

1991 LDRC/ANPA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES
AND IDENTIFICATION OF COMMON FACTORS
BY TOM B. KELLEY

PART I

CASE SURVEY

Introductory Note

The following is an unscientific survey of recent plaintiff's libel verdicts. I contacted defense counsel in all cases reported, but in some cases, counsel was unwilling to discuss the "inside" of the case because post-trial proceedings were pending, or requested that his or her remarks be used as background only. In many cases, I also contacted others who observed the case, including plaintiff's counsel. Sources contacted were given the opportunity to review and comment upon the written results. I also reviewed available publicity concerning the case, including press interviews with jurors.

A. Ball v. E.W. Scripps Co. (Kentucky Post)
Campbell Co. Circuit Court No. 84-CI-1097 (November 1985).

1. Date of Publication: November 1984
2. Case Summary:

Plaintiff was state prosecutor who was accused, inter alia, of losing "about half" of the cases he took to trial. In issue were a series of articles that dealt with plaintiff's performance of the full range of prosecutor's duties, and compared him unfavorably with the prosecutor in the adjacent county. Defendant's reporter later admitted that this was a "math error," but the publisher defended the articles as qualitatively fair.

3. Verdict: \$ 175,000

Compensatory: \$ 175,000
Punitive: None, although an instruction
permitting them was given.

4. Length of Trial: Two weeks (10 trial days)
5. Size of Jury: Twelve

6. Significant pre-trial rulings:

Motion for summary judgment on malice denied.
Motion for summary judgment seeking rulings on individual statements (32 in all) in issue denied.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

None, although defense counsel implored the court to use a special verdict form. Jury was permitted to return a general verdict on 32 separate statements from four news articles and two editorials.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None.

9. Pretrial Evaluation:

The pretrial evaluation centered upon the significance of a then recent United States Supreme Court decision, Bose Corporation v. Consumers Union, which supposedly mandated a very searching and independent appellate court review of adverse jury verdicts in public official/figure libel cases. Since plaintiff had no evidence of actual malice, properly understood, the jury appeal of this case was considered irrelevant in the long run.

10. Defense juror preference during selection:

College educated, without roots in Campbell County (because of local pride issue presented by the case).

11. Actual jury makeup:

None had college education.

12. Issues Tried:

Defamatory meaning, falsity, actual malice.

13. Plaintiff's Theme(s):

Plaintiff's counsel made an aggressive but unfocused attack on the defendant's reporting, picking at the relatively insignificant factual errors and harping on the alleged unfairness of portraying the local prosecutor as less competent than his counterpart in rival Kenton County.

14. Defendant's Theme(s):

The dominant defense theme was that the newspaper had the right and duty to critique the performance of law enforcement

officials in Campbell County, and, as a less dominant theme, that the articles were fair to Ball. Defendants tried the case on liability, and dealt with damages only indirectly with the theme that criticism of this kind "goes with the territory" for a prosecutor who has repeatedly flaunted his record in election campaigns.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

There is a fierce rivalry between the forum Campbell County and neighboring Kenton County where the newspaper was published. The former has always had an "inferiority complex" vis-a-vis Kenton County, so there were socio-economic undercurrents that predisposed the venire towards an award for plaintiff.

b. Sympathy for plaintiff during trial:

Plaintiff presented himself as an honest, competent prosecutor with a good record. He testified to being distraught for months after the publications and to having lost 40 pounds.

c. Proof of actual injury:

There was no evidence of damage to reputation or of economic losses.

d. Defendants' newsgathering/reporting and trial demeanor:

Defendant's reporting contained not much more than the usual level of minor error. The reporter (from the forum County) was slightly arrogant on the witness stand, and the editor (also from the forum) had since moved to Florida, which probably did not help neutralize the effect of local socioeconomic disgruntlement.

e. Other evidence:

f. Trial dynamics:

The judge refused to submit the case on anything but a general verdict or otherwise guide the jury through the discrete elements of the case.

g. Lessons:

Defense counsel tried this case fully mindful of the difficulty juries encounter in applying the peculiar elements of a public figure libel case. Nonetheless, with the benefit of hindsight as to the court's refusal

to guide the jury, counsel would have looked for more ways to reinforce the separate and exacting elements of the plaintiff's burden of proof in voir dire, opening statement, and wherever else possible. This jury obviously did not "get it."

In addition, counsel would have worked harder to express to the jury the theme that the articles were basically fair to the plaintiff, and not so much the theme that the defense had a right and duty to critique and raise questions concerning Ball's performance.

As an example of demonstrating the newspaper's fairness, in response to Ball's criticism that no one at the newspaper double-checked the reporter's statistics, the defense feels it should have emphasized even more strongly that in pre-publication interviews Ball himself did not dispute the statistics about his performance.

16. Results of jury interviews, if any:

Jurors indicated to counsel that their collective judgment was that there were factual errors in the articles, Ball was a good prosecutor, this was a "big" case, because it involved a prominent politician versus a large corporate defendant, so \$175,000 seemed reasonable.

17. Assessment of Jury:

This was obviously not an angry jury, since it declined to award punitive damages. Defense counsel suspects that one or two of the jurors may have had an anti-media bias, but on the whole does not think that a much better jury could have been selected from this venire.

18. Post-Trial disposition:

Reversed by Kentucky Court of Appeals but judgment for Plaintiff reinstated by Kentucky Supreme Court, 801 S.W.2d 684 (Ky. 1990), cert. denied, 111 S. Ct. 1622 (1991).

Plaintiff's Attorneys: Frank V. Benton III, Benton, Benton & Luedeke, Ft. Thomas, Kentucky, (606) 341-1881.

Defendant's Attorneys: Richard G. Meyer, Deters, Benzinger & Lavelle, Covington, Kentucky, (606) 341-1881, FAX-(606) 341-1469.

B. Brown & Williamson v. Jacobson (WBBM-TV CBS), United States District Court, Northern District of Illinois No. 82 C 1648.

1. Date of Publication: November 11, 1981

2. Case Summary:

Plaintiff, a tobacco company, sued Chicago anchorperson and frequent "Perspective" commentator Walter Jacobson, and the CBS-owned station. In his commentary, Jacobson stated that a government report showed that Plaintiff was improperly trying to entice "children" to smoke with advertising linking its cigarettes to a lifestyle of drugs, sex, and alcohol. The broadcast was not protected by the fair report privilege, since the FTC report referred to a five-year old "strategy" but not to actual ads that embodied this startling theme.

In the broadcast, Jacobson stated in pertinent part that plaintiff "will swear up and down in public it is not selling cigarettes to children," it's not Viceroy's fault that children are smoking; "well there is a confidential report of the federal government right now, [containing] a Viceroy advertising, the Viceroy strategy for attracting young people to smoking" by presenting the "cigarette as an initiation into the adult world, . . . as an illicit pleasure, the basic symbol of the growing immaturity process . . . to relate the cigarette to pot, wine, beer and sex [but] not communicate health-related points." Jacobson concluded that "this is the strategy of the cigarette slicksters, a cigarette business which is insisting in public . . . we are not selling cigarette to children. They are not slicksters, they are liars."

Plaintiff claimed this falsely implied that Viceroy actually employed such an advertising strategy, when it was in fact simply a strategy proposed by an advertising firm that was rejected by the company. As evidence of malice, plaintiff urged that the FTC report discussed only a strategy that was five years old, that Jacobson knew that plaintiff denied having actually carried such advertisements, and that his researcher had looked for but had been unable to find any; that Jacobson knew the strategy was a proposal from an advertising consultant and not actually prepared by the company.

3. Verdict: \$ 5.05 million

Presumed Compensatory:	\$ 3 million
Punitive:	\$ 2 million versus CBS, \$50,000 versus Walter Jacobson.

