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Damage Control: Why Japanese Courts Should Adopt a Regime of Larger Libel Awards

I. INTRODUCTION

The Japanese press is the major source of both information and misinformation about Japan.¹ The modern Japanese Constitution, framed principally by United States Occupation forces² and formally enacted in 1947,³ provides, like its American counterpart,⁴ for freedom of the press.⁵ This freedom, however, is checked in Japan and the U.S. by profoundly different approaches to libel.⁶

Japanese libel laws concentrate on restoring the injured individual's place in a society which is historically more homogeneous and cohesive than that of the U.S.⁷ Such laws are more sensitive to the effect libelous statements have on reducing respect for the individual in the community.⁸ Traditionally, the legally proscribed method for correcting such harm has focused on public apology.⁹ Juries infrequently assess damages,¹⁰ and monetary awards are low.¹¹

In contrast, U.S. libel laws reflect the view that robust public debate provides the best insurance against tyranny.¹² Accordingly, plaintiffs have the burden of proving varying degrees of negligence or "actual malice" – i.e., that the disputed statements were published either with the knowledge that they were false or with reckless disregard for the truth.¹³ In the U.S., the injury that

1. See KAREL VON WOLFEREN, *THE ENIGMA OF JAPANESE POWER* 231 (1994).

2. See POLITICAL REORIENTATION OF JAPAN, SEPTEMBER 1945 TO SEPTEMBER 1948, 88-94 (Report of Government Section, Supreme Commander for the Allied Powers, 1948).

3. See Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, in *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 212-213, (Kenneth L. Port ed., 1996).

4. See U.S. CONST. amend. I.

5. See NIHONKOKU KENPO [The Constitution of Japan] art. 21: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed."

6. See PATRICK SMITH, *JAPAN: A REINTERPRETATION* 7-8, 196 (1997).

7. See James J. Nelson, *Culture, Commerce, and the Constitution: Legal and Extra-Legal Restraints on Freedom of Expression in the Japanese Publishing Industry*, 15 *UCLA PAC. BASIN L.J.* 45, 54 (1996).

8. See Ellen M. Smith, *Note, Reporting the Truth and Setting the Record Straight: An Analysis of U.S. and Japan Libel Laws*, 14 *MICH. J. INT'L L.* 871 (1993).

9. See Masao Horibe & John Middleton, *Japan*, in *INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE* 219, 225 (Christian Campbell ed., 1997) (hereinafter "Horibe & Middleton").

10. See *id.* at 230.

11. See *id.* In contrast, Japanese courts have awarded scales of damages in personal injury cases that are among the highest in the world.

12. See Smith, *supra* note 8, at 873.

13. See Dieter Huber, *United States*, in *INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE* 382 (Christian Campbell ed., 1997).

an individual might suffer at the hands of the press is generally viewed as an unfortunate by-product of free speech and the country's commitment to democracy.¹⁴ American society is relatively unconcerned with the need to repair the injured party's reputation.¹⁵ Instead, U.S. courts compensate the injury by imposing monetary damage awards that are often large when a jury finds the media's speech to be grossly negligent or published with actual malice.¹⁶

A number of recent high-profile incidents of false reporting in Japan¹⁷ call into question the effectiveness of Japan's traditional approach to remedies for defamed individuals.¹⁸ Moreover, lawsuits for libel are rising in Japan.¹⁹ In contrast, similar suits in the U.S. are steadily declining,²⁰ even though successful libel plaintiffs are enjoying increasingly large damage awards.²¹

The decline in U.S. libel cases may reflect a "chilling effect," in which large damage awards have discouraged editors from assigning controversial stories.²² Alternatively, the threat of large damages may be a contributing factor toward more balanced reporting as news organizations, while continuing to aggressively report, are more accountable now for their potentially libelous excesses.²³ In contrast, in Japan, the absence of the threat of large damage awards for libel – even in cases that could be considered to fall within the U.S. actual malice standard – has left a changing Japanese society without a substantial deterrent against abuses by its press.²⁴

This Note proposes a new standard for awarding larger damages in Japanese libel cases. An increase in monetary damage awards would more realistically compensate the successful libel plaintiff in Japan. In addition, although fears of chilling free speech must be acknowledged,²⁵ such increased awards are likely to improve the accuracy and objectivity of Japanese reporting. Part II compares the approach to libel in the United States with Japan. Part III analyzes the trend in damage awards in each nation. Part IV proposes that

14. See Smith, *supra* note 8, at 876 (citing LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 35-37 (1991)).

15. See David A. Anderson, *Is Libel Law Worth Reforming?* 140 U. PA. L. REV. 487, 525-526 (1991).

16. See generally LDRC 2000 REPORT ON TRIALS AND DAMAGES (2000).

17. See generally John Middleton, *Reporting Fiction as Fact: The Problem of Misrepresentation and Invention by the Japanese Media*, in *ASIAN LAWS THROUGH AUSTRALIAN EYES* ch. 13 (Taylor ed., 1997). See also Takesato Watanabe, *Japanese Press Misinforms Readers*, S.F. EXAMINER, May 27, 1997, at 16.

18. See Horibe & Middleton, *supra* note 9, at 234.

19. See generally Horibe & Middleton, *supra* note 9, at 229-231 (citing Kenji Akiyoshi, *Current State of Judgments Relating to Reputation and Privacy*, 1038 JURISTO 48-54 (1994)).

