of these risks, one might suspect that US editors would not be free and uninhibited in their coverage. Even editors who believe that they will ultimately prevail in a libel action may be deterred from publishing for fear that the costs of defending a possible action may be substantial.[145] Some publishers may be sufficiently well financed that they are undeterred by these potential costs, and are willing to publish notwithstanding the threat of litigation.[146] But many small publishers would be devastated by a large award. Moreover, even some large publishers indicate unease by requiring authors to agree to indemnify the publisher in the event of a defamation action.[147] These agreements may encourage the authors themselves to engage in self-censorship.[148]

B. The interviews

These dire assessments of the state of US libel were not, however, borne out by the interviews. US editors are concerned about the threat of defamation actions, and the possibility of adverse judgments, but they are far less concerned about this possibility than their British counterparts.[149] For example, Bob Edwards of National Public Radio's Morning Edition flatly stated that defamation laws had no impact on his coverage.[150] One reason there is less concern is that US newspapers are threatened with suit, and actually sued, far less frequently than their British counterparts.[151] The Louisville Courier-Journal is, for example, sued only once every two years or so.[152] *The Washington Post* receives three or four letters a year from lawyers threatening suit,[153] but is rarely sued.[154] *The New York Times* receives about one letter a month from lawyers, and is sued only about once a year.[155] Bob Edwards was unable to state whether NPR had received threatening letters or had been sued.[156]

Because the threat of suit is much lower, US editors tend to be more worried about journalistic accuracy than they are about the threat of defamation suits.[157] Theodora Brown, Assistant General Counsel for National Public Radio, suggested that most threats are made after the fact.[158] Most editors strive, for professional reasons, to report accurately.[159] Editors indicated that they were disinclined to publish material that was untrue, or that they could not support with hard evidence.[160] Thus, at times, they knew things they did not print. But the primary reason for withholding such information was that the editor did not want to publish something that was untrue for ethical reasons, as well as because it might diminish credibility or harm the paper's standing in the community.[161] Moreover, they felt that, if they lived up to journalistic ideals, that they had little to worry about in terms of litigation.[162]

These attitudes are reflected in the day-to-day functioning of US newspapers and broadcasters. Unlike the British, the US media does not have teams

of lawyers who comb through copy searching for material that may be defamatory.[163] Instead, they allow the editors themselves to decide whether an article is potentially defamatory.[164] When editors perceive that there is a problem, they can then involve counsel.[165] At this point, the process is similar to the process used by English media outlets. The outside attorney examines the statement, and seeks to determine whether there is adequate evidence to support the assertion.[166] In some instances, the attorney urges the paper to soften or rewrite an allegation. However, if there is adequate evidence to support a claim, the paper might publish the article without regard to the fact that it contains hard-hitting allegations.

Is there a Maxwell parallel in the United States – a particularly litigious individual who scares newspapers and stunts their coverage of him? The simple answer is no. Some media reported that they encounter particularly litigious individuals,[167] but that the person's litigious nature rarely has much effect on coverage.[168] In a few instances, editors will soften or alter stories to protect themselves, but they rarely kill a story.[169] Moreover, they do not seem to fear any particular individual like the British media feared Maxwell.[170]

One might suspect that US media that publish and broadcast overseas might be more cautious in their coverage for fear that they could be sued under another country's defamation laws. CNN broadcasts around the world. To the extent that plaintiffs have a choice, they will opt to sue CNN in a foreign country. As a result, if the absence of an actual malice standard has a 'chilling' effect on journalism, one would suspect that overseas broadcasters might be 'chilled' in some cases by the threat of an English defamation action.[171]

But the interviews revealed that, by and large, this was not the case.[172] The *Washington Post* and *New York Times* indicated that they use almost the same procedures for overseas publications and broadcasts that they used for domestic ones.[173] In only rare instances would a story be softened for the overseas market.[174] Moreover, neither organisation had been threatened by Robert Maxwell regarding their coverage of him,[175] and both treated him no differently than they treated anyone else.[176] Cable News Network (CNN) was a little more cautious about its coverage. Again, its primary concern was with journalistic accuracy and with 'getting it right.'[177] But, at the same time, because CNN broadcasts constantly to all parts of the globe, it is more cautious about the threat of defamation suits.[178] In addition, CNN is much more likely to have lawyers routinely review its broadcasts for the possibility of defamatory information.[179]

Conclusion

The United States Supreme Court's decision in *New York Times v Sullivan* is now nearly 30 years old. In that decision, the Court speculated about the impact of state defamation laws on editorial decisionmaking. In the process, the Court made sweeping statements about the need to protect free expression, and about the need for 'breathing space.'[180] The Court also indicated that there must be protection for erroneous statements.[181] As a result, the Court articulated the actual malice standard.

In formulating the actual malice standard, the Court itself did not rely on detailed empirical studies demonstrating the impact of defamation laws. Instead the Court chose, as it often does, to speculate about the need for an actual malice standard. Whether the Court speculated correctly has been a matter of debate.