4. Length of Trial: Three weeks on liability and five days on damages.

5. Size of Jury: Six

6. Significant pre-trial rulings:

The case was dismissed on summary judgment on the basis of opinion and fair comment privilege, but the dismissal was overturned by the Court of Appeals with remand for trial.

The trial judge ruled that the defamation was per se, which resulted in a presumed damage instruction.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict on elements, and bifurcation of case into liability and damage phases. The trial evidence on the damage phase did not begin until the jury had returned its verdict of liability.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Defendant relied on a psychological profile which indicated that the best jurors would be white collar, but these types were unavailable in this largely inner-city venue. Failing this, the preference was for black and Hispanic minorities, who would perceive Jacobson as protector of the underdog. The white minorities, primarily Italians and Poles, did not perceive themselves as underdogs and would be most likely to resent Jacobson.

The case was presented to several mock juries. Generally, defendant won, but it had to come from behind after the plaintiff presented its case.

9. Pretrial Evaluation:

Defendant thought this case was close on liability, but the result was within the expected damage range, given Walter Jacobson's controversiality and the size of CBS.

10. Defense juror preference during selection:

See number 8 above.

11. Actual jury makeup:

Defense counsel feels this was a reasonable jury made up of a balance of inner-city ethnic groups.

12. Issues Tried:

Falsity, actual malice, damages.

13. Plaintiff's Theme(s):

Plaintiff's counsel dominated the courtroom with an aggressive attack on the credibility of Jacobson and his researcher, and the actual malice argument suggested by the case summary above.

14. Defendant's Theme(s):

The defendant contended that the broadcast charged only that the plaintiff had mapped, but not necessarily deployed, an advertising strategy aimed at hooking children into cigarettes based on appeals to sex, drugs and other activities by which teenagers assert their independence.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Jacobson was abrasive in style, controversial, loved by some, hated by many; people familiar with him are unlikely to be neutral.

b. Sympathy for plaintiff during trial:

Plaintiff, a cigarette manufacturer, was made to appear somewhat sympathetic by showing the effect of the publicity on the morale of employees and persons in the distribution pipeline. Employees testified concerning their relatives calling, referring to the broadcast, and asking, "did you really do that?"

c. Proof of actual injury:

There was no proof of economic losses to the plaintiff corporation, and no proof of general damage to reputation except for the phone calls referred to above.

d. Defendants' newsgathering/reporting and trial demeanor:

See paragraph 2.

The WBBM commentator, Walter Jacobson, is disliked by many mainly because of his perceived arrogance. The main problem, however, was with Jacobson's researcher, who systematically destroyed opportunistically selected portions of his (and Jacobson's) notes and research materials after he heard that the case was dismissed by the District Court. He claimed he was unaware of the plaintiff's appeal or of a CBS' policy of no destruction of notes in litigated cases absent legal department approval. His eagerness to see to it that some but not all of the notes were destroyed could not be

explained. Also, the demeanor of this witness was unfortunate.

Another factor that undoubtedly affected the outcome occurred after the trial on liability, and before the trial on damages. Jacobson commented for publication that he would do the piece again, and the station indicated that it would institute no change in policy discouraging this kind of reporting. Both comments were widely reported and undoubtedly reached the jury during the weekend recess between the liability and damage trial, as well as during the trial itself.

The jury probably held this network owned station to a higher standard; the scope of damages awarded was probably due in part to this factor and the perceived greater impact of the broadcast media.

e. Other evidence:

The key evidence through which CBS hoped to establish the existence of the "hook 'em while they're young" strategy was through composite drawings for advertising showing blatant appeals to hedonism, primarily through sex. The judge excluded this evidence because he felt the ad drawings were lurid enough that their probative value was outweighed by prejudicial effect. In so doing, the trial judge inhibited the defendants from pursuing one of their major trial themes, that the "sex" part of the appeal "strategy" was in fact in place, even though the ads actually run pursuant to it were far less provocative. This played into the plaintiff's theme that the strategy was never employed, and that the defendant deliberately created the impression that it had actually been employed even though they tried and failed to find evidence of any actual advertisements reflecting such a strategy.

f. Trial dynamics:

The scenario played before the mock juries did not play at a trial. This was due to the judge's mid-trial rulings limiting the evidence, and inability to foil plaintiff's counsel, who was emotional and able to control the courtroom. Walter Jacobson was Walter Jacobson. CBS, because of its \$1 billion dollar net worth, control of a massive media conglomerate, and mass money-making ability, was undoubtedly held to a higher standard and subjected to a higher verdict assessment.

Plaintiff's attorney, Marty London, was emotional, aggressive, and dominating. The defense advocated in a low-key fashion and clearly presented a contrast in styles. Some observers think this did not play well, that the plaintiff made the defense side look foolish, without any counter-punches, and that defense counsel might have appeared not to

believe in his case. See also 3. a. above regarding statements of Jacobson after liability verdict.

The verdict was the result of the cumulative effect of the evidence, and nothing in particular stands out as provocative. Jacobson as a witness and the incredibility of his researcher regarding destruction of notes were the low points.

The judge was weak and unable or unwilling to control the trial, particularly plaintiff's counsel.

g. Lessons:

Because of the debilitating effect of mid-trial rulings on evidence, defendant would advise anyone to attempt to get a pretrial ruling on any critical evidentiary point.

As discussed above, plaintiff's counsel was emotional, aggressive, and maintained control of the courtroom. Because the judge was unwilling to control the case, it appears in hindsight that defense counsel might have been better off taking the offensive and making more of an effort himself to control plaintiff's counsel and to inject emotion into the case.

16. Results of jury interviews, if any:

None.

17. Assessment of Jury:

Defendant believes the pre-selection jury profile was accurate, but were not able to obtain such a jury. They feel that the jury obtained was reasonable, and not unduly infuriated in view of the way this case played.

18. Post-Trial disposition:

Trial court affirmed punitive damages, but reduced compensatory damages to \$1.00. 644 F. Supp. 1240 (N.D. Ill. 1986). On appeal, \$1 million of the compensatory damages reinstated, 827 F.2d 1119 (7th Cir. 1987).

Plaintiff's Attorneys: Martin London, Paul Weiss, Rifkin, Wharton & Garrison, New York.

Defendant's Attorneys: Thomas H. Morsch and Richard J. O'Brien, Sidley & Austin, Chicago, Illinois, (312) 853-7000; P. Cameron Devore, Davis, Wright & Tremaine, Seattle, Washington; Douglas Jacobs, CBS, New York, New York.

C. Crinkley v. Dow Jones & Co. (Wall Street Journal)
Cook County (Ill.) Circuit Court (May 22, 1991)

1. Date of Publication: April 26, 1976

2. Case Summary:

Plaintiff, an executive who had been forced to resign from a pharmaceutical firm (Searle) for reasons related to his performance, was accused of payoffs to officials in foreign countries. Defendant's reporter allegedly misquoted an unnamed company spokesman as saying Plaintiff had resigned because of disclosure of illegal payoffs to foreign nations bribery. Defendant printed a retraction, ascribing misinformation to company spokesman. The spokesman later denied having made the statements.

3. Verdict: \$ 2.225 million

Compensatory: \$ 2.225 million (1.0 for reputation, .354 for emotional distress, .871 for pecuniary loss)

Punitive: \$ 0 (not submitted)

4. Length of Trial: Two and one-half weeks.

5. Size of Jury: 12

6. Significant pre-trial rulings:

Claims for interference with business relations and deceptive trade practices dismissed, libel per se claim based on allegation of criminal conduct dismissed because foreign payments not then illegal. Claim for libel per se for damage to business reputation allowed to go to jury.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict for damage elements only.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None.

9. Pretrial Evaluation:

Liability was not unlikely, but damages were considered entirely speculative and therefore manageable and the size of the verdict was unforeseen, except for the defendant's awareness that damages are unpredictable in this kind of case. The defense believed that in fact plaintiff could prove no actual injury therefore damages should be minimal.