20. See LDRC 2000 REPORT ON TRIALS AND DAMAGES, *supra* note 16, at 4.

21. See *id.* at 7, 8.

22. See Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 682, 683 (1994).

23. See Jerome A. Barron, *Punitive Damages in Libel Cases—First Amendment Equalizer?*, 47 WASH. & LEE L. REV. 105, 107-110, 113 (1990).

24. See Horibe & Middleton, *supra* note 9, at 231.

25. See Nelson, *supra* note 7, at 83: "Libel chill is a subtle phenomenon, as likely to be grounded in perceptions as empirical data."

Japan adopt an approach to libel that essentially parallels the U.S. regime of large compensatory and punitive libel damage awards.

II. A REVIEW OF LIBEL LAW IN THE U.S. AND JAPAN

A. *The Development of U.S. Libel Law*

The First Amendment to the U.S. Constitution provides for the freedoms of speech and of the press.²⁶ Despite concerns over recent corporate media mergers,²⁷ the American press is still renowned as among the most autonomous in the world.²⁸ "Freedom of the press is a keystone of democracy, and its development has been central to the historical struggle for the rule of law."²⁹

In the United States, libel generally is defined as a malicious statement expressed either in print or writing or by signs or pictures tending to injure a person's reputation and expose him or her to public hatred, contempt, or ridicule.³⁰ The remedy for libel in the U.S. almost always has been an award of monetary damages.³¹

In the landmark 1964 case *New York Times v. Sullivan*,³² the U.S. Supreme Court held that public officials could not recover damages for defamatory statements pertaining to their official conduct unless they proved that the statements were false and also made with "actual malice."³³ The Court reasoned that public policy is best served by ensuring an "uninhibited, robust and

26. See U.S. CONST. amend. I, *supra* note 4.

27. See Jim Parker, *The CBS-Viacom Merger: Impact on Journalism*, 52 FED. COMM. L.J. 519, 520-21 (2000). Large-scale corporate media mergers in recent years call into question whether the American press is really as autonomous as it once was. Ben Bagdikian, a Pulitzer Prize-winning journalist and former dean of the University of California, Berkeley, Graduate School of Journalism, and Mark Crispin Miller, Professor of Media Studies and Director of the Project on Media Ownership at New York University, warn against media mergers and contend that their effects will be profoundly negative. For a view in favor of media consolidation, see Paul Farhi, *How Bad Is Big?*, AM. JOURNALISM REV. 29 (Dec. 1999).

28. See Nadine Strossen, *Press Law in the United States*, in PRESS LAW AND PRACTICE 192 (Article 19 pub., 1994).

29. See Smith, *supra* note 8, at 871.

30. See RESTATEMENT (SECOND) OF TORTS § 568 (1977):

(1) Libel consists of the publication of defamatory matter by written or printed words, or by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words. (2) Slander consists of the publication of defamatory matter by spoken words, transitory gestures, or by any form of communication other than those stated in Subsection (1). (3) The area of dissemination, the deliberate and premeditated character of its publication, and the persistence of the defamation are factors to be considered in determining whether a publication is a libel rather than a slander.

31. See generally LDRC 2000 REPORT ON TRIALS AND DAMAGES, *supra* note 16.

32. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The case involved the publication of a political advertisement inaccurately describing an incident involving police treatment of nonviolent protestors in Montgomery, Alabama, during the height of the civil rights movement.

33. See *id.* at 283.

wide-open" debate on public issues.³⁴ Accordingly, it placed a heavy burden on the plaintiff to prove that the defendant either had knowledge that the defamatory statement was false or that the statement was made with "reckless disregard of whether it was false or not."³⁵

The Supreme Court, in *Curtis Publishing Co. v. Butts*, subsequently extended the *Sullivan* holding to include not only public officials but all public figures.³⁶ The Court reasoned that public figures, like public officials, must be held to the actual malice standard because the public has an equivalent "justified and important" interest in the views and actions of public figures with respect to public issues and events.³⁷ The Court, in *Gertz v. Robert Welch, Inc.*, further clarified that a "public figure" includes a person who achieves that status either 1) by position alone, or 2) by thrusting themselves into the middle of a public controversy.³⁸ Thus, the Court found a well-known university football coach³⁹ and a prominent retired army general⁴⁰ to be public figures subject to the actual malice standard, but not a wealthy socialite whose divorce was inaccurately reported to have been caused by extramarital affairs that would "make Dr. Freud's hair curl."⁴¹

Gertz, moreover, distinguished the legal requirements for libel actions by private plaintiffs by holding that those who were not public figures could prevail on the question of intent simply by showing negligence on the part of the media-defendant.⁴² However, private plaintiffs would be unable to recover punitive damages⁴³ unless they could prove actual malice.⁴⁴ The *Gertz* deci-

34. *See id.* at 270. In determining that the New York Times had not libeled the plaintiff, a Montgomery police commissioner, Justice Brennan stated, "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

35. *See id.* at 280.

36. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Butts, a well-known athletic director of the University of Georgia, brought a libel action against the publisher of the Saturday Evening Post based on an article in the magazine charging him with having "fixed" a football game between the University of Georgia and the University of Alabama.

37. *See id.* at 134.

38. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). After a policeman killed a youth, the youth's family retained Gertz to represent them in a civil action. During the trial, respondent published an article about petitioner that labeled him as a "Communist" and a member of a Marxist organization. Because the statements contained serious inaccuracies, Gertz filed a libel action. The Supreme Court held that the actual malice standard does not apply because the facts showed that Gertz was not a public figure.

39. *See Butts*, 388 U.S. at 130.