The British experience provides interesting insights into the impact of the actual malice standard. Interestingly enough, that contrast suggests that the Supreme Court's original conclusions regarding the need for an actual malice standard were essentially correct.[182] By contrast to the US media, the British media is far more timid. British reporting seems to be 'chilled' by prevailing defamation laws, and the British press does not appear to be as free and robust as the US press. Correspondingly, the US media seems to believe that it has more 'breathing space' for errors as indicated by its operating procedures and its statements. US editors seem more concerned about journalistic accuracy and integrity than they do about the threat of liability.

Should the United States Supreme Court provide additional protection to the media? Based on the interviews, it is difficult to argue that additional protection are necessary. The actual malice standard may have its drawbacks, but it does not impose an undue burden on the media. There is no evidence of a serious 'chilling' effect. US editors do consult defamation attorneys from time-to-time, and they do alter some articles in order to minimise the possibility of being sued. But this chilling effect is minimal, and may in fact be healthy.

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NOTES

1. 376 US 254 (1964).
2. *See* Sheldon W. Halpern, *Of Libel, Language, And Law: New York Times v Sullivan at Twenty Five*, 68 NCL Rev 273, 277 (1989–90) ('Certainly, *Sullivan* was new; it was "the first time" that the Supreme Court spoke directly of the extent to which the first amendment limited the common-law defamation action.'); David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v Robert Welch, Inc*, 54 Tex L Rev 199, 211 (1976) (citing Gertz v Robert Welch, Inc 418 US 323, 370 (1974) (White, J, dissenting)); Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U Pa L Rev 1333, 1343 (1991) (Brennan's opinion in *New York Times* revolutionised the law of libel and, perhaps more important, signalled a critical shift in our first amendment jurisprudence).
3. Quoted in Kalven, *The New York Times Case: A Note on 'The Central Meaning of the First Amendment'*, 1964 Sup Ct Rev 191, 221 n 125. Columnist Anthony Lewis remarked, many years later, that he regarded *Sullivan* as a 'thrilling'

decision. Anthony Lewis, *New York Times v Sullivan Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'*, 83 Colum L Rev 603, 625 (1983).

4. Lewis, *supra* note 3, at 608.
5. *Ibid* note 1 at 279–80.
6. *Ibid.*
7. *Ibid.* Although the actual malice standard survived the Rehnquist revolution, it has been scaled back somewhat. *Compare Rosenbloom v Metromedia, Inc*, 403 US 29, 42–43 (1971) ('We honor the commitment to robust debate on public issues . . . by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.') *with Gertz v Robert Welch, Inc*, 418 US 323, 343 (1974) ([W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them).
8. *See* Richard A. Epstein, *Was New York Times v Sullivan Wrong?*, 53 U Chi L Rev 782 (1986).
9. Libel Defense Resource Center Press Release 1 (September 26, 1991):

   The new LDRC findings, summarising a comprehensive report to be issued later this month, cover the two years ending 31 December 1990. The LDRC study documents a dramatic increase in the already-high average of damage awards against media defendants in libel (and related) cases. Compared to the prior two-year period, the average award increased ten-fold, from almost half-a-million in 1987–88 ($431,730) to just under $4.5 million in 1989–90 ($4,470,460). This most recent average is more than 3 times larger than the average award for the 8 years prior to the most recent study period, which was just under $1.5 million ($1,420,866). Including the most recent data, the average media libel award for the decade, 1980–90, was nearly $2 million ($1,836,557).

10. Epstein, *supra* note 8, at 783; *see also* Lewis, *supra* note 3, at 603 ('This is an appropriate time to think again about that great case. It is a time of growing libel litigation, of enormous judgments and enormous costs.'); Rodney A. Smolla, *Let The Author Beware: The Rejuvenation of The American Law of Libel*, 132 U Pa L Rev 1 (1983) ('an astonishing shift in cultural and legal conditions has caused a dramatic proliferation of highly publicised libel actions brought by well-known figures who seek, and often receive, staggering sums of money.').
11. Anthony Lewis describes the process that might transpire in a case (making specific reference to the case of *Westmoreland v CBS)*:

    The first thing that is going to happen in the *Westmoreland* case is discovery: intensive, prolonged, enormous discovery. The General's lawyers will try to learn everything about the preparation and editing of the documentary. They will ask for all the film shot in the making of the programme, of which of course only a small portion went on the air; it is routine for commercial networks to spend hours on a filmed interview for such a documentary, for example, and then use only minutes or even seconds. The lawyers will ask for scripts from all stages of the enterprise, and for internal memoranda among reporters, editors, and producers. The effort will be to show what General Westmoreland and his friends have already charged; that CBS had material in hand disproving its conspiracy theory about the infiltration figures but deliberately chose not to use it – in other words, that CBS could and should have made a different programme. The lawyers will surely also ask for the report of the CBS internal investigation. They will depose the producers and reporters. They will depose the witnesses who made the charges on the programme, asking them for their sources.