10. Defense juror preference during selection:

Sensible, working people, blue and white collar.

11. Actual jury makeup:

Blue and white collar working people, with apparent common sense.

12. Principal Issues Tried

Defamation, negligence, damages. Punitive and presumed damages were not allowed because the plaintiff did not plead actual malice.

13. Plaintiff's Theme(s):

Defendant, in its haste to report a startling disclosure, deliberately or negligently skewed or fabricated damaging information given from a Searle company source. Failed to take adequate steps to check information with plaintiff prior to publication and published improper correction.

14. Defendant's Theme(s):

The defendant correctly reported the statement of a company source; the plaintiff's former employer was responsible for plaintiff's woes and in particular responsible for releasing the statement that was published by the defendant newspaper. The defendant's publication did not cause any of the damages claimed by the plaintiff.

That defendant's failure to check information resulted in part from fact that statement in issue was part of information disclosed at an annual meeting and the sole purpose of the article was to report what occurred at the meeting, not to vouch for the truth or falsity of such reports.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Not a large factor, so far as known absent jury interviews. The reporter was based in Chicago, and the plaintiff had not lived there 12 years. The plaintiff was not a "little guy," had made more money and lived considerably better than the jurors.

b. Sympathy for plaintiff during trial:

Plaintiff was an impressive, likable witness, and spoke with a shaking voice as he testified to how he was devastated and damaged by the publication. Plaintiff apparently

convinced the jury that his failure ever to be employed full-time as an executive for 15 years following the article resulted from the article's publication, even though he stopped seriously looking for such work a year after publication. In connection with his termination/resignation from Searle, Crinkley had in effect taken early retirement and lived in the San Juan islands in Washington. The jury apparently confused the damage caused by the firing of plaintiff, a highly paid 53-year old executive, by Searle with the damage caused by the article which was published more than two months afterwards.

c. Proof of actual injury:

Crinkley presented a recruiting consultant who testified that the publication and correction would likely reduce Crinkley's marketability in his field, plus an economist who calculated pecuniary loss at more than twice the \$871,000 lost earnings awarded. However, the only testimony of actual causation between the article and the damage was the plaintiff's, who said he contacted more than 200 persons with negative results. Plaintiff admitted that no one had given the article as the reason for not hiring him, and none of the persons solicited testified at trial. The only evidence of emotional harm was the plaintiff's testimony; there was no evidence of actual injury to reputation.

d. Defendant's newsgathering/reporting and trial demeanor:

The reporter was not endearing and ~~may~~ have been viewed as arrogant for insisting that he quoted ~~the~~ company spokesman correctly.

e. Other evidence:

The defendant offered expert testimony to show that plaintiff's method of obtaining employment in his very narrow field was unlikely to generate results, but did not present an opposing expert to testify concerning the amount of likely loss since defendant denied any connection between the article and plaintiff's losses.

Defendant's motion to exclude expert testimony under the reasonable man standard was initially granted, but ultimately this evidence was allowed to show "customs and practices" but not breach of the standard of care. Both sides called experts on journalistic practices.

f. Trial dynamics:

In cross-examining the plaintiff, defense counsel impeached him with prior inconsistent statements no less than 11 times. Although the cross-examination was competent and professional, it is likely that the jury had become so

sympathetic with the plaintiff and taken with his veracity that they resented defendant for making the plaintiff look bad.

g. Lessons:

Defendant would do some jury work, more to determine how aspects of the case would play than to profile the jury.

Defendant would also present more direct expert evidence to counter plaintiff's recruiting expert and to testify that any concern caused by such an article can easily be dispelled by asking the prospective employer to call plaintiff's former superiors at Searle and confirm that plaintiff had no involvement in the payoffs.

Finally, the defense expert on journalistic practices was less than effective.

16. Results of jury interviews, if any:

None.

17. Assessment of Jury:

This jury, although not overtly impassioned, was taken with the plaintiff and generally accepted his proof of actual losses without scrutiny on the issue of causation. As in similar cases involving professional people, the jury seemed willing to visit damages for loss of employment or professional stature upon a media defendant where the primary factor was plaintiff's treatment by his former employer. The jury was unaware that Crinkley's former employer was a defendant in this suit until shortly before trial, but settled on undisclosed terms.

18. Post-Trial disposition:

Motion for Judgment N.O.V. and related post-trial motions pending; hearing scheduled for September 25, 1991.

Prior appeals, 67 Ill. App. 3d 869, 385 N.E.2d 714 (1978); 119 Ill. App. 3d 147, 456 N.E.2d 138 (1983).

Plaintiff's Attorneys: Joseph M. O'Callaghan

Defendant's Attorneys: Michael M. Conway, Hopkins & Sutter, Three First National Plaza, Chicago, Illinois 60602, (312) 558-6600; Robert D. Sack, Gibson, Dunn & Crutcher, 200 Park Avenue, New York, New York.

D. Diesen v. Hessburg (Duluth News-Tribune)
St. Louis Co. District Court (1989)

1. Date of Publication: September 15, 1981

2. Case Summary:

Defendant published three articles concerning plaintiff county attorney's handling of wife-battering cases. The article correctly documented dispositions of cases favorable to defendants, but plaintiff claimed that it failed to report circumstances that the plaintiff claimed justified the dispositions, thus creating the false implication that he was guilty of misfeasance and laxity with respect to this type of case.

3. Verdict: \$ 785,000

Compensatory
(emotional distress and reputation
injury): \$ 285,000
Punitive: \$ 500,000

4. Length of Trial: Eight days.

5. Size of Jury: Six.

6. Significant pre-trial rulings:

The court denied the motions for summary judgment. At trial, the court ruled as a matter of law that all of the statements in the articles were true, but permitted the jury by special interrogatory to determine whether "the implications of the articles" published by defendants were substantially untrue and whether the defendant knew or acted recklessly as to whether "the implications of the articles were substantially false."

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict form on liability issues and damage elements.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None.

9. Pretrial Evaluation:

The defense thought the case would be dismissed on liability, and didn't think it to be a significant case in terms of damages.

10. Defense juror preference during selection:

Persons who could understand the instructions, and have some appreciation for the value of free and open debate regarding public officials; middle to higher income, liberal, women's rights. The defendant chose the jury with a view to liability rather than damage issues.

11. Actual jury makeup:

The jury included a retired teacher, two college graduates. One juror was a bailiff for another judge who slept through the trial. Surprisingly, he was elected foreman. Perhaps this person should have been left off.

12. Issues Tried:

Falsity and defamatory character of alleged implications of article, actual malice towards those implications.

13. Plaintiff's Theme(s):

The defendant reporter was emotionally involved, biased, and out to get to the plaintiff by forcing the information he wanted out of sources and reporting it in a manner (juxtaposition and omission) that falsely disparaged the plaintiff; that the editorial staff knew of the reporter's bias but declined the plaintiff's plea to state his case to another reporter or editor.

14. Defendant's Theme(s):

The newspaper reported two sides of an issue regarding a public official, as was its right and duty, and the report, which contained much information favorable to the plaintiff, was fair; that the refusal to reinterview the plaintiff was consistent with accepted journalistic practice.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

N/A

b. Sympathy for plaintiff during trial:

The plaintiff was a mild mannered and honest if not sufficiently aggressive county attorney who was reasonably sympathetic. Plaintiff's wife was very sympathetic, and testified in tears about how the publication adversely effected the plaintiff's family.

c. Proof of actual injury:

The plaintiff lost the ensuing election for county attorney, and opened his own law office. He made only \$5,000 or \$6,000 per year thereafter and essentially went into retirement. The decline of income from his previous \$50,000 salary was consistent with the award.