40. *See Associated Press, Inc. v. Walker*, 388 U.S. 130 (1967). The general sued Associated Press for distributing a news dispatch, which, in giving an eyewitness account of the riots at the University of Mississippi caused by the court-enforced enrollment of black students, stated that he had taken command of the violent crowd, had personally led a charge against federal marshals, and encouraged and advised the rioters.

41. *See Time Inc. v. Firestone*, 424 U.S. 448 (1976).

42. *See Gertz*, 418 U.S. at 339-348.

43. *See LDRC 2000 REPORT ON TRIALS AND DAMAGES, supra* note 16, at 34. Punitive damages were awarded in slightly more than half of all libel cases in which damages were

sion was seen as balancing the need to compensate wronged plaintiffs with the desire to avoid punishing the press unnecessarily for investigating and reporting on controversial issues.⁴⁵

U.S. courts have consistently envisioned the press as an aggressive and independent "Fourth Estate" – a quasi-branch of government serving as a check on the other three⁴⁶ – to be outspoken and critical about those in power.⁴⁷ Even in comparison to the media in other democracies, the American press remains "unusually forceful and untrammelled."⁴⁸ Nevertheless, a fierce debate continues to rage among scholars who, for the most part, consider the effects of large punitive awards in libel cases as too great a deterrence against protected speech.⁴⁹

U.S. libel law today primarily focuses on penalizing the media for publishing an injurious or false statement in an irresponsible manner.⁵⁰ This perspective is evidenced by the steadily increasing sums of record-breaking libel damage awards over the past twenty years.⁵¹ Thus, as supermarket tabloids like *The Globe* have experienced,⁵² a damage judgment in a U.S. libel case primarily serves the aims of punishment and deterrence.⁵³

B. *Japanese Libel Law – And How It Differs From the U.S.*

Article 21 of the Japanese Constitution guarantees freedom of expression, including that of the press.⁵⁴ These rights are balanced against the rights to

awarded in the 1990's. The average punitive award in the 1990's was more than double that of the 1980's. The median award of punitive damages in the 1990's was \$300,000.

44. See *Gertz*, 418 U.S. at 349-350. See also *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 759 (1985), where the Court held that matters of private concern affecting private figures are subject to a negligence standard ("Speech on matters of purely private concern is of less First Amendment concern"). Moreover, punitive damages in such cases are available.

45. See *Smith*, *supra* note 8, at 876.

46. See *BOLLINGER*, *supra* note 14, at 55-57.

47. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966): "The Constitution specifically selected the press, which includes not only newspapers, books and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs."

48. See *Strossen*, *supra* note 28, at 216.

49. See generally Charles Rothfeld, *The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 19 *YALE L. & POL'Y REV.* 165 (2000).

50. See Randall P. Bezanson, *The Libel Tort Today*, 45 *WASH. & LEE L. REV.* 535, 536 (1988).

51. See LDRC 2000 REPORT ON TRIALS AND DAMAGES, *supra* note 16, at 2.

52. See generally *Khawar v. Globe International*, 965 P.2d 696 (Cal. 1998), *cert. denied*, 526 U.S. 1114 (1999). *Khawar* successfully sued *The Globe* for publishing a photograph of an individual it claimed was the real killer of Robert Kennedy. The photograph, identified as Ali Ahmand, actually was a photograph of *Khawar*, who at the time was a Pakistani citizen (and now a naturalized American citizen) working as a freelance journalist. He was awarded \$500,000 in punitive damages along with \$675,000 in compensatory damages.

53. See *Bezanson*, *supra* note 50, at 545; see also Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 *AM. U.L. REV.* 1393, 1395 (1993) ("Punitive damages, we suggest, constitute the best available means for social control and moral sanction of economically formidable wrongdoers. Moreover, we suggest that if punitive damages are pared back too drastically, civil law may be under enforced.")

54. See *Beer*, *supra* note 3, at 213.

reputation and privacy under both Japan's Civil Code (MINPO)⁵⁵ and Penal Code (KEIHO).⁵⁶ Japanese law defines defamation as reducing the respect of another in the community or lowering such a person in the estimation of his or her peers.⁵⁷ This treatment may be based on Japan's traditional cultural emphasis on group cohesion over personal autonomy.⁵⁸ Libelous acts are consistently remedied by public apology rather than by large monetary awards.⁵⁹

Article 230 of the Penal Code provides that a person who injures the reputation of another by publicly alleging facts, whether true or otherwise, may be sentenced to imprisonment, with or without hard labor, for a term not exceeding three years.⁶⁰ Additionally, he or she may be fined up to ¥500,000 (US\$3,817).⁶¹ If, however, the matter relates to public concern or public interest, the person or entity making the statement would not be punished if the truth of the statement could be established.⁶² The test for "matters of public concern" depends on the extent of that person's social activities and his or her influence on society.⁶³ Although criminal penalties for libel may seem to pose a severe deterrent to an offender, such suits are rare. The reason for the rarity of such suits may be because 1) prosecutors are not eager to contest

55. See generally MINPO, Articles 709, 710, and 723. Article 709 states: "A person who has intentionally or negligently violated the right of another is bound to compensate any damages resulting in consequence." Article 710 states: "Irrespective of whether the person, liberty or honor (reputation) of another is injured or his property rights are violated, the person who is bound to make compensation for damage in accordance with the provisions of the preceding Article must make also compensation even for damage other than that to his property." Article 723: "Against a person who has injured the honour (reputation) of another, the Court may, upon the demand of the injured party, order suitable measures to be adopted for the recovery of his honour (reputation) instead of, or together with, compensation for damage."