    CBS's lawyers will be at least as ingenious and determined. They will turn to all imaginable public and private sources to explore the accuracy of what the programme said – and of what General Westmoreland says it said. They will depose the General, taking him in infinite detail over the conduct of the war in Vietnam. They will depose men who were with him there, army officers and CIA agents and diplomats, and they will depose high Washington officials of that time: everyone involved in the estimates of enemy strength, from the field to the White House. They will no doubt also look in the *TV Guide* article that may have provoked the libel suit. The article relied on confidential sources inside CBS, who leaked unedited transcripts of the full interviews from which editors put the programme together. Who were those sources?

    The prospect of discovery in the *Westmoreland* case is so endless that a cynic might suggest a conspiracy by lawyers. And the irony is that discovery has become as massive as it has in libel cases in large part because of *New York Times v Sullivan*.

    Lewis, *supra* note 3, at 609–10; *see also* Halpern, *supra* note 2, at 279–80. The abuse of discovery is a potential hazard not confined to the American law of defamation, see Armstrong, Discovery abuse and judicial management, New LJ Vol 142 No. 6559 at p. 927 (1992). The contrast between the American and English approach to this area is striking and reflects differences in the way cases are pleaded and processed in the two jurisdictions.

12. 441 US 153 (1979).
13. *See* Lewis, *supra* note 3, at 612.
14. *See* Garbus, *25 Years After 'Times v Sullivan': What Remains to Be Done*, 201 NYLJ 2–3 (1989) ('One idea advanced by Professor Theodore Silver, a libel law scholar, is to require the injured party to prove that the media intentionally tried to harm him – it would not be enough to show only that the media acted in reckless disregard of the truth.' He also notes: 'I believe that public officials and public figures should not be permitted to sue for libel.'); Lewis, *supra* note 3, at 614–24.
15. The British Government's latest report continues to reject the idea of a *Sullivan* defence. *See* Supreme Court Procedure Committee Report on Practice and Procedure in Defamation (1991).
16. *See*, Winfield and Jolowicz on Tort 13th ed 1989, at p. 345.
17. *See*, Epstein, *supra* note 8, at 783:

    Initially the rule [the actual malice rule] offends the sense of justice because it makes innocent persons bear that harms that have been inflicted upon them by other persons, including those who have acted with negligence or even gross negligence. Indeed my own view is that the proper rule in defamation is strict liability, as it was at common law, so that the deviation between the present law and the ideal is even greater than it might seem to others. The question, then, is what public interest can justify the deviation from these ordinary standards of liability?

18. 418 US 323 (1974).
19. *Ibid* at 343.
20. 376 US at 271.
21. *Ibid* note 1 at 269–70:

    The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v United States*, 354 US 476, 484, 77 S Ct 1304, 1308, 1 L Ed 2d 1498. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' *Stromberg v California*, 283 US 359, 369, 51 S Ct 532, 536, 75 L Ed 1117. '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' *Bridges v California*, 314 US 252, 270, 62 S Ct 190, 197, 86 L Ed 192, and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' NAACP v Button, 371 US 415, 429, 83 S Ct 328, 9 L Ed 2d 405. The First Amendment, said Judge Learned Hand,

'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all.' *United States v Associated Press*, 52 F Supp 362, 372 (DCSDNY 1943). Mr Justice Brandeis, in his concurring opinion in *Whitney v California*, 274 US 357, 375–76, 47 S Ct 641, 648, 71 L Ed 1095, gave the principle its classic formulation:

'Those who won our independence believed *** that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

22. The case arose during the relatively turbulent decade of the 1960s, and involved the historic struggle by African–Americans, and others, for their civil rights. The case involved a full-page advertisement titled 'Heed Their Rising Voices' describing events that had allegedly transpired in Montgomery, Alabama. *Ibid* at 256. The Court summarised the ad as follows:

Respondent's complaint alleged that he had been libelled by statements in a full-page advertisement that was carried in *The New York Times* on March 29, 1960. Entitled 'Heed Their Rising Voices,' the advertisement began by stating that 'As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the US Constitution and the Bill of Rights.' It went on to charge that 'in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom.***' Succeeding paragraphs purported to illustrate the 'wave of terror' by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr Martin Luther King, Jr, leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading 'We in the south who are struggling daily for dignity and freedom warmly endorse this appeal,' appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the 'Committee to Defend Martin Luther King and the Struggle for Freedom in the South,' and the officers of the Committee were listed. *Ibid* at 256–57.

Respondent LB Sullivan was one of three elected Commissioners of the City of Montgomery, Alabama, and was designated 'Commissioner of Public Affairs' with responsibility for, among other things, supervision of the Police Department. Sullivan claimed that the advertisement defamed him because it made several allegations regarding police conduct in Montgomery. *Ibid* at 257–58:

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

'In Montgomery, Alabama, after students sang 'My Country, Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.'

Sixth paragraph:

'Again and again the Southern violators have answered Dr King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times – for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury' – a *felony* under which they could imprison him for *ten years*.***'

In addition, he alleged that some of these statements were untrue, but all of which Sullivan thought defamed him as Commissioner of Public Affairs.

