Fee Shifting in Libel Litigation: How the American Approach to Costs Allocation Inhibits the Achievement of Libel Law’s Substantive Goals

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“As it stands today, libel law is not worth saving. What we have is a system in which most claims are judicially foreclosed after costly litigation. It gives plaintiffs delusions of large windfalls, defendants nightmares of intrusive and protracted litigation, and the public little assurance that the law favors truth over falsehood. If we can do no better, honesty and efficiency demand that we abolish the law of libel.”

David A. Anderson

The fee-shifting system used in U.S. libel litigation compels the media and potential plaintiffs to behave in a manner inconsistent with the achievement of libel law’s substantive goals. Since 1964, libel law in this country has sought to recalibrate the balance between protecting reputation and encouraging free speech. It has moved from being concerned primarily with the achievement of traditional tort-based goals centered on restoring and incentivizing to concerning itself more with diluting the potential chilling effect that broad defamation laws can have on press self-censorship. It now (somewhat ambitiously) seeks to restore both the defamed and the defamer to their pre-infringement positions and to deter media outlets from publishing defamatory material. And it seeks to

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do this in a manner that more meaningfully materializes the protection of the First Amendment and compels robust reporting and public criticism. Although the substance of the law points in this direction, some procedural elements (namely the American approach to costs allocation) seem to induce behavior with an entirely different trajectory.

This article will consider the relationship between the two major goals of U.S libel law—restoring and incentivizing (both incentivizing the media to report robustly and incentivizing the media to desist from defamatory reporting)- and the current system of fee-shifting used in American litigation. Specifically, it will examine whether the English fee-shifting model of “loser pays” is better suited to achieving the purposes of U.S. libel law than the American model of “bear your own costs.” Part I will set out five goals of U.S. libel law and locate them within the overarching categories of restoring and incentivizing. Part II will outline the salient aspects of both the American and English fee-shifting models. It will examine the role of contingency fees in both jurisdictions, and indicate the exceptions developed by U.S. courts to the American rule that permit the recovery of fees from a losing party. Part III will assess whether, and to what extent, each fee-shifting model inhibits, does not affect, or promotes the goals set out in Part I. It will underscore the important role that procedural law can have on the achievement of goals articulated in the substantive law. It will set out the traditional arguments proffered by proponents of each model and seek to use empirical material to determine the weight such arguments should be given. Ultimately, a good argument can be made that the English model is better-suited to achieving the goals of the U.S. libel system.

I. What are the Goals of the U.S. Libel Law System?

Tort law is designed to serve the dual function of compensating plaintiffs for their individual injuries and limiting the incidence of high-risk behavior. It seeks to restore both parties as nearly as possible to their respective positions prior to the defendant’s violation while at the same time incentivizing potential tortfeasors to desist from engaging in tortious conduct in the future. For libel law specifically, courts and legislatures have developed laws and implemented procedures aimed at concurrently returning the plaintiff’s reputation to its pre-defamation

level and incentivizing the press to desist from publishing defamatory material. However, as suggested in this paper’s introduction, efforts have been made to ensure that such laws and procedures do not operate to chill the media into self-censorship and the constitutional guarantee of a free press continues to encourage forthright reporting and public comment by the media. 4 With these broad purposes in mind, this article will categorize five key goals under the headings of restorative-based goals (Goals (1), (2), (3)) and incentive based goals (Goals (4), (5)).

A. Restorative-Based Goals

The restorative goals of the U.S. libel system are hinged on the proposition that courts cannot create wealth; they can only redistribute it5 with a view to making a successful plaintiff “whole.”6 One party has improved its position at the expense of the other party and it is the task of the courts to recalibrate the respective positions of each party and return them to their pre-infringement levels. In defamation, this means penalizing a media outlet that has profited from a particular publication that contravenes the law and remunerating plaintiffs in an amount commensurate to the damage inflicted on their reputation by that publication. 7 It is not a goal of libel law to repair damage caused to a plaintiff’s reputation by a non-tortious publication, irrespective of how offensive, degrading, or even false that publication may be.

The ability of libel law to return both the defamed and the defamer to their pre-infringement positions will largely depend on the achievement of three more particular goals:

1. GOAL (1): POTENTIAL PLAINTIFFS SHOULD BE DISCOURAGED FROM FILING NON-MERITORIOUS LAWSUITS.

Libel law is concerned with restoring both parties to their pre-infringement positions. 8 Where it is highly probable that there has been

6. Randall R. Bovberg & Frank Sloan, Valuing Life and Limb in Tort: Scheduling “Pain and Suffering, 83 Nw. U. L. Rev. 908, 909-10 (1989) (“There is a universal agreement that the compensatory goal of tort law requires making the successful plaintiff ‘whole’[.]”).
no infringement, it is highly probable that libel law will not seek to adjust the positions of either the press or the plaintiff. Yet, the initiation of a non-meritorious lawsuit will always operate to adjust the parties’ positions because the litigation costs that are imposed on each party will not be recovered. Libel law is concerned only with the redistribution of wealth from the defamer to the defamed. Where the publication will not satisfy the standards prescribed by libel law to justify redistribution, the litigation process operates contrary to the goals of libel law by simply reducing the wealth of both parties, rather than redistributing it.