56. See KEIHO, art. 230, which distinguishes between ordinary defamation and defamation involving the public interest. If indicted, the press attempts to prove truth under art. 230, para. 2, which provides:

- 1) When the statement as defined in [§230 (1)] relates to matters of public concern and has been solely for the purpose of promoting the public interest, the person making such statement shall not be punished if the truth thereof is established on inquiry into its truth or falsity.
- 2) In applying the provision of the preceding subsection, facts concerning the criminal act of a person against whom prosecution has not yet been instituted shall be deemed to be facts relating to matters of public concern.
- 3) When the statement as defined in [§230 (1)] relates to facts concerning a public employee or a candidate for elective public office, the person making such statement shall not be punished if the truth thereof is established on inquiry into its truth or falsity.

57. See Horibe & Middleton, *supra* note 9, at 223.

58. See SMITH, *supra* note 6, at 41.

59. See Nelson, *supra* note 7, at 58-59.

60. See Keiho art. 230, para. 1.

61. See *id.* Dollar/yen ratios are calculated as \$1/¥131, the rate at date of publication.

62. See *id.*

63. See LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 637-643 (1996) (hereinafter "Beer & Itoh"). The accused editor in *Gekkan Pen, Inc. v. Japan*, 1128 HENREI JIHO 32 (Supreme Court, 1984), was subsequently convicted on the grounds that: 1) the truth of the magazine's allegations of womanizing against a Buddhist leader had not been proven; and 2) the editor lacked a reasonable ground to believe that they were true.

them; 2) prison sentences tend to be suspended by judges; or 3) plaintiffs are unaware of the option.⁶⁴ The majority of plaintiffs in Japan, therefore, file civil rather than criminal libel actions.⁶⁵

Under the Japanese Civil Code, the media defendant must prove that the matter reported was of public interest; the information was reported with the purpose of benefiting the public good; and the reported information was true or the defendant had a good reason to believe that it was true.⁶⁶ In 1969, the Supreme Court of Japan held that in both civil and criminal cases, a media defendant need only show that the alleged libelous statement was made under the mistaken but reasonable belief that it was true.⁶⁷

Actions for defamation and invasion of privacy in Japan had been rare until recently and awards of damages very small by international standards.⁶⁸ Thus, Japan's media traditionally has published and broadcast with little fear of litigation.⁶⁹ Today, however, such actions are on the rise.⁷⁰

The key difference between the American and Japanese approaches to libel law is that the U.S. focuses on protecting the public good through robust reporting, while Japan emphasizes restoring the reputations of defamed individuals.⁷¹ The laws of both nations support aggressive reporting.⁷² However, Japan, unlike the U.S., requires the press to demonstrate a good-faith basis for believing the truth of the disputed statement.⁷³ The U.S. awards large damages to successful plaintiffs both in negligence and actual-malice actions.⁷⁴ Japanese damage awards are exceedingly low. The courts in Japan, unlike those in the U.S., do not utilize juries to set damages.⁷⁵ Rather, the Japanese courts promote remedies such as apologies that seek to correct falsehoods and restore good reputations.⁷⁶

This traditional Japanese approach, however, is not as relevant today as it used to be. Private Japanese television networks, vying with one another for larger audiences and advertising revenues, are feeding viewers a once-shock-

64. See E-mail from John Middleton, Professor of Law at Hitotsubashi University to Jeffrey Ourvan (Aug. 7, 2001)(on file with author); see also E-mail from Andy Sumimoto, Soka Gakkai International Office of Public Relations to Jeffrey Ourvan (Aug.6, 2001)(on file with author).

65. See *id.*

66. See Smith, *supra* note 8, at 885-886.

67. See Horibe & Middleton, *supra* note 9, at 225, describing the Wakayama Evening Times case.

68. See Horibe & Middleton, *supra* note 9, at 228.

69. See *id.*

70. See *id.*

71. See generally INTERNATIONAL MEDIA LIABILITY: CIVIL LIABILITY IN THE INFORMATION AGE (Christian Campbell ed. 1997).

72. See *id.*

73. See Horibe & Middleton, *supra* note 9, at 225.

74. See LDRC, *supra* note 16, at 2.

75. See Horibe & Middleton, *supra* note 9, at 230.

76. See Nelson, *supra* note 7, at 57.

ing diet of scandals, gossip, and fads.⁷⁷ According to numerous Japanese commentators, Japan has become an increasingly "selfish and materially obsessed society."⁷⁸ It is a nation altering the dynamic most people consider to be quintessentially Japanese – the relationship between the individual and society, and between the desires of self and the duty to the social whole.⁷⁹ As Japanese publishers and broadcasters are increasingly obliged to convey salacious material in order to attract consumers, it must be questioned whether quaint apologies are enough to keep their libelous excesses in check.⁸⁰

Although the values of the Japanese people and the role of their press have altered dramatically since World War II, the approach of Japanese courts to cases of libel have changed little.⁸¹ As highlighted by the long struggles of its most litigious libel plaintiffs, the imprisoned Kazuyoshi Miura and the Soka Gakkai Buddhist association, what has worked for Japan in the past does not work as well today.⁸² A reassessment of Japanese remedies for libel, based on the example of the U.S. damages regime, may be one area of that nation's jurisprudence ripe for change.