23. *Ibid* at 271.
24. Under Alabama law, the ad was 'libelous per se' and not privileged. *Ibid* at 262. As a result, the trial court judge instructed the jury that they should find for Sullivan if they concluded that the *New York Times* had published the advertisement, as well as that the statements were made 'of and concerning' respondent.' *Ibid* The judge also instructed the jury that, even though Sullivan offered no proof of 'actual pecuniary loss,' they should presume that respondent had suffered legal injury on the mere proof of publication. *Ibid*. The judge gave this instruction because Alabama law provided that, if the advertisement was libellous *per se*, falsity and malice were presumed. *Ibid*.

Respondent also sought punitive damages. Under Alabama law, a court could only award punitive damages to a public officer if the official had first made a written demand for a public retraction, and the defendant had failed or refused to make the retraction. *Ibid* at 261. Sullivan had served the required demand on petitioners, but none of them had responded. *Ibid*. The judge therefore submitted an instruction on punitive damages which stated that punitive damages could only be awarded based on a showing of 'actual malice,' *Ibid*. and could not be awarded based merely on a showing of negligent or careless conduct. *Ibid*. However, the trial judge refused to instruct the jury that they must be 'convinced' of malice, in the sense of 'actual intent' to harm or 'gross negligence and recklessness.' *Ibid*.

The jury returned a verdict for Sullivan in the amount of $500,000. *Ibid* at 256. The verdict did not differentiate between actual and punitive damages. In fact, the judge refused a jury instruction that would have required the differentiation between actual and punitive damages. *Ibid*. at 262.

The *New York Times* appealed the judgment to the Alabama Supreme Court, but that court affirmed. The court agreed that petitioners' statements were libelous *per se*, and that they were actionable without proof of pecuniary injury. *Ibid* at 263. After finding that the statements referred to Sullivan, the court concluded that the *New York Times* had acted irresponsibly. The Alabama Supreme Court placed great emphasis on the fact that 'the *Times* in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement.' *Ibid* at 263.

25. *Ibid* at 273 (quoted *Craig v Harney*, 331 US 367, 376.)
26. *Ibid*.
27. *Ibid* The Court stated in full that:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth – whether administered by judges, juries, or administrative officials – and especially one that puts the burden of proving truth on the speaker. . The constitutional protection does not turn upon 'the truth,

popularity, or social utility of the ideas and beliefs which are offered.' NAACP v Button, 371 US 415, 445, 83 S Ct 328, 344, 9 L Ed 2d 405. As Madison said, 'Some degree of abuse in inseparable from the proper use of every thing: and in no instance is this more true than in that of the press.' 4 Elliott's Debates on the Federal Constitution (1876), p. 571. In *Cantwell v Connecticut*, 310 US 296, 310, 60 S Ct 900, 906, 84 L Ed 1213, the Court declared:

'In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion, and right conduct on the part of the citizens of a democracy.'

28. *Ibid* at 271–72 (quoting NAACP v Button, 371 US 415, 433): 'That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need *** to survive."'
29. *Ibid* at 278.
30. *Ibid* at 279.
31. *Ibid* at 279.
32. *Ibid* at 274.
33. *Ibid* at 279–80.
34. *Op cit* note 16 at p. 310.
35. *Ibid* at 314.
36. *Ibid* at 324–33.
37. *Ibid* at 333–45.
38. *The Financial Times*, 9 October 1989, p. 48, col. 1. There have been other proposals for change as well. *See* Robert O'Connor, *The Debate Over Britain's Libel Laws: Discussions Have Intensified Since the Death of Robert Maxwell*, Editor and Publisher, at 22–23 (29 February 1992).
39. *The Financial Times*, 30 May 1989 p. 44, col. 2.
40. Supreme Court Procedure Committee Report on Practice and Procedure in Defamation (1991).
41. *Ibid* at 164–65.
42. *Ibid* at 164. It has been suggested to us by some media representatives that we should consider the introduction of a defence similar to that applied in the United States in the light of the decision in *New York Times v Sullivan* (1964) 376 US 254.
43. *Ibid*.
44. *Ibid* at 164–65.
45. *Ibid* at 165.
46. *Times* (London), 17 December 1987, at 2, col. 2.
47. *Times* (London), 18 December 1987, at 5, col. 8.
48. *Times* (London), 17 December 1987, at 2, col. 2.
49. *Times* (London), 20 July 1986, at 1, col. 4.
50. *Ibid*.
51. *Times* (London), 14 December 1986, at 2, cols. 7, 8.
52. *Times* (London), 20 July 1987, at 1, col. 4.
53. *Ibid*.
54. *Times* (London), 21 March 1987, at 2, col. 1.
55. *Times* (London), 25 July 1987, at 1, col. 4.
56. *Ibid*.
57. *The Financial Times* (London), 30 May 1989, p. 44, col. 1.
58. Her husband, Peter Sutcliffe, was convicted of committing a number of murders in Yorkshire. He was dubbed by the press the 'Yorkshire Ripper.'
59. *The Financial Times*, 9 October 1989, p. 48, col. 2.
60. *Ibid*.
61. Bob Edwards, Morning Edition, National Public Radio (15 October 1991).
62. *Ibid*.
63. *Private Eye*, p. 7, col. 3 (22 May 1992).
64. In a recent issue, it criticised other newspapers for their reporting:

    The fantastic vendetta conducted by the Murdoch press against Carmen Proetta, a witness to the SAS shooting of three unarmed IRA members in Gibraltar in 1988, has reached a new low.