Plaintiff did not use any expert testimony to establish damages.

d. Defendants' newsgathering/reporting and trial demeanor:

All of the reporter's reporting of facts checked out. However, the reporter conducted tape recorded interviews that indicated to the editors, prior to publication, that the reporter was badgering sources and using leading questions to curry from them the information he wanted; that the reporter was personally involved and had lost objectivity. The editors also concluded that some of the stories provided by battered women victims were not sufficiently credible for publication, and these facts were deleted from the series. The editors and the publisher of the paper received letters from the plaintiff, that, after a ten-hour interview with the reporter, plaintiff believed that the reporter was biased, out to get him, and about to publish an inaccurate story. Diesen demanded the opportunity to meet with the editors' or someone besides the reporter handling the story to provide further and correct information. Not wishing to permit the subject to dictate editorial policy, the editors declined to meet with the plaintiff, but told him to provide his further information directly to the reporter. The editors also did some verifying of the facts reported against public records, but did not check with live sources to see if crucial facts, which might refute the implications of the story, were available. The jury was disturbed and offended by editors' refusal to give the plaintiff a hearing before publication.

The editors acknowledged that the articles charged Diesen with misfeasance in office.

Additional problems were that the reporter could not account for missing portions of tapes reflecting five hours of the ten-hour interview with Diesen, and the reporter's notes had scribbles indicating bias.

Defense counsel did attack the plaintiff indirectly by calling the new county attorney, who testified essentially that the plaintiff was a decent individual, but not particularly qualified for the job of county prosecuting attorney, in an effort to show lack of damage.

The editor in charge and the reporter clearly offended the jury, but the defense had no choice but to call them in order to establish lack of malice.

e. Other evidence:

Defendants called a journalistic practice expert who testified that the refusal to give the plaintiff an independent hearing was consistent with journalistic practices, but made numerous admissions on cross-examination which were not helpful.

The jury was given Knight-Ridder's corporate financial statement, which was not broken down for the local newspaper. The statement indicated that the company had annual earnings of over \$100,000,000. The plaintiff's lawyer urged the jury to send him a message, award a couple of million, they won't notice it. The defense argued that the defendant had done nothing wrong and that punitive damages should not be awarded, and although there was some jury anger, the jury was not willing to punish to the level requested by the plaintiff.

The defendants also called some of the battered women victims as witnesses, but the jury was unmoved by their testimony and simply concluded that the plaintiff was not responsible for their plight.

Plaintiff presented evidence, in addition to justification for the dispositions on individual cases, that the battered women problem in Duluth, Minnesota was not really the plaintiff's fault, that there was a tendency on the part of law enforcement to leave such matters to intrafamily resolution.

f. Trial dynamics:

The judge, who indicated during trial he would grant a judgment NOV and ultimately did so, was impartial and showed no disfavor for the defense case. Defense counsel was able to keep the plaintiff's attorney under control.

g. Lessons:

In newsgathering, be professional but polite with the subject, and give him the opportunity to be heard when he asks for it.

16. Results of jury interviews, if any:

Two jurors spoke with defense counsel. The jurors did not like the reporter, who they thought was arrogant and obnoxious, and the editors and publisher, for their refusal to hear the plaintiff. They bought the plaintiff's case on compensatory damages and sought to punish the newspaper, but not to the extent requested by the plaintiff.

17. Assessment of Jury:

Counsel feels that this was as good a jury as he was likely to pick and if it could not be persuaded on the issue of actual malice under the instructions of this case and the argument permitted, it is unlikely that a better result could have been reached with a different jury.

18. Post-Trial disposition:

Trial judge granted JNOV for Defendant, judgment for Plaintiff reinstated by Minnesota Court of Appeals, 437 N.W.2d 705 (Minn. App. 1989), JNOV for Defendant reinstated by Minnesota Supreme Court, 455 N.W.2d 446 (Minn. 1990). Cert. was denied by U.S. Supreme Court.

Plaintiff's Attorneys: Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, St. Paul.

Defendant's Attorneys: Thomas R. Thibodeau, Joseph J. Roby, Jr., Johnson, Killen, Thibodeau & Sieler, P.A., Duluth, Minnesota, (218) 722-6331.

E. Feazell v. Belo Broadcasting Corp. (WFAA-TV) Waco (Tex.) District Court No. 86-2227-1 (April 19, 1991).

1. Date of Publication - 11-part series in 1985.

2. Case Summary:

In response to persistent rumors that plaintiff, a District Attorney, was inexplicably lax in prosecuting drug and related cases and may have taken bribes in drunk driving cases, Dallas WFAA TV's prize-winning reporter Charles Duncan investigated and did an 11-part series (10 news stories and one opinion piece) critical of Feazell's performance, that discussed these allegations and a pending federal investigation. Plaintiff was later indicted more than two years later on federal racketeering and bribery charges. He was acquitted, but voluntarily resigned as District Attorney and went into private law practice.

3. Verdict: \$ 58 million

Compensatory:	\$ 17 million
	(\$9.0 for damage to reputation,
	\$6.0 for emotional distress,
	\$2.0 for business losses)
Punitive:	\$ 41 million

4. Length of Trial: Six weeks

5. Size of Jury: 12 (10 may render a verdict)

6. Significant pre-trial rulings:

Motions of summary judgment denied; motion by codefendant Police Chief Larry Scott (interviewed on the program) for summary judgment granted.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Written charge, special verdict on elements of liability and damages.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

No surveys or mock trial work. The plaintiff used a jury consultant. The plaintiff prepared a jury questionnaire which defense counsel approved and was completed by the jury venire. Defense counsel considered doing an attitude survey (as in the Newton case) but decided this was ill-advised in a small, tight-knit community like Waco. Defendant did not undertake any mock trial exercises, but learned during the three summary judgment hearings that some arguments were not going to fly.

9. Pretrial Evaluation:

Defendants thought the case was defensible on the element of actual malice. If lost, a large verdict was considered likely, but nothing in the universe of this award was expected.

10. Defense juror preference during selection:

Better educated, lack of ties to Waco, upper class: nine women, three men.

11. Actual jury makeup:

Foreperson with M.S.W. degree was opinionated and pro-Feazell in deliberations. Others generally not well-educated, one school teacher, others high school education, one unemployed; two Hispanics, 1 black, balance white.

12. Issues Tried:

Actual malice, damages. The meaning conveyed by the broadcasts was in issue: The plaintiff claimed the defendant accused him of taking bribes; the defendant claimed that it fairly reported an investigation of allegations pending at the time.

13. Plaintiff's Theme(s):

Plaintiff alleged that defendant's principal information sources, the Texas Department of Public Safety (Texas Rangers), were pursuing a vendetta against plaintiff for exposing the falsity of confessions by a serial killer apprehended by the Rangers. Plaintiff claimed that the defendant reporter entered into or was a tool of a conspiracy against plaintiff by the Texas Rangers and others who were embarrassed by plaintiff. Plaintiff's counsel referred to this as one "plank" in the "fence" of actual malice.

14. Defendant's Theme(s):

That the defendants were not there to retry the criminal case, that this was not the thrust of the 11 broadcasts (only nine of which went to the jury); rather, the broadcast was a needed, fair, and thorough airing of serious charges. The defense called witnesses including state court judges who testified against Feazell at the criminal trial, but this was largely to show that the charges were "out there" before and independent of the broadcast and that the source of the damage was other than the defendant. Defendant felt that malice rather than truth was the defense of choice.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Waco is the home of the Southern Baptist Convention, Baylor University (a Baptist institution), and Word Publishing Co., a publisher of fundamentalist Baptist literature. Plaintiff's background as a Baptist minister very probably was a factor.

The venue is also typical of medium-sized Texas towns in which there is a small group of upper middle class and gentry and a large group of blue collar and lower classes. The blue collar groups worked at several state and federal facilities, a food packing plant, etc. The area is economically depressed. Feazell was perceived to be the champion of the blue collar worker and lower classes.