III. AN ANALYSIS OF LIBEL AWARDS IN THE U.S. AND JAPAN

A. Key Trends in U.S. Libel Cases

The Libel Defense Resource Center⁸³ reported 438 U.S. libel trials from 1980-1999.⁸⁴ The number of trials, however, steadily decreased as the century drew to a close. Specifically, 261 cases went to trial in the 1980's compared to 177 cases in the 1990's.⁸⁵ Although the frequency of trials did not consistently decrease year-to-year throughout the 1990's, the last three years demonstrated a steady decline.⁸⁶ In particular, actual malice cases dropped drastically in the 1990's.⁸⁷

77. See Kwan Weng Kim, *Japan's Moral Crisis*, THE STRAITS TIMES, October 2, 1999, at 48.

78. See *Japanese PM Sends Seoul Condolences Over Good Samaritan Killed by Train*, AGENCE FRANCE PRESS, January 30, 2001.

79. See SMITH, *supra* note 6, prologue.

80. See Horibe & Middleton, *supra* note 9, at 219.

81. See *id.*

82. See BEER & ITOH, *supra* note 63, at 637-643, which reveals that the Soka Gakkai's involvement as a libel plaintiff dates back to the mid-1970's; see also Nelson, *supra* note 7, at 59-64, for detailed information about Miura's libel suits from the early 1980's.

83. The Libel Defense Resource Center (LDRC), Inc., is an information clearinghouse that monitors trends in libel, privacy, and related law. It is largely funded by major news and publishing corporations throughout the U.S..

84. See LDRC, *supra* note 16, at 4.

85. See *id.*

86. See *id.* at 3. The LDRC reports a decrease from twenty-two trials in 1997, to eighteen trials in 1998, to eleven trials in 1999.

87. See *id.* at 4. There were 147 actual-malice trials in the 1980's, compared to seventy-nine in the 1990's.

Despite the fact that there were fewer trials in the 1990's and that media defendants won a higher percentage of those trials,⁸⁸ the total number of dollars awarded in the 1990's far exceeds the amount awarded in the 1980's.⁸⁹ In the 1990's, the average award was \$5,354,154 with a median of \$370,000.⁹⁰ In the 1980's, the average award was \$1,444,486 with a median of \$200,000.⁹¹ In general, the number of libel cases has dropped as damage awards have risen.⁹²

Some of the more recent high-profile cases that the U.S. media lost at the trial court level include: *Graves v. Warner Bros.* (the "Jenny Jones case");⁹³ *Cobb v. Time Inc.* (suit by former boxer Tex Cobb against Sports Illustrated, which accused him of fixing fights);⁹⁴ *Hoffman v. Capital Cities/ABC Inc.* (suit by Dustin Hoffman against L.A. Magazine for publishing an altered photo depicting him in "Tootsie"-like drag);⁹⁵ and *Krupski v. The Daily Camera* (suit by a reporter against her former publisher, which had publicly charged her with stealing files on the Jon Benet Ramsey story).⁹⁶ The jury verdicts in these four cases totaled close to \$40 million.⁹⁷

Three possible factors may explain the correlation between increasing damage awards and decreasing cases of libel in the U.S. First, potential plaintiffs may be inhibited by the fact that defendants win most of the cases at trial – though a large proportion of cases are later overturned on appeal.⁹⁸ Second, a chilling effect may have settled in at newsrooms across America, making editors and reporters less likely to pursue controversial stories.⁹⁹ Third, news organizations, due to the risk of high damage awards, may be pursuing stories more carefully and reporting them more accurately. Under this last theory,

88. *See id.* at 5. In the 1980's, media defendants won 35.4 percent of their cases. In the 1990's, they won 39.1 percent.

89. *See id.* at 2.

90. *See id.*

91. *See id.*

92. *See generally* LDRC, *supra* note 16.

93. *See id.* at 13. The plaintiffs are parents of and personal representatives for the Scott Amedure estate, the Jenny Jones show guest killed days after he revealed his sexual attraction to another male guest during a taping of the show. Plaintiffs settled all claims with the murderer before trial, but maintained their claim that the Jenny Jones show's negligence caused the killer's humiliation and therefore proximately caused their son's death. Post-trial motions have been filed, and the show's owner, Warner Brothers, reportedly plans to appeal.

94. *See id.* The plaintiff, former boxer-turned-actor Randall "Tex" Cobb, sued Sports Illustrated over a 1993 article titled "The Fix Was In." The article accused Cobb of participating in a fixed boxing match in 1992 and of sharing cocaine with his opponent after the fight. The Sixth Circuit reversed Cobb's \$10.7 million jury verdict in January 2002.

95. *See id.* The caption of the photo read: "Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels." The Ninth Circuit, in 2001, reversed Hoffman's \$3 million jury verdict.

96. *See id.* at 12.

97. *See id.* at 12, 13.

98. *See* LDRC 2000 REPORT ON APPELLATE RESULTS, 1 (2000). In the 1990's, plaintiffs' verdicts were fully affirmed 33.8 percent of the time, an almost nine-point increase from the 24.6 percent rate of the previous decade.