2. GOAL (2): POTENTIAL PLAINTIFFS WITH SMALL CLAIMS SHOULD BE ENCOURAGED TO FILE LAWSUITS.

The overarching goal of restoration underpinning libel law must extend to plaintiffs, irrespective of the size of their claim. Libel law must have the effect of encouraging the defamed plaintiff “with a just but monetarily small claim to seek redress.”

3. GOAL (3): PLAINTIFFS SHOULD BE ENCOURAGED TO SETTLE LITIGATION PRIOR TO TRIAL.

Since the law of libel is primarily directed at returning both the media and the defamed to their positions prior to trial, protracted litigation should be avoided because it “imposes financial and emotional burdens that move both parties further from their pre-incident positions as the trial progresses.” If appropriate wealth redistribution is the “transaction” that libel law purports to effect, then protracted litigation can be properly understood as a “transaction cost” which reduces the total wealth that can be redistributed. Settling before trial is a means to reduce this transaction cost.

B. Incentive-Based Goals

Some authors have suggested that compensating victims for their losses is no longer as important as incentives for potential tortfeasors to behave optimally. For most torts, optimal conduct is usually framed in negative terms—compelling tortfeasors to desist from committing tortious behavior. For example, the tort of negligence seeks to compel would-be negligent drivers to take additional care when driving so as

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11. Fischbach et al, supra note 7, at 320.
12. Id.
13. Bungard, supra note 9, at 9-10.
to meet the standard that the law deems appropriate. In these cases, the law is not necessarily concerned with incentivizing all non-tortious behavior (as opposed to deterring tortious behavior). If a driver decides to drive well below the speed limit or with excessive care, the only societal loss is a reduction in efficiency. The goals of libel law are different. The effect of the First Amendment is that there is much more to be lost than efficiency, should the media decide to exercise an inappropriately high level of care. In addition to expanding the field of reporting that the law considers acceptable and non-tortious, courts have become increasingly concerned with ensuring that the press operate to the outer boundaries of this field. Put differently, they have become equally concerned with incentivizing all non-tortious conduct (namely all robust reporting and public comment that falls below the level of defamation) as they have with deterring tortious conduct.

Accordingly, two separate, although related, goals of libel law can be stated as follows:

1. GOAL 4: ENCOURAGE ALL REPORTING AND PUBLIC COMMENT BY MEDIA OUTLETS THAT IS LESS THAN ACTIONABLE DEFAMATION
2. GOAL 5: DISCOURAGE ALL REPORTING THAT AMOUNTS TO ACTIONABLE DEFAMATION

II. What are the Features of the U.S. and English Fee-Shifting Systems?

There are two general approaches to fee-shifting: the American rule and the English rule. The former requires litigants to bear their own costs irrespective of the outcome of the litigation. The latter requires the losing party to pay a portion or all of the victorious party’s costs. Outside of the U.S., some variant of the English rule is the “norm.”

A. The American Rule

The U.S. Supreme Court first articulated the American rule in 1796 in *Arcambel v Wiseman*. In rejecting the lower court’s decision to award $1,600 for attorneys’ fees, the court stated:

We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it and even if that practice were not strictly correct

15. See infra Part III, Goal (4) and Goal (5) (discussing the ways in which the Supreme Court has expanded the types of publications that the law will no longer deem “defamatory”).
16. See Bungard, supra note 9, at 33-34.
in principle, it is entitled to the respect of the court, till it is changed or modified by statute.\textsuperscript{18}

Over the past two centuries U.S. courts have adhered to the American rule by refusing to award damages to a victorious party unless otherwise provided for by statute.\textsuperscript{19} There are over 200 federal statutes\textsuperscript{20} and 2000 state statutes\textsuperscript{21} that provide for the shifting of attorneys’ fees in the United States. These statutes however, usually do so in narrow circumstances and on a one-way fee-shift basis.\textsuperscript{22} One-way fee-shifting statutes permit victorious plaintiffs to recover from defendants; victorious defendants, on the other hand, must still bear their own costs.\textsuperscript{23} The only state to provide a two-way fee shifting mechanism is Alaska as set forth in that state’s Rule of Civil Procedure 82:

“Except as otherwise provided by law or agreed to by the parties, the prevailing party...shall be awarded attorneys’ fees calculated under this rule.”\textsuperscript{24}

Despite the apparent breadth of its wording, in practice this provision only permits a partial recovery by the winning party,\textsuperscript{25} with a showing of bad faith required to support an award of full damages.\textsuperscript{26} In 1980, Florida enacted a two-way fee-shifting statute that applied only to medical malpractice suits. It was repealed in 1985.\textsuperscript{27}