Waco is becoming a high verdict area typical of this type of community that is divided along socioeconomic lines. Defense counsel does not feel there was significant anti-Dallas bias, although plaintiff's counsel did emphasize the "cross the county line" (see paragraph 15f) notion. Waco is within the station's Dallas viewing area.

b. Sympathy for plaintiff during trial:

The jury obviously found the plaintiff appealing, a young man with a bright future before the broadcast. Counsel does

not know how much the plaintiff's Baptist background and the Baptist preoccupation in the local area played in the outcome. The jury was willing to punish Belo for the conduct of others, particularly those who prosecuted plaintiff.

c. Proof of actual injury:

The proof was emotional rather than substantive. The most compelling factor at work was the sympathy built for plaintiff. The plaintiff's secretary testified how proud she was to work for the plaintiff, but that she now had to "hang her head in shame." Also compelling was the mother of a slain teenager who testified to plaintiff's prosecution of the killer and her dismay over the broadcasts. There were approximately two to three days of such testimony, then there was a videotape, prepared for a roast honoring plaintiff six to nine months before the broadcast, which presented several public officials extolling the plaintiff's virtues and the record built during his career, as well as plaintiff's background as a Baptist minister.

The proof on emotional distress was compelling due to witnesses described above. The plaintiff's wife was not called. Plaintiff called a good set of "groaners" on the subject of emotional and reputation injury.

The only evidence of loss to the plaintiff's business was plaintiff's own testimony to his belief that he lost approximately \$100,000 a year for 20 years. This evidently was allowed in not as evidence of business losses (there was no evidence of any lost clients, loss of past business, or loss of future profits), but as evidence of "lost earning capacity." The court denied the defense request to exclude this theory and evidence. The jury apparently bought it wholesale, awarding the \$2,000,000 requested.

d. Defendants' newsgathering/reporting and trial demeanor:

Plaintiff called the reporter first: he was on the stand ten days. The reporter held up reasonably well. Plaintiff drummed his theory and built up at least moderate dislike for the reporter. The reporter weathered a barrage of yelling by plaintiff's counsel and adhered to his belief in the truth of what he had said and that he felt he had done enough investigation to feel comfortable with the series. Plaintiff then called other adverse witnesses and, as with the reporter, engaged in wide open cross-examination with no limitations from the court. Plaintiff called several of the principal sources who denied giving the information attributed to them, and demonstrated various failures to interview and contact specific key people.

e. Other evidence:

Defendant fought the reputation injury case by introducing evidence of reports of other media testimony during the criminal trial and other sources of the damaging information including criminal trial publicity from other media. Feazell was also subject to bar disciplinary proceedings in which he consented to sanctions. Plaintiff explained this by saying he was tired, out of money, and now regrets having done that. The jury was evidently willing to hold the defendant responsible for the conduct of others, either because its reporting was deemed to be the catalyst or because the jury simply was willing to vindicate the plaintiff at the expense of whomever was present. Plaintiff's counsel emphasized the conspiracy theory, and used the image of plaintiff's broadcast as being the first spark in a grass fire that spread.

Plaintiff endorsed an expert witness, but, because of defendant's staunch opposition, more or less confessed a motion to exclude him. The defense is not sure that an expert on its side would have helped its position, particularly if the plaintiff were allowed to call its own. This tactic was not seriously considered, however, largely due to defense counsel's view that such testimony should not be allowed in these cases, and that offering one would establish a bad precedent. Moreover, the large record would present a massive task for an expert.

This elephantine verdict undoubtedly resulted in large part from the scope of the case as defined by a combination of factors: 11 broadcasts, six weeks of trial, and the volume of documents.

f. Trial dynamics:

This state court judge was generally passive, in the face of the freewheeling, aggressive, emotional and inflammatory tactics of the plaintiff's lawyer, Gary Richardson. The defense tried to shorten the cross-examination, and asked for instruction to disregard argumentative and colloquiative questions as not evidence. The judge declined to help and permitted nearly unlimited cross-examination without pressing counsel to move along on the grounds of repetitiousness or marginal relevance.

Richardson engaged in raw, unsophisticated cross-examination, (e.g., "Can't you see that Duncan had a preconceived plan to destroy the plaintiff?"). He had a "country lawyer" style akin to that of Gerry Spence.

Richardson did not even attend the jury instructions conference, but left this to Feazell himself, probably to prepare for his closing argument. In general, the plaintiff let the defendants have their way on the jury instructions,

quite obviously believing that the jury would rule in their favor regardless of what was in them.

The reputation injury damage was asked for by plaintiff's counsel in closing for \$1 million for each of the nine broadcasts. The jury gave it to him.

In closing, plaintiff's counsel argued the usual case for punitive damages, but did not offer defendant's financial information. The A.H. Belo Company was nonsuited because it did not employ the reporter who did the broadcast, and Belo Broadcasting was the only corporate defendant. Plaintiff evidently thought that its financial statement was too small. Plaintiff's counsel asked the jury for "no less than \$35,000,000" total damages, or the defendants "will be smiling when they cross the county line," and similar xenophobic arguments.

Defendants feel they may have angered the jury by proving the other sources of plaintiff's claimed injury, such as the bar disciplinary proceedings in which plaintiff was found guilty (after a "no contest" response) of misconduct, all of which might have been seen as an attack upon plaintiff. The defense called the sitting federal judge in Waco who testified to prevalent rumors concerning the plaintiffs being "on the take." The jury reportedly hated his guts.

During the trial, this jury for the most part concealed its feelings, except for some tears during some of the plaintiff's mental anguish/reputation evidence.

g. Lessons: ??

16. Results of jury interviews, if any:

Counsel did not interview jurors. According to information gleaned from the jurors through local media, they were willing to give Feazell anything he wanted. The courtroom was packed with Feazell supporters when the verdict was announced, and after it was announced, Feazell gave a speech to the jury and invited them to his victory party. Some of the jurors hugged Feazell and, indeed, most attended the party. Defense counsel did hear comments, as they left the courtroom, to the effect that they (defense counsel) were good attorneys, just doing their job.

Local newspaper reports indicated that some members of the jury did not like and scoffed at defense counsel's "big firm" background. Local media also reported that the jurors were angered at the manner in which the defendant's TV reporter covered the trial. They felt he slept during the trial, and did not like his coverage. Reports also indicated that the jury did not like the defendant, but defense counsel believes that the anger at the defendant was not as critical a factor as was sympathy for the plaintiff.

One juror was quoted as saying, "Vic Feazell is destined for great things. I believe that if that man had not been slandered . . . that he could have gone on to bigger things . . . We saw proof that Charles Duncan knew he was putting lies on TV." Another juror was quoted as saying that she was not pro-Feazell before trial, but was satisfied that Duncan was "out to get Feazell" after she viewed outtakes of the interviews and saw how the quotes were "taken out of context." "You can take any conversation with someone and piece things together and make them say anything, this is the way he did every single thing."

17. Assessment of Jury:

Defense counsel does not think it is possible that a jury properly applying the malice instruction could find liability on all nine broadcasts. Nine segments of the 11 part series went to the jury. Only five of the nine mentioned the FBI investigation of the plaintiff for alleged bribery charges. The eleventh piece was an opinion perspective piece. The first dealt with DWI's and dismissals of those cases. All dealt with the plaintiff's record as a public official. The "nut" of all broadcasts was the FBI investigation. It is apparent that the jury would have found for plaintiff and awarded damages at this level regardless of the instructions.

The jury was unmoved by defendant's plea that the public good is served by calling attention to appearances of impropriety, and bought the plaintiff's argument that plaintiff was convicted on television, that the television broadcast caused him to be indicted and tried 16 months later.

18. Post-Trial disposition:

Settled, amount undisclosed.

Plaintiff's Attorneys: Gary Richardson, Richardson & Meier, P.C., Tulsa, Okla.

Defendant's Attorneys: Thomas Leatherbury, John McElhaney, Locke Purnell Rain Harrell, Dallas, Texas, (214) 740-8535.