    Last Sunday, the *News of the World* produced lurid allegations that Mrs Proetta took money to provide fake passports, and the allegations were copied out by *The Sunday Times*. The *News of the World* story reads oddly and its details will be fully investigated in the weeks ahead. *Private Eye*, p. 5, col. 2 (22 May 1992).

65. *Ibid* at 11, col. 2–3.
66. *Daily Mirror*, p. 5, col. 4 (4 June 1992).
67. *The Sun*, p. 4, col. 6 (5 June 1992) (emphasis in original).
68. Michael Goldfarb, National Public Radio, interviewing Ian Hislop for National Public Radio's Morning Edition (15 October 1991) [hereinafter Hislop Interview].
69. Hislop Interview, *supra*.
70. Interview with Mr Alistair Brett, Company Solicitor, *The Times* (London), in London, England (3 June 1992) [hereinafter Brett Interview].
71. Interview with Mr Campbell Page, Executive Editor, *The Guardian*, in London, England (28 May 1992) [hereinafter Page Interview].
72. Interview with Mr Peter Smith, Head of Programme Legal Services, Thames Television, in London, England (4 June 1992) [hereinafter 'Smith Interview'].
73. *Ibid* (Suggesting that this occurs because the tabloids tend to cause both the public and judiciary to hold the press and broadcast media in disrespect). Others agreed. Interview with Mr Tom Crone, Legal Manager, News International, in London, England (4 June 1992) [hereafter Crone Interview] (at the trial court, newspapers are 'likely to lose.').
74. Brett Interview, *supra* note 70 (*The Times* receives letters from solicitors at the rate of two to three a fortnight, and a writ about once a month); Crone Interview, *supra* note 73 (News International gets three to four letters per week, or one hundred and fifty to two hundred letters per year); Page Interview, *supra* note 71 (*The Guardian* receives somewhere between 100 and 120 letters from solicitors per year); Smith Interview, *supra* note 72 (Thames Television receives about 100 letters from solicitors per year).
75. *Ibid*.
76. Page Interview, *supra* note 71 (Of the 100–120 letters *The Guardian* receives from solicitors per year, it pays a small settlement sum in about 40 cases). However, Thames Television finds that they have an adequate defense, and are able to convince opposing solicitors of this fact, in nearly 99 per cent of all cases. Smith Interview, *supra* note 72.
77. Crone Interview, *supra* note 73 (Of the 150 to 200 letters that News International receives per year, about ten percent evolve into writs); Smith Interview, *supra* note 72 (for every one hundred or so demand letters received by Thames Television about five writs were issued).
78. Editors and Libel Claims, A report on Libel Claims against Regional Newspapers (1992).
79. Libel in the news, New LJ, Vol. 142 Nos 6570 and 6571 at pp. 1337 and 1390. The study is based on four national dailies, *The Guardian*, *The Times*, *The Sun*, and the *Daily Mirror*, four national Sunday papers, *The Observer*, *Sunday Mirror*, *The People*, and the *News of the World*, and one local evening paper the *Evening Standard* published in London. It covers the six months from January to June of 1992.
80. *Ibid* at p. 1337.
81. New LJ Reports Vol 142 No. 6569 at p. 1306, (CA).
82. Bob Edwards, National Public Radio's Morning Edition, interviewing Mr Ian Hislop, Editor, *Private Eye* magazine (3 March 1992).
83. *Ibid*.
84. Page Interview, *supra* note 71.
85. *Ibid*.
86. Smith Interview, *supra* note 72. The Guild Of British Newspaper Editors survey (above note 78) found that there had been an increase in the percentage of titles which carried insurance from 58 per cent in 1990 to 70 per cent in 1991. Insurance premiums had increased for 13 per cent of those insured.
87. Page Interview, *supra* note 71.