\begin{thebibliography}{9}
\bibitem{18} \textit{Id}.
\bibitem{21} \textit{Id}. For a lengthier discussion of state fee shifting statutes, see Note, \textit{State Attorney Fee Shifting Statutes: Are we Quietly Repealing the American Rule?}, Law & Contemp. Probs. (Winter 1984) [hereinafter \textit{State Attorney Fee Shifting Statutes}].
\bibitem{22} Herbert M. Kritzer, \textit{Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say}, 80 Tex. L. Rev. 1943, 1946 (2002). See \textit{id}. at 1946 (“Most of the statutes that abrogate the American Rule in the United States introduce a ‘one-way’ fee-shifting regime...”).
\bibitem{24} For a judicial discussion of this rule, see Anchorage Daily News v Anchorage School Dist., 803 P.2d 402, 404 (Ak. 1990); City of Anchorage v McCabe, 568 P.2d 986, 993-94 (Ak. 1977); Gilbert v State, 526 P.2d 1131, 1136 (Ak. 1974).
\bibitem{25} For example, a victorious party that recovers a money judgment can receive up to 20% of that judgment (for the payment of costs) for the first $25000 and 10% for any amount over that. This amount decreases if there has not been a trial (18% then reduced to as low as 2% for money judgments over $500,000) or if the amount has not been contest (10% then reduced to as low as 1% for money judgments over $500,000).
\bibitem{27} FLA. STAT. ANN. § 768.56 .(YEAR).
\end{thebibliography}
A further dimension to the costs allocation system in the United States is the prevalence of attorneys working on the basis of a contingent fee.28 Contingent fee agreements provide for fees as a fraction, usually one third, of the amounts recovered in an action.29 Some studies suggest that up to seventy-one percent of plaintiffs are represented on a contingency basis.30 For libel matters, this percentage has been reported as being as high as eighty-six percent.31

In libel litigation, the most relevant exception to the American rule relates to the recovery of attorneys’ fees for frivolous or bad faith claims. Although there exists a range of federal32 and state statutes33 that permit such fee-shifting, only “the rare libel complaint” or “the extreme case” is likely to satisfy the high threshold required for recovery.34

B. The English Rule

The English rule requires the losing party in civil litigation to pay the winning party’s attorneys’ fees.35 In its purest form, this rule of-

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28. For a discussion on the various other methods of payment in the United States see Kritzer, supra note 22, at 1944. Kritzer lists six different approaches to payment: fixed fees; time-based fees; task-based fees; statutory fees; commission based fees; and value-based fees.


33. For a comprehensive discussion of state statutes, see Media Law Resource Center, MLRC 50-State Survey: Employment, Libel and Privacy Law. See, e.g., statutes in Arizona (A.R.S. § 12-341.01(C) (“clear and convincing evidence that the other’s claim or defense constitutes harassment, is groundless and not made in good faith”)); California (Code Civ. Proc. § 1021.7 (“a court may award reasonable attorneys’ fees to the defendant in a libel or slander action, upon a finding that the action was not filed or maintained in good faith and with reasonable cause”)); Colorado (C.R.S. § 13-17-102 (“a defendant may recover reasonable attorney fees in the event an action is determined to be groundless or frivolous”)); and Illinois (Illinois Supreme Court Rule 137 permitting the taxing of attorney’s fees and reasonable expenses against parties which plead untrue statements without reasonable cause). See also decisions in New York: Nemeroff v. Abelson, 704 F.2d 652, 9 Media L. Rep. 1427 (2d Cir. 1983) in which the court held that a prevailing defendant is entitled to an award of attorneys’ fees if an action is brought or maintained without an adequate factual basis or in bad faith. See also Mitchell v. Herald Co., 137 A.D. 2d 213, 529 N.Y. S.2d 602, 15 Media L. Rep. 1613 (4th Dep’t 1988), in which the court held that the defendant was entitled to reasonable fees and costs pursuant to CPLR § 8303-1 because the plaintiff and counsel knew that neither falsity nor gross irresponsibility could be shown and refused to discontinue suit.


fers the winning party indemnification of its fees. In its diluted, more widely used and arguably more practical form, fee-shifting occurs when a winning party’s claim for fees is “taxed” or assessed and a reasonable proportion allocated from the losing party. To label the law “English” may understate its international prevalence. For example, article 696 of the French Code requires that “costs are assessed against the losing party unless the judge assesses the whole or part of the burden against the other party, in a decision with reasons given.” Similarly, section 91 of the German Code provides that the “losing party must bear the costs of the litigation, and must in particular reimburse the costs incurred by the opponent insofar as they were necessary . . .”. The English version of the rule provides slightly more discretion for judges than the French and German statutes, granting to the court “full power to determine by and who and to what extent the costs are to be paid.” Although these statutes provide a means by which a party can conceivably recover their total legal costs, the reality is that a winning party will rarely recover more than three quarters of their total legal costs. Recovery can also decrease depending on the court in which the matter was heard, and the size of the litigation. Contingent fees, although once impermissible, are now allowed in most countries using the English rule.