F. McCoy v. Hearst Corp. (San Francisco Examiner)

1. Date of Publication: May 19-21, 1976
Date of Verdict: April 18, 1979

2. Case Summary:

Plaintiffs were police officers and a prosecutor in the case of a Chinese youth gang member convicted of murder. The defendants charged the plaintiffs with procuring this

conviction against an innocent person out of a zeal in confronting the problem presented by Chinese youth gangs in San Francisco. The story was supported primarily by information provided by a convict who testified to a jailhouse confession by the defendant, but later recanted the confession to the reporter and claimed that the false testimony was procured by the prosecutor and the police. At the libel trial, the convict testified through deposition that in fact his original testimony was true, and he was induced to recant it by the reporter with the suggestion that the reporter would help him to avoid detainer under a state charge after completion of a federal prison sentence.

3. Verdict: \$ 4.56 million.

For each of three plaintiffs:

Compensatory: \$500,000 vs. the newspaper;
\$250,000 vs. one reporter;
\$250,000 vs. second reporter

Punitive: \$500,000 vs. the newspaper;
\$10,000 vs. each of the two
reporters

4. Length of Trial: Three weeks

5. Size of Jury: Twelve

6. Significant pre-trial rulings:

Motions for summary judgment denied.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict as set forth above.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None.

9. Pretrial Evaluation:

The case should be won on liability, the likely damage award should not be significant.

10. Defense juror preference during selection:

Unknown.

11. Actual jury makeup:

Because of the age of this case, we were unable to learn much about the jury except through an unpublished study of the case by a Stanford law student. From that study, it appears that the voir dire process was ineffective in screening out all jurors with strong sympathies to law enforcement and strong animus towards the media. See paragraph 16.

12. Issues Tried:

Actual malice, damages.

13. Plaintiff's Theme(s):

The defendants, in their zeal to expose prosecutorial misconduct aimed at eradicating Chinese youth gangs, relied upon an obviously unreliable source and in fact induced him to say what they wanted to hear with promises of assistance.

14. Defendant's Theme(s): N/A

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Jury interviews indicated that there was anti-Examiner bias and sympathy towards law enforcement personnel trying to deal with the criminal element in San Francisco.

b. Sympathy for plaintiff during trial:

The plaintiff police officers were about as sympathetic as law enforcement personnel can get. The plaintiff prosecutor and the police testified effectively concerning the emotional trauma and reputational damage resulting from the publication.

c. Proof of actual injury:

Other witnesses testified to reputation injury. This, together with the plaintiffs' testimony, was the extent of the proof of actual injury.

d. Defendants' newsgathering/reporting and trial demeanor:

The defense argued strenuously that the investigation was thorough, that there was no malice, but also urged that the award of damages should be small. The damage arguments apparently distracted some of the jurors.

That the principal source was a flaky convict was obviously a problem. Under the circumstances, defendants had reasonably good backup evidence that the plaintiffs pursued a win-at-any-cost theory against Chinese gang members, and could show that the defendants had ample reason to believe the convict, since he was taking a considerable risk in recanting his testimony. The defendants urged that they did nothing more than promise to look into sources concerned for freedom at the conclusion of his federal sentence, and that the defendants were entitled to rely on this particular source just as the plaintiff did in procuring a conviction.

e. Other evidence:

N/A

f. Trial dynamics:

The plaintiff's lawyer was aggressive, and not particularly well controlled by the judge.

g. Lessons:

See jury interview results.

16. Results of jury interviews, if any:

In LDRC Bulletin No. 8, page 72, Henry Kaufman reported the findings of an unpublished study by Ellen Leslie Kaufman, then a law student researching for Professor Mark A. Franklin of Stanford Law School, now an associate with Gibson, Dunn & Crutcher in Los Angeles. As reported by Henry, the findings of Ms. Kaufman's jury interviews are as follows:

Although there was voir dire, it was apparently not entirely effective in screening out all jurors with natural sympathies to law enforcement and with some animus toward the media. Indeed, in the Kaufman study one juror admitted to having always disliked the Examiner and felt it to be notoriously inaccurate and sensational. According to Kaufman, this juror claimed not to have been asked about these views, although the voir dire transcript reveals that the juror was questioned about any bias or prejudice toward the Examiner, but did not admit to it at the time.

The jurors interviewed all liked plaintiffs' attorney.

Conversely, none of the jurors liked the defense lawyers. In fact, they found one of the reporter's lawyers argumentative, combative and unreasonable, with a "superior" and insolent attitude. Also, they were upset that the publisher's lawyer in their view did not attempt to defend or explain why an erroneous story was

published, choosing instead to argue that any award of damages should be small.

The reporter-defendants made less of an impression on the jurors, although the position they took in defending their extensive investigative reporting apparently fell on unsympathetic ears. In fact, their testimony backfired, with the jurors concluding that if this was such an elaborate investigation by "top-notch" investigative reporter-defendants, then they should have exercised even greater care and should have gotten the story right. Apparently, the judge's charge on actual malice did not leave an impression either, since the jurors felt strongly that the defendants had a duty to report the truth. The jurors were also left with the impression that the reporters were out to "make" the story rather than determine its accuracy. All of the details of the elaborate investigation simply left the jurors wondering why more of an effort was not made to corroborate the particular allegations made against plaintiffs.

Plaintiffs also did not leave a strong impression on the jury, although there was apparently some sympathy by at least certain of the jurors for the plight of law enforcement officials dealing with the criminal element. All of the jurors were quite sympathetic, however, to plaintiffs' testimony regarding emotional trauma and reputational damage.

As noted, the jurors apparently did not accept or at least take to heart the actual malice standard. Whether or not they consciously "nullified" the judge's charge in this regard, it is clear that years later their recollections and views of liability in the case leave little room for the actual malice defense. The jurors were "incensed" by the argument that the Examiner has a right to publish stories that turned out to be false or that the stories that were published were the result of "good journalism." As summarized by Ms. Kaufman, "the jurors felt that the seriousness of the accusations and the potential damage to reputations required the defendants to be sure the story was true before printing it."

Relatedly, the jurors were impressed by the defendants' lack of remorse and self-righteous, non-apologetic attitude. They found the defense's "honest mistake" argument inconsistent with the fact that no retraction was published.

The jurors all agreed that the damages issues were the hardest to decide. Their calculations were "imprecise" but they nonetheless wished to compensate plaintiffs fully for the "emotional trauma" and "intangible

loss to reputation" that "would follow plaintiffs for the rest of their lives." (The compensatory award was \$3 million.) With regard to the punitive damage award (\$1.56 million), the jurors wanted to punish the Examiner in part for its "unacceptable journalism" but perhaps even more for its continued remorselessness at the trial. Two of the three dissenters apparently disagreed with the damage award, feeling that it was simply too high.

Defense counsel feels that this trial was not well controlled by the trial judge, and, as a result, the jury was not likely to follow the instructions as to actual malice.

17. Assessment of Jury:

See above.

18. Post-Trial disposition:

Reversed and remanded for dismissal for insufficient proof of actual malice. Reversed by California Supreme Court, 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986), cert. denied, 481 U.S. 1041 (1987).

Plaintiff's Attorneys: Charles O. Morgan, Jr.

Defendant's Attorneys: E. John Kleines, Kleines & Getchell, 114 Sansome Street, Suite 627, San Francisco, California 94104, (415) 981-0920; Walter R. Allan, Pillsbury Madison & Sutro, San Francisco, California (415) 893-1000.