88. Brett Interview, *supra* note 70; Crone Interview, *supra* note 73 (News International which controls a number of papers including *The Sun* and *The Times* also has a lawyer who comes in at night to review 'every sentence with legal danger').
89. Smith Interview, *supra* note 72.
90. *Ibid.*
91. Brett Interview, *supra* note 70; Crone Interview, *supra* note 73; Page Interview, *supra* note 71; Smith Interview, *supra* note 72.
92. *Ibid.*
93. Crone Interview, *supra* note 73.
94. Smith Interview, *supra* note 72.
95. *Ibid.*
96. *Ibid.*
97. Brett Interview, *supra* note 70; Crone Interview, *supra* note 73.
98. Brett Interview, *supra* note 70.
99. The Prime Minister's private secretary may brief the political editors of Britain's national newspapers. These briefings, which were once rendered in the lobby and therefore referred to as the 'lobby system', are usually 'off the record.' Nevertheless, editors obtain much salient, and sometimes juicy, information. *Ibid.*
100. Crone Interview, *supra* note 73.
101. Smith Interview, *supra* note 72.
102. Brett Interview, *supra* note 70.
103. Page Interview, *supra* note 71.
104. Brett Interview, *supra* note 70; Page Interview, *supra* note 71; Smith Interview, *supra* note 72 (The interviewee could only remember one instance in which Thames Television was forced to 'kill' a programme in its entirety).
105. Brett Interview, *supra* note 70; Page Interview, *supra* note 71.
106. Brett Interview, *supra* note 70.
107. Smith Interview, *supra* note 72.
108. Brett Interview, *supra* note 70.
109. Page Interview, *supra* note 71.
110. *Ibid.* The incident concerned a politician in a potentially compromising bout of nocturnal swimming.
111. *Ibid.*
112. Crone Interview, *supra* note 73.
113. Columnist Anthony Lewis summarised the situation as follows:

> How could he get away with it for so long? That is the question posed by the collapse of Robert Maxwell's empire so quickly after his death.
>
> For years he ran what amounted to an international confidence game, borrowing more and more, covering up his accounts. An official British inquiry in 1971 found him unfit to be in charge of a public company.
>
> Yet politicians honored him; and newspapers printed his boasts, hollow though most of them turned out to be.
>
> *The Financial Times* of London said last week that Maxwell was not some unimportant figure; his operations affected large interest and many people. 'How was it,' the paper asked, 'that he was able to play such a role, for so many years, with such apparently cavalier disregard for the normal standards of probity? How could some of the world's leading banks lend so much money to him?'
>
> It was British corporate regulatory law that failed, *The Financial Times* said. Yes, it did.
>
> But there was another reason why Maxwell escaped proper scrutiny for so long: Britain's stringent libel law, which makes it dangerous to write critically about a scoundrel like Maxwell.
>
> Whenever anyone suggested wrongdoing by Maxwell, he sued. He brought 21 libel actions against the authors and others connected with two biographies of him. He sued the BBC, Rupert Murdoch, the editors of half a dozen English newspapers.
>
> The threat of a libel suit is so potent in silencing critics in Britain because the law is so favourable to libel plaintiffs. Nearly everyone who sues the press gets a cash settlement or wins a jury verdict at trial – and keeps it on appeal.

Anthony Lewis, *Britain's Plaintiff-Friendly Libel Laws Shielded Maxwell's Scams From Scrutiny*, LA Daily J, at 2 (16 December 1991); O'Connor, *supra* note 38, at 22 (Maxwell, who is now known to have looted the pension fund of the *Daily Mirror*, used frequent lawsuits to discourage negative press coverage of his activities. The suits tied up publications in lengthy and expensive litigation.).

114. Brett Interview, *supra* note 70.
115. *Ibid.*
116. Smith Interview, *supra* note 72; *see also* Crone Interview, *supra* note 73 (media was 'afraid' of Maxwell).
117. Crone Interview, *supra* note 73.
118. Brett Interview, *supra note* 70.
119. *Ibid.*
120. *Ibid.*
121. Smith Interview, *supra* note 72.
122. *Ibid.*
123. *Ibid.*
124. *Ibid.*
125. Crone Interview, *supra* note 73.
126. *Ibid.*
127. Smith Interview, *supra* note 72.
128. Brett Interview, *supra* note 70; Smith Interview, *supra* note 72.
129. Brett Interview, *supra* note 70.
130. Winfield & Jolowicz, *supra* note 16, at 333.
131. Illustrative is the following piece:

> Two Kray twin copycats hatched an amazing plot to kidnap soccer hero Paul Gascoigne, a court heard yesterday.
>
> Would-be gangsters Lindsay and Leighton Frayne allegedly recruited Gazza's bodyguard and driver – ex-SAS man Paul Edwards – to snatch the star.
>
> The plot was revealed at Newport Crown Court where the brothers are accused of robbery and conspiracy.
>
> *The Daily Mirror* at 1, col. 5–6 (4 June 1992).

132. Brett Interview, *supra* note 70; Smith Interview, *supra* note 72.
133. *See* Epstein, *supra* note 8, at 782.
134. Epstein, *supra* note 8, at 783; *see also* Lewis, *supra* note 3, at 603 ('This is an appropriate time to think again about that great case. It is a time of growing libel litigation, of enormous judgments and enormous costs.').
135. Smolla, *supra* note 10, at 1. The situation was summarised by one commentator as follows:

> Among the public officials joining the litigation feast have been Philadelphia Mayor William J. Green, who sued a CBS television station for $5.1 million for reporting that he was under federal criminal investigation; former Governor Edward J. King of Massachusetts, who filed a $3.6 million suit against the *Boston Globe* for implications conveyed by articles, editorials, and political cartoons that King was 'unfit and incapable of properly performing the duties of governor'; Governor William J. Janklow of South Dakota, who filed a $10 million suit against *Newsweek* for an article allegedly implying that he had raped an Indian girl; former United States ambassador to Chile, Nathaniel Davis, and two of his ex-assistants, who filed a $150 million suit against the makers of *Missing*, alleging that the 1982 film implied that the American embassy was connected with the killing of an American free-lance writer during the 1973 coup d'etat in Chile; and General William Westmoreland, who has sued CBS for allegedly suggesting his complicity or incompetence in connection with the underestimation of enemy troop strength levels in Vietnam. Even former President Jimmy Carter was prepared to join the list by suing the *Washington Post* for a gossip column item relaying rumours that Blair House had been bugged during Ronald and Nancy Reagan's residence there before Reagan's inauguration. Carter chose not to take action after his public threat of suit was enough to force a retraction from the *Post* and a published letter of apology.
>
> Public interest advocates who are prominent among the list of recent libel plaintiffs include Ralph Nader, who sued Ralph de Toledano for statements de Toledano made in a syndicated column about Nader's crusade against the lack of

safety in General Motors' Corvair, and feminist attorney Gloria Allred, who filed a $10 million libel suit against a California State Senator because of a characterisation in a press release.

Entertainers, writers, and other media figures have also contributed to the recent resurgence of the libel suit. Carol Burnett's $10 million libel action against the *National Enquirer*, and the $1.6 million verdict returned by the jury, although later reduced by the court, obviously added great impetus to the trend. There have, however, been many others. Wayne Newton sued NBC over a report linking him to organized crime, and Elizabeth Taylor filed a complicated action against ABC over a 'docu-drama' that depicts Taylor's life. Writer Norman Mailer filed a $7 million libel suit against the *New York Post*, claiming that the newspaper defamed him in reports about the trial of writer Jack Henry Abbott. Kimerli Jayne Pring, Miss Wyoming of 1978, was awarded $26 million (later reversed on appeal) by a federal court jury in a suit against *Penthouse* magazine. Even E. Howard Hunt has sought the refuge of the courts to rehabilitate his reputation; Hunt was awarded $650,000 in damages by a federal jury in Miami against a weekly newspaper called the *Spotlight*, for a story that linked Hunt to the assassination of John F. Kennedy.

Ibid.

136. *See* Lewis, *supra* note 3, at 608.
137. *Ibid* at 608.
138. *Ibid.*
139. *See* Anderson, *supra* note 11, at 435.
140. *Ibid* at 435.
141. *Ibid* at 430–31 ('Nevertheless, self-censorship remains. Its full extent is impossible to determine. Much of it is inherently unmeasurable; it occurs whenever a reporter or editor omits a word, a passage, or an entire story, not for journalistic reasons but because of the possible legal implications.').
142. *See* Lewis, *supra* note 3, at 612 (In *Herbert v Lando*, discovery took eight years, and CBS spent between $3 million and $4 million in legal fees).
143. *See* Lewis, *supra* note 3, at 613:

> The leaked secrets of the jury room are not likely to help the *Post* on appeal. But they give us dramatic evidence in support of a conclusion that libel lawyers had already reached: When a case goes to a jury, the *Sullivan* rule means little or nothing. All those phrases designed by the Supreme Court to protect freedom of speech and press may not in fact be applied. When a judge's charge lasts an hour or more, and one sentence speaks of the need to find 'reckless disregard,' it rolls right past the jurors – it would roll past any of us. In the real world, too, jurors are part of a public that is not very fond these days of the institutions that are usually libel defendants: big newspapers and magazines and broadcasters. They think that those media giants can afford hefty damages and might as well pay. In the brief hearing that Judge Gasch held after the return of the $250,000 compensatory judgment for Tavoulareas, the jury heard testimony about the healthy profits of the Washington Post Company, and Tavoulareas testified that he had spent $1.8 million on lawyers' fees in this case. The jury took a few minutes to fix punitive damages at $1.8 million.

144. *Ibid* at 603.
145. *See* Anderson, *supra* note 11, at 431 (Describing an editor who deleted several passages from an article. 'The review had consulted its lawyers, who advised that it would probably win a libel suit, "but that the cost of defending it might easily bankrupt the magazine. After a good deal of agonizing, . . . we decided the risk was not worth it" ' The article notes that a book was withdrawn from the market because of the threat of a libel action); Lewis, *supra* note 3, at 614 ('Any sensible publisher of comment on official conduct must worry today about the legal process and its expense.').
146. Anderson, *supra* note 11, at 432.
147. *Ibid* at 433–34:

> In book publishing, and to a lesser extent in magazine publishing, the economic pressures for self-censorship are exacerbated by the practice employed by many companies of requiring authors to agree to indemnify their publishers for some or all of the losses resulting from libel suits. In some cases the writer promises only to indemnify ultimate judgments. Other agreements require him to pay the judgment and a specified portion of the costs of defending all suits, whether successful or unsuccessful. Still others require him to bear all costs of litigation as well as pay any settlement or judgment. At least one major underwriter of libel insurance insists that its policyholders obtain indemnification agreements from writers. Some publishers and insurers maintain that the losses caused by libelous statements should be borne by those writing them and that indemnification provides insurers with their only means of protection against irresponsible writers. This argument, however, is untenable when indemnification is not limited to ultimate judgments. To require the author to bear the costs of successfully defending a suit deters him not only from writing libelous statements, but also from writing statements that, although not libelous, may nevertheless be the subject of a suit. For the authors these defense costs are overwhelming. In the instance of the six books mentioned above, the authors reported defense costs ranging from $10,000 to $19,000, figures that represented 25 to 100 percent of their royalties.