III. Why the English Rule Best Achieves the Goals of U.S. Libel Law

The thesis of this article is that the fee-shifting approach of the American rule (each party bears its own costs) incentivizes behavior

36. For a discussion on the various forms of the English Fee Shifting model, see Bungard, supra note 9, at 34.
37. Code Civil [C. civ.] art. 696 (Fr), as cited in Bungard, supra note 9, at 34.
38. BGB [Civil Code] § 91, as cited in Bungard, supra note 9, at 34.
39. See Senior Courts Act, 1981, c. 54 § 51 (Eng.), as cited in Bungard, supra note 9, at 34.
40. See Vargo, supra note 20, at 1613 (recalling telephone interviews the author conducted with partners from Australian law firms Cashman & Partners (now Morris Cashman) and Attwood Marshall Solicitors). The author stated that these interviews revealed a consensus that the amounts collectible under the Australia party/party system are between one-half and two-thirds of the amounts charged to a client under solicitor/client costs. The author of this article’s professional experience litigating in Australia is that the amount collectible is usually closer to one-half.
41. See id., discussing in Australia, a recovering party should expect less from a Federal Court than a state court. This is because the taxing system used by the federal court is older and accordingly the permissible hourly charge-out rate of partners and attorneys are lower. The court is also likely to allow less “permissible” charges as the litigation gets larger. The rationale is that the larger the matter, the more duplicative work is conducted and the greater the “leakage” of costs.
42. See Bungard, supra note 9, at 35. In England, contingent fees were introduced in 1990 by section 58 of the Courts and Legal Services Act 1990.
that is contrary to the key goals of libel law. Although the English rule (loser pays) is far from perfect, it is better suited to achieving these key goals. Part III will assess the impact of both fee-shifting models on each of the five goals of libel law set out in Part I, supra. Some authors argue that “neutral” procedural law should not be changed to achieve the goals of the substantive law. This paper will argue that the American rule, in its current state, is not procedurally neutral (because it compels behavior that is contrary to the substantive libel law) and, can appropriately be amended. The original aim of this research was to conduct a comparative empirical analysis of the effect of the American and English rules on libel litigation in the United States and England respectively. Due to the difficulty of collecting data relating to the effects of fee-shifting on tort claims generally and libel claims specifically, this paper will use the sparse empirical material to elucidate some of its key arguments without relying on such material to draw conclusions.

43. See Rodney A. Smolla, The Annenberg libel Reform Proposal, in REFORMING LIBEL LAW 269 (John Soloski & Randall P. Bezanson eds. 1992). Professor Smolla suggests that the U.S. Supreme Court was unwilling to import additional procedural safeguards to bolster the constitutional protection provided by the substantive law of defamation in Calder v. Jones, 465 U.S. 783 (1984) and Keeton v. Hustler Magazine Inc, 465 U.S. 770 (1984). He further suggests that this approach is consistent with the notion of “procedural neutrality” and that tailoring procedural law to defamation litigation could create an “overprotective form of ‘double counting.’ ” Professor Smolla also points out that the Supreme Court imposed “special procedural rules more protective than free speech interests…to reinforce substantive constitutional principles” in Bose v. Consumer Union of United States, Inc., 466 U.S. 485 (1984).

44. The framework for a comparative analysis would involve a comparison of the quantum of cases initiated under each system, how many of those cases are settled and what percentage do plaintiffs win.

45. See Avery Wiener Katz, Indemnity of Legal Fees, 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 64-65 (Boudewijn Couckaert & Gerrit de Gees eds. (2000)). Avery Katz explains that despite the prima facie appeal of such a comparative study, a meaningful empirical analysis is nearly impossible because “legal costs influence all aspects of the litigation process (and as such) the effects of fee shifting are complex and difficult to ascertain….The current state of economic knowledge does not enable us to reliably predict whether a move to fuller indemnification would raise or lower the total costs of litigation, let alone whether it would better align those costs with any social benefits they might generate…. See also Herbert Kritzer, supra note 22, at 1984-99. Professor Kritzer argues that there has been “relatively little empirical research on the actual effect of fee shifting on lawyers, litigants and litigation” and labels cross-national examination of fee shifting “problematic because of other legal differences between the countries.”

46. The author gained information relating to the difficulties of collecting empirical data relating to libel claims from a telephone conversation with Staff Attorney David Heller of the Media Law Research Center. Professor Heller suggested that the simple problem of not having a specific box that claimants would tick on their initiating document could be enough to derail a comprehensive empirical analysis of libel litigation.

The English rule would operate to deter potential plaintiffs from filing non-meritorious libel suits by threatening them with the potential burden of paying the defendant’s costs. Former Vice President Dan Quayle, speaking on behalf of the elder Bush Administration’s Council on Competitiveness, argues “because the losing party would be obligated to pay the winner’s fees, this approach will encourage litigants to evaluate carefully the merits of their cases before initiating a frivolous claim.” 47  Approaching this issue from an economic perspective, Professor Bungard concludes that “a simple economic analysis of the two general approaches to fee-shifting demonstrates that...American rule plaintiffs are more likely to file suits that are frivolous or have a low probability of victory than English rule plaintiffs.” 48

Professor Vargo questions such a conclusion and the “mystical curative powers to deter non-meritorious claims” that have been attributed to the English rule. 49 His challenge is based on the erroneous assumption that the abusing party, when deciding to file suit, would be cognizant to the potential liability that fee-shifting rules create. A study conducted by the Alaska Judicial Council on Alaska’s Rule 82 supports this challenge, with only thirty-five percent of attorneys recalling a single instance in which the state-based fee-shifting rule played a significant role in a prospective client’s decision not to file suit or assert a claim. 50 Other data collected in this study seems to compel the drawing of contrary conclusions. For example, Alaska has fewer tort filings than the rest of the country but more cases go to trial. 51 Such data could indicate that Rule 82 has had an effect by reducing the number of non-meritorious cases being filed (which accounts for the overall drop in tort filings) and relatedly increasing the quality of cases that were filed (which accounts for the increase in cases going to trial rather than being settled or dismissed). The Council was unwilling to embrace such a firm conclusion. 52