G. McDermott v. Philadelphia Newspapers (Philadelphia Inquirer), Philadelphia Court of Common Pleas (December 7, 1990).

1. Date of Publication: 1983 Series, Reprint.

2. Case Summary:

Plaintiff was a Pennsylvania Supreme Court Justice. Defendant published a series of articles entitled "Above the Law" that focused on the Pennsylvania Supreme Court, and documented nepotism, potential conflicts of interest, appearances of impropriety, and failure to disclose same. One article reported that Justice McDermott attended a coal country outing in a limousine provided by a member of a law firm that represented the coal industry and contributed heavily to the Justice's election campaign. Thereafter, the Justice voted in favor of the industry defendant in a pending environmental case. The article stated that the vote occurred after the trip and after the heavy contributions from the law firm, and raised the question of whether there was a conflict of interest and appearance of impropriety because of failure to disclose. The article quoted a representative of the

opposing environmental group, who expressed outrage at the circumstances and the Justice's failure to disclose them. The plaintiff admitted that each word of the article was correct, but claimed that it falsely implied that he had engaged in a fix. The defendant denied the article alleged any actual impropriety but merely raised the question of an appearance of impropriety.

A second statement complained of was from an interview with McDermott, where he told a Philadelphia District Attorney that his son was applying for a job, but also claimed that he told the DA to make it twice as tough for his son and added "nepotism will never die." Plaintiff claimed this was reported in a way that implied he, notwithstanding his protestations to the contrary, acknowledged that nepotism was at work, whereas the Justice claimed he intended it to mean that no matter what, the press will claim nepotism, and the article implied he used his position to influence the hiring of his son.

The series was republished in tabloid form as is the newspaper's practice for important series, and 25 reprints were made available at a meeting of the American Judicature Society in Las Vegas. After the article, before the reprint, McDermott called the paper and complained. The lawyer who attended the trip and whose law firm contributed to the Justice also called and said that the trip was merely a social trip and no public business was discussed. The Inquirer columnist who attended the trip also protested that the trip was innocent.

3. Verdict: For Inquirer on original series, for plaintiff on reprint. \$ 6 million

Compensatory: \$3,000,000
Punitive: \$3,000,000

4. Length of Trial: Four weeks

5. Size of Jury: Ten

6. Significant pre-trial rulings:

Motions for summary judgment denied.

Summary judgment was denied without opinion. The judge permitted only the parts of the series complained of by McDermott to go to the jury, and not the balance, some of which was favorable to McDermott. The judge precluded the parties from using the phrase "appearance of impropriety" because he determined that the issue being tried was the existence of and truth or falsity of the implication that the plaintiff fixed the case. The judge barred the defendant's experts on the ethics of the plaintiff's failure to disclose under the circumstances.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict on elements of liability and damages.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Defendant retained a consultant who sat during the jury selection. (In Pennsylvania state court, no significant voir dire is allowed and the selection process is relatively useless.) There were informal mock trial presentations.

9. Pretrial Evaluation:

Defendant considered the case winnable but considered a verdict range of \$1 to \$3 million to be a significant possibility.

10. Defense juror preference during selection: N/A

11. Actual jury makeup: N/A

12. Issues Tried:

Whether the publication carried the false implication claimed by McDermott, whether that implication was false, and whether the defendant acted with a knowing or reckless state of mind in publishing it.

13. Plaintiff's Theme(s):

The defendant skewed the information they had so as to deliberately create the impression that the plaintiff had engaged in improper or illegal conduct.

14. Defendant's Theme(s):

Defendant's publication did not charge that there was anything wrong with the coal country trip; but that the problem was plaintiff's participating in the case after the trip without disclosure. Defense contended that it reasonably interpreted and reported the plaintiff's comment concerning nepotism.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Not known to be a factor.

b. Sympathy for plaintiff during trial:

Plaintiff's emotional appeal was only moderate. He was portrayed as a poor Irish kid who made it in the legal field.

c. Proof of actual injury:

There was no proof of damages other than the plaintiff's testimony. The defendant did not offer direct proof rebutting the damage case, but stressed to the jury the lack of any proof whatsoever on damages.

d. Defendant's newsgathering/reporting and trial demeanor:

See case summary. There was some anger at the defendant for the second publication, but not in the extreme.

e. Other evidence:

See case summary.

Plaintiff used Clark Mollenhoff as a journalistic practice expert, but the defense did not call an expert.

f. Trial dynamics:

This case was not out of the ordinary in terms of plaintiff's counsel's aggressiveness or the trial judge's willingness to control the case.

As reflected in the result, the problem appeared to be the newspaper's decision to republish the article. The fact that the Inquirer columnist who attended the coal country outing criticized the series in a way that suggested an untoward tendency to see evil behind every tree was not helpful.

g. Lessons: ??

16. Results of jury interviews, if any:

None.

17. Assessment of Jury:

Inexplicably, the jury found that the article carried the implication complained, that it was true with respect to the original articles, but false with respect to the reprints. Observers speculate that the jury was either confused or sharply divided, that they were irritated with the newspaper for rubbing the plaintiff's nose in the matter with the reprint in the face of complaints following original publication, and did not know exactly how to express this view in the verdict.

18. Post-Trial disposition:

On appeal.

Plaintiff's Attorneys: James Beasley, Beasley, Casey, Colleran, Erbstein, Thistle & Kline, Philadelphia.

Defendant's Attorneys: William Hangley, Hangely, Connolly Epstein, Chicco Foxman & Ewing, Ninth Floor, 1515 Market Street, Philadelphia, Pennsylvania 19102, (215) 851-3400, Samuel Klein, Kohn, Savett, Klein & Graf, P.C.

H. Newcomb v. Cleveland Plain Dealer
(Ohio Ct. Cm. Pls., Cuyahoga County, No. 93757,
September 14, 1990)

1. Date of Verdict: September 14, 1990

2. Case Summary:

Plaintiffs were auto racing promoters who sued Defendant over a series of articles alleging that plaintiffs, in violation of a lease with the City of Cleveland, had given their partnership and closely held corporations preference in disbursing nearly \$1,000,000 in race proceeds.

3. Verdict: \$ 13.5 million

Compensatory: \$4,500,000 awarded to the plaintiffs.

Punitive: \$9,000,000 (\$3,500,000 awarded to each of the individual plaintiffs, \$2,000,000 to the corporate plaintiff.)

4. Length of Trial: Eight weeks.

5. Size of Jury: Eight.

6. Significant pre-trial rulings:

Motions for summary judgment denied. The court declined to rule concerning the plaintiffs' status before trial, saying that he would leave that issue for the jury to determine, but later decided that they were private figures in framing instructions to the jury.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

None.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Counsel declined to respond.

9. Pretrial Evaluation:

The case appeared to be defensible but losable on liability after summary judgment motions were denied. The defense did not anticipate that the jury would buy the plaintiffs' damage case to the extent that it did.

10. Defense juror preference during selection:

Counsel declined to respond.

11. Actual jury makeup:

12. Issues Tried:

Defamatory meaning, falsity, actual malice.

13. Plaintiffs' Theme(s):

The plaintiffs' trial theme was that the headline and nut paragraph of the story, that the race promoters had paid a million dollars to themselves and no money to the city, was knowingly false and defamatory. The balance of the article explained that these payments were made to various entities in which the plaintiffs had direct or indirect interests, purportedly for debts arising from operation of the race, but the jury apparently accepted the plaintiffs' argument that the gist and thrust of the article was in the headline and nut paragraph.

14. Defendant's Theme(s):

The defense theme was the truth of the gist of the article as a whole: that the plaintiffs were using City property to benefit themselves and their companies in the operation of the Grand Prix race, that when they had debts to pay they used race proceeds to pay their companies and themselves first and did not pay the City, despite a lease with the City requiring a guaranteed annual rental and which prohibited or limited related party transactions. The balance of the article spelled out exactly whom the plaintiffs paid, for what, and their relationship to the companies paid. The plaintiffs' case ignored the truth of the details, and simply denied the broader statements taken out of context.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

The size and net worth of the Plain Dealer.

b. Sympathy for plaintiff during trial:

The plaintiffs were promoters and not particularly sympathetic.

c. Proof of actual injury:

The plaintiffs' presented testimony of an accountant/economist to support the plaintiffs' damage theory. This expert submitted grossly exaggerated figures for lost profits, extrapolated from the experience of the company which had succeeded plaintiffs in the management of the race. His estimate of damages essentially permitted the plaintiffs to recover the value of the race company twice. This witness attributed profits to the plaintiffs' operation, which had never shown a profit, based upon the experience of a different company, which had a different deal with the City and a larger amount of capital invested in the race. Defense motion in limine and trial objections directed to this testimony were denied.