99. *See* Casarez, *supra* note 22, at 682-686.

the potential of receiving a large punitive damage award thus functions as an equalizer and promotes at least a modicum of media accountability.¹⁰⁰

Although libel plaintiffs continue to seek creative means to avoid the actual malice standard and First Amendment precedent,¹⁰¹ their prospects for success remain dim.¹⁰² In addition, the decline in libel cases over the past ten years may reflect the fact that both plaintiffs and defendants increasingly settle their cases before they reach trial.¹⁰³ Plaintiffs may recognize the need to do so because their prospects of success drop precipitously as cases make their way through the appeals process.¹⁰⁴ The media, for its part, is faced not only with daunting legal fees but the potential for enormous punitive damages.¹⁰⁵

The threat of a chilling effect was widely discussed in U.S. journalism trade publications¹⁰⁶ in the wake of a 1979 U.S. Supreme Court decision that allowed discovery into newsroom editorial decision-making.¹⁰⁷ Today, however, there is little hard evidence to suggest that the U.S. press has foregone certain types of news coverage because of the perceived threat of a potential libel suit. If anything, the press has become more dogged in its pursuit of controversial stories, as evidenced by its coverage of O.J. Simpson, Monica Lewinsky, Woody Allen, and many others.¹⁰⁸ Also, as demonstrated by news coverage in the late 1990's of Richard Jewell¹⁰⁹ and in 2000 of Wen Ho

100. See Barron, *supra* note 23, at 113.

101. See *Food Lion v. ABC*, 194 F.3d 505 (4th Cir. 1999) for an example of this phenomenon. The case concerned secret videotaping by ABC-TV news crews posing as employees, which uncovered the sale of tainted beef in the supermarket chain. The plaintiffs in this case, seeking to avoid the absolute malice standard, cast their claims in fraud and trespass. The appeals court dismissed the fraud claim, and awarded Food Lion \$1 in damages for trespass.

102. See Barron, *supra* note 23, at 112: "Winning and keeping a punitive damage judgment in a libel case is as unlikely and yet as alluring as winning the state lottery."

103. See LDRC 2000 REPORT ON APPELLATE RESULTS, *supra* note 98, at 2.

104. See *id.*

105. See Casarez, *supra* note 22, at 683.

106. See generally Michael Massing, *The Libel Chill: How Cold is it Out There?*, COLUMBIA JOURNALISM REV. May-June 1985, at 31 (1985); see also David Zucchino, *Publish and Perish: Libel and the Little Publication*, WASHINGTON JOURNALISM REV. (1979).

107. See *Herbert v. Lando*, 441 U.S. 153 (1979).

108. See Frank Rich, *The Age of the Mediathon*, NEW YORK TIMES MAGAZINE, October 29, 2000, at 58. Simpson, the former football star and murder defendant in the "trial of the century," complains that the press is lazy and the news industry is only about making money. Lewinsky, President Clinton's famous paramour, criticizes the media for wrenching facts out of context to create a biased caricature of who she really is. Allen, who married his ex-wife's adopted daughter, Soon Yi Previn, observes that a completely fictional account about him was reported as news.

109. See Maria Elena Fernandez, *Park Bombing: The FBI Gathers Evidence; A bad man to cross on his beat; Some in North Georgia say Jewell 'was on a power kick'*, ATLANTA JOURNAL & CONSTITUTION, August 1, 1996 at 15A. See also Ann Woolner, *Just Doing Our Jobs*, BRILL'S CONTENT, April 2000, at 86. Richard Jewell, who has sued the Atlanta Journal & Constitution, was wrongfully accused of the 1996 Atlanta Olympics bombing.

Lee,¹¹⁰ the fine line that may distinguish a libelous story seems not to be of paramount concern to editors in the increasingly competitive news business.

Over the past twenty years, many observers have worried that large punitive damage awards in libel suits would chill free expression.¹¹¹ Essentially, it can be neither proven nor disproven that punitive damages do so.¹¹² For example, in *Gertz*, Justice White in dissent opined that the Supreme Court's decision requiring private libel plaintiffs to show actual malice to recover punitive damages was based on an "undifferentiated fear of unduly burdensome punitive damages awards."¹¹³ Questioning the wisdom of relying on the chilling effect argument, he stated, "The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none."¹¹⁴ Neither have news editors nor law review commentators.¹¹⁵

A more likely explanation for the decrease in U.S. libel suits is that the threat of high damages and the costs of litigation are leading news organizations to increasingly get the facts right. Punitive damages are the last potent weapons left in the quivers of libel plaintiffs.¹¹⁶ Without the lure of punitive recoveries, for example, many private plaintiffs could not attract on a contingency basis the best attorneys to represent them in defamation actions.¹¹⁷

Moreover, the threat of large exemplary awards is needed to ensure media responsibility.¹¹⁸ Limitations on recoverable damages in libel actions may further inhibit potential plaintiffs,¹¹⁹ create lesser press accuracy, and result in increased injuries to reputation.¹²⁰ Also, a decrease or elimination of punitive damages may infuriate jurors who today often view the press as the "enemy".¹²¹ This perspective reflects a general attitude of some that the press has become irresponsible following the change in libel liability rules brought about by *Sullivan* and its progeny.¹²² While the reality of increasingly large

110. See Editorial *The Times and Wen Ho Lee*, THE NEW YORK TIMES, September 26, 2000, at 2. Some believe that Wen Ho Lee, the Los Alamos scientist accused of passing nuclear secrets to the Chinese government, was singled out due to his Asian ancestry.

111. See Casarez, *supra* note 22, at 683.

112. See Barron, *supra* note 23, at 108.

113. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, at 397 (1974) (White, J., dissenting).

114. See *id.* at 390.

115. *But cf.* Casarez, *supra* note 22, for a comprehensive review of the traditional theories and arguments against large libel damage awards.

116. See Barron, *supra* note 23, at 111-112.

117. See Anderson, *supra* note 15, at 502-503.

118. See Barron, *supra* note 23, at 112-114.

119. See *id.*

120. See David A. Hollander, *The Economics of Libel Litigation*, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS (Everette E. Dennis & Eli M. Noam eds., 1989), at 257, 266.