48. Bungard, supra note 9, at 37.
49. Vargo, supra note 20, at 1632.
50. See Kritzer, supra note 22, at 1952.
51. See id. at 1951.
52. Id.
Although the available empirical material permits the drawing of only equivocal conclusions, it is widely accepted that the threat of paying an opponent’s fees under the English rule deters low-probability or non-meritorious plaintiffs from filing suit more effectively than the American rule. The proposition that the English rule should thus be adopted (because it reduces the number of non-meritorious cases being filed) gains even more weight in the context of U.S. libel litigation given the large number of low-probability defamation claims that are filed. There are two key reasons for the proliferation of non-meritorious libel suits:

1. **Libel Plaintiffs Are Incentivized to Sue Even When They Know That Their Suit Will Fail**

The Iowa Libel Research Project concludes that a majority of the plaintiffs interviewed filed suit because they were interested in curing alleged falsity and not in receiving money. Commenting on this finding, Professors Bezanson, Cranberg and Soloski cite this as a reason that so many non-meritorious plaintiffs file libel suits. Individuals with claims that are without merit because they will clearly be defeated by a constitutional privilege (and accordingly will not result in financial reparations) are still incentivized to file suit because the court system provides a forum in which the falsity of the accusation can be judicially proclaimed and their reputation vindicated. In this way, the act of suing, rather than winning, provides a “direct and effective form of self-help.” A further incentive for plaintiffs, entirely unrelated to the merits of their case, is the desire to “get even” or “punish the media.” The Iowa Project identified such a motive in thirty percent of those plaintiffs interviewed.

53. See Randall P. Bezanson, Gilbert Cranberg & John Soloski, The Economics of Libel, in THE COST OF LIBEL: ECONOMIC POLICY IMPLICATIONS (Everette E. Dennis & Eli M. Noam eds. 1989). Viewing libel litigation as a means to achieve goals unrelated to the merits of a case undermines the force of the constitutional hurdles erected by the Court within the substantive law. This issue is taken up in more detail at Goal (4).

54. See Randall P. Bezanson, Gilbert Cranberg & John Soloski, supra note 53, at 33-37 (“The high standards of proof do not necessarily discourage litigants who are more interested in clearing the air than in being awarded money damages. Most plaintiffs have found to be more interested in restoring their reputation or punishing the media than in winning money damages. The plaintiffs sue to set the record straight and this is accomplished independent of the judicial result”).

55. See Bezanson et al., supra note 31, at 151.

56. See, e.g., Smolla, supra note 8, at 76 (“What is clear... is that if the plaintiff’s primary motive is vindication through punishment of the media defendant, it is not necessary to win in order to win. If the suit can be prolonged sufficiently the mere ticking away of the defense lawyer’s clock will be enough to extract the pound of flesh”).

57. See Randall P. Bezanson, Gilbert Cranberg & John Soloski, supra note 53, at 34.
2. THE HIGH RATE OF CONTINGENCY FEE ARRANGEMENTS IN LIBEL LITIGATION UNDERMINES THE TRADITIONAL DETERRING EFFECT THAT THE AMERICAN RULE HAS ON LITIGANTS

Plaintiffs have traditionally been deterred from filing non-meritorious suits under the American rule because irrespective of the outcome they will have to pay for their own legal fees. For libel, this deterring effect is largely obviated because of the prevalence of contingency fee arrangements between attorney and plaintiff. Contingency fee arrangements are most common with public figure plaintiffs. Many attorneys are happy to bear the additional risk because “representing a well-known public figure has appeal beyond the fee.” Ironically, public plaintiffs have the least chance of success and should accordingly be the most deterred from filing non-meritorious suits. Even so, the likelihood that a public figure plaintiff will enter into a contingency arrangement reduces their risk to almost zero and as such incentivizes the filing of a suit irrespective of its merits.

The adoption of the English rule may be an artful way to reduce the disproportionately high number of non-meritorious libel suits being filed. It would make plaintiffs who sue to achieve goals other than winning the suit—such as using the courts to repair their reputation or punishing the media—reassess the cost they are willing to pay to achieve such goals. It would also inject risk into the decision-making process of those litigants who have engaged attorneys on a contingency basis and are presently able to sue with zero or low potential liability under the American rule.