148. Newspapers and broadcasters do have incentives which encourage them to report items of public interest notwithstanding the threat of a libel suit. The most important incentive is their professional ethic, and their desire to provide the public with necessary information. *Ibid.* at 434 ('Reporters and editors share a professional ethic that encourages them to seek to inform the public, even at the risk of libel litigation.'). But, whether this ethic prevails, in a battle between the ethic and economic realities, is unclear.
Ibid.
149. Interview with Jim Mitchell, News Anchor, WDRB Television, in Louisville, KY (8 July 1992) [hereafter Mitchell Interview] (For local news programmes, most of what they report on raises little or no defamation problems. Problems arise most frequently with regard to investigative stories.).
150. Interview with Bob Edwards, Host, National Public Radio's Morning Edition, at Washington, DC (23 July 1992) (hereafter 'Edwards Interview') ('zip impact').
151. Mitchell Interview, *supra* note 149 (WDRB Television may receive two letters from lawyers a year regarding its coverage, and is hardly ever sued).
152. Interview with Mr Hunt Hale, Louisville Courier-Journal, in Louisville, KY (1 July 1992) [hereafter Hale Interview].
153. Telephone interview with Mary Ann Werner, Assistant Counsel, *Washington Post* (6 July 1992) [hereinafter Werner Interview].
154. *Ibid.*
155. Telephone interview with Mr George Freeman, Senior Counsel, *New York Times* (7 July 1992) [hereinafter Freeman Interview].
156. Edwards Interview, *supra* note 150 Theodora Brown of NPR stated that NPR receives threatening letters very infrequently, perhaps once a year. Interview with Theodora Brown, Assistant General Counsel for National Public Radio, at Washington, DC (23 July 1992) (hereafter 'Brown Interview').
157. Edwards Interview, *supra* note 150 (Edwards relates an incident in which an interviewee alleged that the head of a conservative political action committee frequented gay parties. Edwards contacted the subject of the allegation who threatened to sue if Edwards aired the allegation. Ultimately, Edwards decided not to air. However, his decision was based on concern for journalistic accuracy rather than from the threat of suit.); Freeman Interview, *supra* note 155; Hale Interview, *supra* note 152; Mitchell Interview, *supra* note 149; Telephone interview with Ms Jennifer Weiss, Staff Counsel, Cable News Network (9 July 1992) [hereafter Weiss Interview].
158. Brown Interview, *supra* note 156.

159. Edwards Interview, *supra* note 150; Freeman Interview, *supra* note 155; Hale Interview, *supra* note 152; Weiss Interview, *supra* note 157.
160. Weiss Interview, *supra* note 157.
161. Hale Interview, *supra* note 152.
162. Freeman Interview, *supra* note 155; Hale Interview, *supra* note 152.
163. Those who publish internationally do, however, sometimes ask lawyers to undertake pre-publication review as a matter of routine. Weiss Interview, *supra* note 157. But they do so because of the risk under foreign laws. *Ibid.*
164. Freeman Interview, *supra* note 155; Hale Interview, *supra* note 152; Mitchell Interview, *supra* note 149; Werner Interview, *supra* note 153.
165. *Ibid.*
166. Hale Interview, *supra* note 152; Mitchell Interview, *supra* note 149.
167. Mitchell Interview, *supra* note 149.
168. *Ibid.* Again, the one major exception is provided by those who publish internationally. CNN will consider an individual's litigious nature in deciding what to publish. Weiss Interview, *supra* note 157.
169. *Ibid.*
170. *Ibid.*
171. In this regard it is interesting to note the refusal of a New York court to enforce a British libel judgment, see *Journal of Media Law*, Vol. 13 No. 2 at 205.
172. Freeman Interview, *supra* note 155; Werner Interview, *supra* note 153.
173. *Ibid.*
174. Freeman Interview, *supra* note 155.
175. *Ibid.*
176. *Ibid.*
177. Weiss Interview, *supra* note 157.
178. *Ibid.*
179. *Ibid.*
180. *Ibid* at 271–72 (quoting *NAACP v Button*, 371 US 415, 433): 'That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need *** to survive".'
181. *Ibid.*
182. Columnist Anthony Lewis agrees:

> The stuff of governmental decisions cannot be subject to a legal test of truth in our constitutional system. One man's truth is not another's. That is the central meaning of the first amendment: the right to differ about political truth, the right to criticise those who govern us without being held to a standard of temperateness or truth.
>
> Lewis, *supra* note 3, at 620.