121. See Barron, *supra* note 23, at 114-115.

122. See, e.g., James P. Cain, *Protect Us From a Reckless Press*, 71 A.B.A. J., 38, 41 (July 1985).

libel damages certainly has captured the attention of the American press, it appears to have also put it on notice to report more carefully.

B. Key Trends in Japanese Libel Cases

Although reports of libel trials in Japan have not been compiled as precisely as in the United States,¹²³ it is clear that the problem of false news reporting is pervasive there.¹²⁴ This problem poses emphatic concerns, because the Japanese are the most avid newspaper readers in the world.¹²⁵ Moreover, a Japan Times survey reported that seventy-two percent of the Japanese describe what they read in newspapers as "accurate".¹²⁶

The number of successful civil actions brought against the Japanese media significantly increased during the 1990's.¹²⁷ The scale of damages has also risen, but not nearly to the level of those in the U.S.¹²⁸ The largest-ever Japanese libel damage award against a media defendant was ¥10 million (US\$76,336) by the Tokyo District Court in March, 2001.¹²⁹

Between 1990 and 1993, the most recent years for which precise figures are available in Japan,¹³⁰ there was a three-fold increase in the number of judgments handed down in defamation cases, from nineteen judgments in 1990 to sixty-two in 1993. The average amount of damages awarded during this period were ¥939,000 (US\$7,168).¹³¹ In contrast, the average damage award during that period in the U.S. was more than \$1.3 million.¹³²

Many potential Japanese libel plaintiffs fail to bring cases to court because of the high cost of litigation and the low compensatory damages they might expect.¹³³ There are, however, two notable libel litigants in Japan. One is Kazuyoshi Miura, who has brought more than 200 defamation and privacy actions over the past ten years and won a large proportion of his cases.¹³⁴ Miura was a former entrepreneur who attracted unprecedented media attention for his involvement in the fatal shooting of his wife in Los Angeles in 1981 –

123. See Nelson, *supra* note 7, at 83.

124. See generally Middleton, *supra* note 17.

125. See Marisa Chimprabha, *Press Organises Conference With a Difference*, THE NATION (Thailand), October 30, 2000, at 3.

126. See Curt Young, *Fact v. Fancy: The Deplorable Japanese Media*, TOKYO WEEKENDER, June 7, 1996, at 1.

127. See Horibe & Middleton, *supra* note 9, at 229-231.

128. See *id.*

129. See *Giants Slugger Wins Libel Suit*, MAINICHI SHIMBUN, March 28, 2001, at 12. The Tokyo District Court ordered publisher Shogakkan to pay damages of ¥10 million to Kazuhiro Kiyohara, a professional baseball player, for publishing a story in the Shukan Post that accused Kiyohara of failing to excel on the field due to his alleged pre-season frequenting of strip bars. The previous record for libel damages in Japan had been ¥5 million. See also Horibe & Middleton, *supra* note 9, at 231, citing 872 HANREI TAIMUZU 298 (Tokyo District Court, 1995).

130. See Horibe & Middleton, *supra* note 9, at 229-231.

131. See *id.*

132. See LDRC, *supra* note 16, at 31.

133. See Horibe & Middleton, *supra* note 9, at 230-231.

134. See Nelson, *supra* note 7, at 59-64.

opening the floodgates to a stream of highly sensational and inaccurate reports.¹³⁵ Despite his sentence to life imprisonment for conspiracy to murder, Miura, who insists he is innocent, has brought lawsuits from behind bars and without legal representation.¹³⁶ He has said that he benefits from the fact that defendants in defamation cases bear the burden of proving the truth of their allegations.¹³⁷

The ten-million-member Soka Gakkai Buddhist association is the other aggressive libel plaintiff in Japan. In 1999, the Tokyo District Court awarded Soka Gakkai ¥2 million (US\$16,260) in a libel action against the weekly magazine *Shukan Gendai*.¹³⁸ The magazine accused the organization of conspiring to murder a city councilwoman who police later determined had committed suicide. The Court condemned the article for “its bias toward one-sided information.”¹³⁹ In 1998, Japan’s Supreme Court upheld a ¥1.1 million (US\$8,397) award on behalf of a Soka Gakkai member who sued *Shukan Shincho*¹⁴⁰ for publishing an article that wrongly accused him of murdering a member of a rival sect.¹⁴¹ But while the Soka Gakkai can pursue many of these suits because it is well funded,¹⁴² the same cannot be said for other potential private libel plaintiffs in Japan.

For example, in 1994 Yoshiyuki Kouno was incorrectly targeted by many Japanese news organizations as the person responsible for the sarin gas attacks that were later attributed to the Aum Shinrikyo terrorists – Kouno in fact was a victim of that attack.¹⁴³ Much of the news coverage focused on comments from neighbors who said they felt unsafe and hoped the police would arrest Kouno soon. The cumulative impact was to create a near-unanimous public opinion of Kouno’s guilt. He received hundreds of threatening letters and phone calls.¹⁴⁴ *Shukan Shincho* posed the published question: “If he’s innocent, why does he need a lawyer?”¹⁴⁵ Once it became clear that Kouno was not involved in the crimes, though, much of the press failed to print apologies

135. See Horibe & Middleton, *supra* note 9, at 229.

136. See *id.*

137. See *id.*

138. See *Kodansha Ordered to Pay Damages and Publish an Apology Regarding Its Article About the Death of a City Councilwoman*, ASAHI SHIMBUN, July 20, 1999, at 38.