B. Goal (2): Potential Plaintiffs with Small Claims Should Be Encouraged to File Lawsuits.

Both the American and the English rules partially achieve this goal. For proponents of the American rule, bearing one’s own costs means

58. Id.
59. Id.
60. It may be argued that the decreasing potential damage awards for a winning plaintiff could lead to similar reductions in non-meritorious libel litigants as increasing costs for a losing plaintiff. The key problem with this argument is that, as noted above, non-pecuniary motivations are prevalent in many libel litigants’ decisions to sue. As a result, raising or lowering potential damages awards is unlikely to change the way a libel litigant acts in the same way that raising or lowering potential damages awards is likely to change the way, for example, a plaintiff with a potential negligence claim acts. This should be viewed differently to the liability a potential litigant will incur if he or she loses; a factor that this paper considers has a significantly larger impact on a litigant’s decision-making process. Put differently, decreasing the likely award a libel plaintiff can recover if they win will probably have less effect on that plaintiff’s decision to sue than increasing the liability a plaintiff will incur if they lose.
litigants with small claims will not be discouraged from suing because of concerns over paying their opponent’s legal fees should they lose.\textsuperscript{61} Professor Anderson argues that fee-shifting “could impose a severe—possibly disastrous—penalty on the [small claim] plaintiff who miscalculates the merit of his claim.”\textsuperscript{62} For proponents of the English model, small claimants are discouraged by the knowledge that their own large legal fees are likely to dwarf any potential damage awards.\textsuperscript{63} This argument gains weight when one considers the relationship between attorneys’ fees in libel cases and the average damage award, with some studies suggesting that the former can often be four times the quantum of the latter.\textsuperscript{64} Proponents of the American rule have responded to this claim by underscoring the prevalence of contingency fee arrangements in libel matters.\textsuperscript{65} Such arrangements, at the end of the day, greatly reduce the fees a plaintiff is likely to incur and make the pursuit of small claims more financially viable.

Professor Shavell provides a useful categorization of the type of small claimant that is assisted by each of the English and American rules:

When a plaintiff is relatively optimistic about prevailing, his expected legal costs will be relatively low under the English system (because the other side will pay) whereas under the American system he must bear his own costs with certainty. Thus, he will be likely to find suit a more attractive prospect under the English system. But when the plaintiff is not optimistic, converse reason explains why he would be expected to sue more often under the American system.\textsuperscript{66}

Proponents of the English rule will suggest that it is more appropriate to incentivize optimistic plaintiffs to sue because their claims are more likely to have merit. Proponents of the American rule will argue that U.S. libel law is so heavily tilted in favor of the defendant that no plaintiff would ever be optimistic and accordingly risk responsibility for defendant’s fees under the English rule.\textsuperscript{67} For every argument in

\textsuperscript{61} See, e.g., Fischbach et al., \textit{supra} note 7, at 325 (“Where the normative value of particular legal rights outweighs a plaintiff’s financial interest in their preservation… such rights might atrophy from lack of enforcement”).

\textsuperscript{62} See David A. Anderson, “Libel and Press Self-Censorship” 53 Tex. L. Rev. 422, 437 n.76 (1975) (“If the law is to retain a remedy for defamation, it should not put a plaintiff to such great peril for seeking to avail himself of that remedy”).

\textsuperscript{63} Smolla, \textit{supra} note 8, at 239.

\textsuperscript{64} Id.

\textsuperscript{65} See, e.g., G. Marc Whitehead & Robert B MacDonald, \textit{The Truth About the English Rule}, Litig. 3 (Winter 1995).

\textsuperscript{66} As quoted in David A. Hollander, \textit{The Economics of Libel Litigation, in The Cost of Libel} 282 (Everette E. Dennis & Eli M. Noam eds. 1989) [hereinafter Hollander].

\textsuperscript{67} This argument may also have relevance to UK libel law after the decision of the House of Lords in \textit{Jameel v Wall Street Journal Europe} [2006] UKHL 44. In that case, the House of Lords restated the “responsible journalist” defense enunciated by Lord
favor of either the American rule or the English rule as the best means to encourage small-claim plaintiffs to sue there seems to exist a counter-argument. As such, neither rule is better-suited to achieve Goal (2); they are either equally as likely or unlikely to do so.

C. Goal (3): Plaintiffs Should Be Encouraged to Settle Litigation Prior to Trial.

The English rule would provide greater incentive than the American rule for plaintiffs to settle prior to trial. It would enable courts to more completely restore both parties to their pre-infringement positions. Settlement is of particular pertinence in libel matters because of the high cost of litigation.\(^{68}\) There exist two major barriers to settlement in libel litigation and the English rule is best equipped to deal with both.

The first barrier to settlement in libel litigation is that negotiated solution is unlikely to appeal to the defamed plaintiff who uses litigation to achieve non-monetary goals. Settlement normally occurs in libel litigation where the defamed’s minimum demand is less than the defamer’s maximum settlement.\(^{69}\) Where the defamed’s minimum demand is an acknowledgment of falsity or the imposition of costs on (i.e., to get even with) the defendant, it is hard for a defendant to set a maximum amount that responds to these demands. Put simply, settlement is not apt to deal with the former non-monetary demand (acknowledgement of falsity) and represents the antithesis of the latter demand (the imposition of costs on the media).\(^{70}\) As a result, the most effective way for a fee-shifting model to maximize settlement numbers is to limit the number of plaintiffs that initiate litigation seeking non-monetary goals. These are

Nicholls in Reynolds v Times Newspaper [2004] EWHC 37 (QB), which developed the common law defense of qualified privilege in libel cases to establish a public interest defense for newspaper articles that were the product of responsible journalism. Based on the articulation in Reynolds, it was a difficult a defense for a defendant to make out because of the ten relevant factors that needed to be proven. The effect of the decision of the House of Lords in Jameel was to “significantly strengthen press freedom to report on matters of public interest.” See Guy Vassall-Adams, A Resounding Victory for Newspapers, TIMES ONLINE, Oct. 11, 2006 (available at http://www.timesonline.co.uk/tol/comment/article668356.ece). (Vassall-Adams was second junior counsel for the Wall Street Journal Europe before the House of Lords on this case.).