139. See *id.*

140. See Young, *supra* note 126. *Shukan Shincho* is one of the leading weekly magazines in Japan and the subject of numerous libel suits. Juichi Saito, a top-level editorial advisor to the magazine’s parent company in 1995, *Shinchosha*, stated at the time: “In the art of writing, there’s no such thing as truth or justice.” *Id.*

141. See *Shinchosa’s Appeal in a Libel Suit is Rejected by the Supreme Court*, MAINICHI SHIMBUN, March 26, 1998, at 2. The victim, according to police and insurance investigators, accidentally had been killed in a car crash.

142. See Teresa Watanabe, *Japan’s Crusader or Corrupter?*, LOS ANGELES TIMES, March 15, 1996, at 1.

143. See Kenichi Asano, *Japan’s Troubled News Media*, THE CHRISTIAN SCIENCE MONITOR, August 29, 1997, at 18.

144. See *id.*

145. See *id.*

or retractions. Shukan Shincho issued only a small back-page apology in the editor's name.¹⁴⁶

A common form of false reporting in Japan is "netsuzo," which means "the manufacturing of news."¹⁴⁷ In one documented case, a group of sports-writers, wishing to quote the unavailable baseball player Hideo Nomo, agreed on a common statement on the basis of what they thought the pitcher would say and attributed it to him. The National Press Club of Japan published an account of the incident, written by one of the sportswriters involved, without any comment that it had been a breach of journalistic ethics.¹⁴⁸ Other unethical, and arguably libelous, recent press transgressions in Japan include the abuse of victims of industrial pollution in the region of Minamata; the labeling of plaintiffs in HIV suits as "suit profiteers"; and the disparagement of so-called Korean "comfort women" who allegedly were enslaved as prostitutes by the Japanese army during World War II.¹⁴⁹

Japanese libel plaintiffs traditionally avoid litigation, although some, like Miura and the Soka Gakkai, have asserted their legal rights. This reluctance may be due in part to the conformist nature of Japanese society.¹⁵⁰ However, it may also be attributed to the daunting costs of litigation and the relatively miniscule awards that Japanese civil courts grant plaintiffs for their troubles.¹⁵¹

Freedom of expression in Japan is guaranteed effectively by its Constitution, but open to abuse by a media more concerned with circulation and ratings figures than the protection of reputation and privacy through responsible, ethical journalism.¹⁵² The excessive competition and commercialism among the media have led to serious violations of individuals' rights.¹⁵³ With the continuing development of Japan's information society – and the reluctance of Japan's justice system to effectively counteract libel through increased compensatory and punitive damages – the likelihood of further infringements can only be expected to increase.¹⁵⁴

IV. CONCLUSION

The possibility of large compensatory and punitive awards would surely encourage more deserving plaintiffs in Japan to seek vindication.¹⁵⁵ It would also, as it apparently does in the U.S., appropriately check the Japanese press

146. *See id.*

147. *See* Horibe & Middleton, *supra* note 9, at 235.

148. *See id.*

149. *See* Watanabe, *supra* note 17.

150. *See generally* SMITH, *supra* note 6, at 37-43.

151. *See* Horibe & Middleton, *supra* note 9, at 230-31.

152. *See id.* at 239.

153. *See id.*; *see also* Middleton, *supra* note 17, at 262-66.

154. *See* Horibe & Middleton, *supra* note 9, at 239.

155. *See id.* at 231.

and provide an effective balance to its inaccurate excesses.¹⁵⁶ The relative difficulty of assembling data on lawsuits in Japan renders any objective study of litigation trends problematic.¹⁵⁷ Nevertheless, pertinent Japanese commentary and news articles attest that defamation and privacy actions against media organizations are on the rise to a troubling degree.¹⁵⁸

The past twenty years of American libel jurisprudence demonstrates two salient trends. First, litigated cases of libel have dropped significantly. Second, this precipitous fall corresponds to a steep rise in libel damage awards.¹⁵⁹ Japan, on the other hand, is witnessing a rise in libel cases coupled with a negligible rise in already-low damage awards.¹⁶⁰ Potential libel plaintiffs in Japan may be more willing to state causes of action, however, if, like in the United States, the reward of compensatory and punitive damages looms large.¹⁶¹

Potential libel cases are not being litigated in Japan.¹⁶² If the U.S. experience was to serve as a model, it is evident that an increase in damages would not necessarily provoke in news organizations the chilling effect that many observers fear.¹⁶³ Nor would the press be any less inclined to vigorously pursue controversial stories.¹⁶⁴ Rather, there should be every expectation that plaintiffs would be more encouraged to engage the offending media defendant in court.¹⁶⁵ Such an environment, as in the U.S., may very well nurture a renewed climate of accuracy and objectivity in Japanese reporting.

Jeffrey A. Ourvan

156. *See id.*

157. *See* Nelson, *supra* note 7, at 83.

158. *See, e.g.,* Horibe & Middleton, *supra* note 9; *see also* Nelson, *supra* note 7, at 83.

159. *See generally* LDRC, *supra* note 16.

160. *See* Horibe & Middleton, *supra* note 9, at 229-31.

161. *See* Horibe & Middleton, *supra* note 9, at 229.

162. *See, e.g.,* Watanabe, *supra* note 17; Asano, *supra* note 144.

163. *See generally* Barron, *supra* note 23; Anderson, *supra* note 15.

164. *See generally* Barron, *supra* note 23; *but cf.* Casarez, *supra* note 22, for a contrasting view.

165. *See* Horibe & Middleton, *supra* note 9, at 229.