\(^{68}\) See, e.g., James Goodale, who described the rise in libel costs as an “uncontrollable firestorm” in Survey of Recent Media Verdicts, Their Disposition on Appeal, and Media Defense Costs, in PRACTICING L. INST., MEDIA INSURANCE AND RISK MANAGEMENT (1985).


\(^{70}\) Settlement represents the antithesis of imposing costs on the media because settlement, by its very nature, is always designed to minimize the imposition of costs on each settling party.
the plaintiffs who will not be responsive to the traditional financial appeal of settlement. Although such plaintiffs exist under both fee-shifting systems, for reasons discussed at Goal (1) supra, the English rule better deters plaintiffs with non-monetary goals than the American rule.

The second barrier to settlement in libel litigation is the willingness of the defamed to settle in a situation where the defamed is seeking to achieve pecuniary-based goals (unlike those non-monetary goals outlined in the paragraph above). Although the system of settlement attached to the common law system is apt to address these goals, a libel plaintiff can most clearly evince their unwillingness to settle at the outset by setting a minimum demand that far exceeds the maximum settlement offer of the defamer. Moreover, as the litigation continues, such plaintiffs can continue to reduce the likelihood of settlement by refusing to adjust a high demand or, indeed, by increasing it.

Under the American rule, plaintiffs will set their minimum demand level relatively high because they are likely to be litigating with minimal or zero risk due to a contingency arrangement and/or the knowledge that the defendant will have to bear its own costs. Moreover, this minimum demand is unlikely to become negotiable over the course of the trial because their liability to either their own attorneys or their opponent does not increase. The demand starts high and gets higher.

Conversely, English rule plaintiffs will set their minimum demand level relatively low in a libel settlement and be willing to adjust this figure as the litigation progresses. There are two separate, although related, reasons for this. First, at the outset, English rule plaintiffs know that their potential exposure to their opponents will only increase as the trial progresses. Accordingly, and with a view to killing the litigation early, their initial offer is usually much more reasonable. Second, the willingness of an English rule plaintiff to settle increases as the trial progresses. As suggested above, this is because their risk increases in line with the defendant’s costs increasing. Some authors, such as Professors Mitchell Polinsky and Daniel Rubinfeld, reject this conclusion arguing that having the U.S. switch to the English rule would lead to lower settlement rates. Such arguments seem inconsistent with the statistic that approximately ninety-seven percent of all tort claims in England are terminated before trial.

71. See Bungard, supra note 9, at 47.
73. Bungard, supra note 9, at 47 n.197.
D. Goal (4): Encourage All Reporting and Public Comment by Media Outlets That Is Less Than Defamation

Over the last half century, the U.S. Supreme Court has sought to achieve Goal (4) by adjusting the substantive elements of defamation as a cause of action and providing increased protection to the media. The American rule, by requiring the press to incur legal costs irrespective of the outcome of litigation, has operated to undermine the incentivizing effect that these substantive changes were designed to create. Conversely, the English rule would bolster and support these substantive protections.

1. ATTEMPTS TO ACHIEVE THIS GOAL USING THE SUBSTANTIVE LAW

In 1964, in the landmark decision of New York Times v Sullivan, the court required that a public official plaintiff show actual malice on the part of the publisher to make out a claim in defamation; \(^{74}\) in 1967, this requirement was extended to “public figures”; \(^{75}\) and in 1974 the court required all states to set a standard of fault greater than strict liability in respect of publications concerning private figures. \(^{76}\) The rationale of the court in each case has been well-documented: the threat of large damage awards that flow from a successful defamation action will lead the press down a path of self-censorship that is contrary to the core protection that the First Amendment is designed to provide. In Sullivan, Justice Brennan articulated this approach, explaining “the pall of fear and timidity imposed (by large damage awards) upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.” \(^{77}\) Increased legal protection incentivizes the media to report robustly on matters of public interest.

It is unclear how much these substantive protections have encouraged all reporting and public comment by media outlets that donot rise to a claim for defamation. Professors Stephen Renas, Charles Hartmann and James Walker conducted a useful study into the incentivizing effects that different levels of fault (strict liability, negligence and actual

\(^{74}\) 376 U.S. 254, 279-80 (1964). Justice Brennan delivering the opinion of the Court stating: “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 is was false or with reckless disregard of whether it was false or not.”


\(^{77}\) 376 U.S. 254, 278 (1964) (alteration in original).
malice) have on the willingness of editors to publish certain types of material.\textsuperscript{78} Twelve percent of all daily newspaper editors were presented with four different scenarios, non-defamatory under standards of the day, but each varying in degrees of “controversy” and “risk.” They were asked to rate their willingness to publish (from zero to ten) each of these stories under each of the three levels of fault. Unsurprisingly a “chilling” effect could be seen as the standard of proof moved from actual malice down to strict liability:

The percentage of editors absolutely willing to publish declines as the standard of proof is reduced, while the percentage absolutely unwilling to publish increases as the standard of proof (is reduced).\textsuperscript{79}

One cannot expect the actual malice standard to make every editor willing to publish all four articles. However, it is telling that, on average, only forty-five percent of the editors were absolutely willing to publish any of the four articles, even though none of them were likely to be considered “defamatory” under U.S. libel law.

\textbf{a. The American Rule Undermines the Protection Provided By the Substantive Law; The English Rule Would Bolster and Support These Protections}

The authors’ explanation for the unwillingness of editors to publish despite legal protection underscores the chilling effect that the threat of suit, rather than the threat of a damage payout, can have on the press. They argue that the chilling effect is not uniform and is “most pronounced among papers…that have been sued but have not paid damages.”\textsuperscript{80} Professor Anderson argues that the chilling effect does not come solely from the judgment “since the media enjoy success rates that most other classes of tort defendant would envy.”\textsuperscript{81} Rather, it comes primarily from


\textsuperscript{79} \textit{Id.} at 48. The authors argue that the magnitude of chilling is not insubstantial: “A change in the standard from malice to negligence reduces the percentage of editors who are absolutely willing to publish by between 9.7 percent and 16.5 percent. A change from malice to strict liability reduces the percentage by between 13.6 percent and 28.7 percent.”

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} Anderson, \textit{supra} note 1, at 36. \textit{See also} Smolla, \textit{supra} note 8, at 238: “To force the media to incur huge legal costs to defend what ultimately turns out to be true creates an obvious chill on free expression.” In \textit{Gertz v Robert Welch, Inc.}, Justice White, in his dissent, questions such conclusions, arguing: “The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are
the cost of litigating. This distinction—between the chilling effect of judgment and the chilling effect of suit—is the primary reason that the constitutional privileges established by the U.S. Supreme Court have not incentivized the press to publish with absolute confidence and without self-censorship. Although these privileges give the press comfort that they will not face large damage awards, they do not give the press comfort that they will not be sued and face high litigation costs. The primary reason for this is the American rule, which operates to undermine any potential deterring effect the constitutional privileges may have on a plaintiff’s decision to sue or to continue litigating. The need for a showing of malice or negligence would logically deter a non-meritorious plaintiff from suing or compel a litigant in a long running suit to settle. For reasons discussed at Goal (1) of part III supra, the removal of the risk of paying your opponents costs makes these “logical” incentives and disincentives less compelling. An English rule would reinvigorate these constitutional privileges and make them as relevant to the decision of the plaintiff to sue or settle as they are to the decision of the judge or jury to award damages.

A further problem for editors is the inability of media defendants to rely on their constitutional privilege to dismiss a suit early on in proceedings. Constitutional privilege, and the actual malice standard, is not a test that lends itself to summary judgment. It will rarely be apparent from the pleadings alone and as such does not provide a predictable ground for a motion to dismiss. Put differently, the press must incur substantial costs and progress well down the path of litigation before it can rely on the protections afforded to it by the Supreme Court. The English rule will not solve this problem; it will simply reduce the number of cases being filed that are ultimately dismissed on privilege grounds.

E. Goal (5): Discourage All Reporting That Amounts to Actionable Defamation

In addition to incentivizing the press to publish non-tortious material, the English rule better discourages the press from reporting in a manner that amounts to actionable defamation. The reasoning supporting this argument can be stated simply: the English rule punishes defamatory publication more than the American rule. The American rule

causing the press to refrain from publishing the truth. I know of no hard facts to support this proposition, and the Court furnishes none.” 418 U.S. 323, 390 (1974).

82. Anderson, supra note 1, at 15.
requires a losing defendant to pay damages and its own legal costs; the English rule requires a losing defendant to pay damages, its own costs and the plaintiff’s legal costs. Proponents of the American rule have argued that the English fee-shifting model will encourage the press to report more recklessly knowing that they will be recompensed for any expenses incurred defending publications that do not meet the very high standard required to prove of defamation. This is not an attack against the English rule; rather, it is a criticism of the proof required to prevail in defamation. So long as the law delineates acceptable conduct from unacceptable conduct, the fee-shifting model that services this law must dissuade only the conduct that is deemed unacceptable. The English rule imposes greater liability on the media for defamatory publication than the American rule and better achieves Goal (5).

IV. Conclusion

This article has argued in favor of adopting the English rule of fee-shifting for all U.S. libel litigation. It does not undertake to make a normative analysis of whether the standards set by the U.S. Supreme Court are tilted too heavily in favor of either protection of reputation or freedom of the press. Nor has it considered practical difficulties arising from implementing a fee-shifting rule that goes against the legacy of two centuries of state and federal jurisprudence. It has sought only to elucidate five key goals of libel law and determine whether, and to what extent, the American rule and English rule inhibit, do not affect, or promote the achievement of these goals. In four out of the five goals, the English rule was more apt to achieve these goals. It has a greater propensity to restore parties to their pre-infringement position than the American rule, and is more likely to incentivize optimal behavior that strengthens, rather than undermines, the force of the substantive law.