The defendants called their own damage expert, an accountant, to challenge the plaintiffs' assumptions. The defense expert's basic premise was there was no way the plaintiffs' organization, with its stats and track record, could ever have been expected to show a profit.

Plaintiffs testified to their chagrin at being disparaged in the newspaper and offered some reputation damage evidence. This was not the focus of the case.

d. Defendants' newsgathering/reporting and trial demeanor:

Plaintiffs' counsel tried to paint a sinister picture of the defendant and its reporters, by innuendo and otherwise. The suit was brought shortly before the statute of limitations ran, and the reporter did not have his notes. Plaintiffs' counsel suggested that he systematically cut through his notes and destroyed the incriminating ones. The plaintiffs also argued that the publisher, a racing fan, set out to destroy the plaintiffs' ability to run the race so that Roger Penske (the succeeding operator) could buy the rights to operate it, because the publisher was a fan of Penske's and wanted to become tight with him. Defense counsel is not sure how much of this the jury bought.

e. Other evidence:

Plaintiffs testified that the "nut" paragraph and numerous other statements in the article were false. The plaintiffs' theory of the case was supported by the testimony of the psycholinguist, whom the defendants moved to exclude,

who supported the plaintiffs' claim that the meaning of the article was to charge them with skimming a million dollars and putting it in their own pockets, while claiming they couldn't pay rent to the City.

Both sides called journalistic practice experts. The plaintiff called David Jamison, a professor at Akron College with a law degree, whose journalistic background was advisor to the student newspaper. The defense called Timothy Smith, a professor of journalism at Kent State. Defense motions to exclude this testimony on the grounds that the issue was actual malice were denied.

f. Trial dynamics:

The judge generally allowed everything in and refused to attempt to control plaintiffs' counsel. The only things excluded were items significant to defense case, including the agreement under which plaintiffs sold the rights to the race to Roger Penske, in which the plaintiffs agreed not bring any litigation. The plaintiffs agreed to this provision after specifically discussing with Penske their contemplated litigation against the Plain Dealer. Opposing counsel was aggressive and offensive at times, and the judge did not significantly restrict his tactics.

Plaintiffs' counsel frequently attacked and insulted witnesses associated with the defendant. Objections to these tactics were rarely sustained.

g. Lessons:

Defense counsel concludes from jury interviews that the jury simply would not follow the instruction that "a publication must be read in context, and be considered as a whole." Counsel believes the defendant was convicted of writing an erroneous or misleading headline and nut or bullet paragraph, notwithstanding that they are easily understood if the reader peruses the entire story.

16. Results of jury interviews, if any:

Defense counsel interviewed most of the jurors. One of them made a comment which defense counsel interpreted to mean that the compensatory damages awarded were based upon economic losses established by plaintiffs' experts, and the punitive damage award was intended to cover general reputation damage, mental anguish over being in the newspapers, and being asked about the publicity by acquaintances. A second juror indicated that based upon the Plain Dealer's net worth, the verdict should not significantly bother them.

17. Assessment of Jury:

Counsel declined comment.

18. Post-Trial disposition:

Post-trial motions for JNOV and for new trial are still pending.

Plaintiffs' Attorneys: Jerome Kalur, Esq., Jacobson, Maynard, Tuschman & Kalur, L.P.A., Cleveland, Ohio.

Defendant's Attorneys: Louis A. Colombo, Esq., Baker & Hostetler, Cleveland, Ohio.

I. Doe v. Magazine

Los Angeles Superior Court (October 19, 1990)

NOTE: Counsel on this case prefers that the name of the case and the client not be used in reporting, a request with which I have abided because of counsel's cooperation.

1. Date of Publication: February 1982
Date of Verdict: October 19, 1990

2. Case Summary:

Plaintiff was an attorney employed as counsel for Kodak. The defendant published a February 1982 cover story on Kodak which described in a sidebar how Fuji Photo Film, rather than Eastman Kodak Co., became the official sponsor of the Los Angeles Olympics. The article did not name plaintiff, but said, "A Kodak attorney picking over contract language declared, 'After all, this is Eastman Kodak,' recalls [a source representing the Los Angeles Olympic Committee], 'it appeared to be a lack of enthusiasm, an arrogance.'" Plaintiff was subsequently fired by Kodak. The plaintiff sued the magazine for libel and Kodak for wrongful discharge. The wrongful discharge claim against Kodak was dismissed because plaintiff's employment was at will.

3. Verdict: \$ 1.6 million

Compensatory: All
Punitive: None

4. Length of Trial: Four weeks.

5. Size of Jury: 12

6. Significant pre-trial rulings:

The complaint was twice dismissed upon demurrer and summary judgment, based on the opinion defense, but the Court of Appeals reversed each dismissal.

Claims for interference and invasion of privacy, which were not legally sustainable under New York law, were dropped during trial. The claim for punitive damage was dismissed for lack of proof of actual malice at the end of the testimony. The trial court declined to rule whether a negligence standard or a gross irresponsibility standard (under New York law) governed until after the evidence was in, and then applied the gross irresponsibility standard.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict on elements of liability and damages.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Defendant's consultant prepared a psychological profile by submitting questionnaires to focus groups: one consisting of young blue collar workers, Democrats; the other being over-50 Republican middle American types. In identifying the ideal jury, the defendants looked primarily towards damage control and persons who were not inclined to award punitive damages.

9. Pretrial Evaluation:

Defendant thought it had a decent shot on liability, but knew that if liability were lost the verdict would be substantial based upon the plaintiff's loss of income. For this reason, defendant prepared and presented its own evidence on damages.

10. Defense juror preference during selection:

Counsel looked for people who would be concerned about out of control verdicts in civil cases. Under the California voir dire rules, liberal questioning is permitted and counsel could explore the juror's experience. They looked for people who had suffered or seen real injuries, so that they could put the kind of injuries complained of by the plaintiff in perspective; people who deal with complaints, such as nurses, department store complaint people and others were likely to have a jaundiced attitude regarding hurt feelings; hard-nosed accountants and others who would take a conservative approach to the calculation of damages; people who earn salaries as opposed to commissions or other "blue sky" compensation; people with respect for authority, such as police officers, two of whom were on a jury; military and ex-military types; people who had fired employees and would be sympathetic to Kodak's position; retired, fixed income types; intelligent white collar types but not emotional, artistic or creative types; America-first types, given the Kodak vs. Fuji competition for sponsorship of the Olympics.

11. Actual jury makeup:

The jury picked, surprisingly, was predominately well educated white collar. Counsel had assumed that such people would be sympathetic to First Amendment arguments, the plight of journalists facing deadlines, inability to prove or disprove any story beyond a reasonable doubt. From the liability verdict in this case, counsel concludes that intelligence and education do not necessarily increase a jury's propensities in this regard.

12. Issues Tried:

Fault (which was defined only after the evidence was in as gross responsibility under New York law); Causation (whether the magazine article caused the plaintiff's boss, general counsel of Kodak, to terminate him); Truth (did plaintiff's attitude cause breakdown in Olympic negotiations); and "Of and Concerning" (whether a reader could identify plaintiff as Kodak attorney).

13. Plaintiff's Theme(s):

Plaintiff argued that by refocusing the article on the plaintiff's role in the transaction late in the editorial process, without interviewing the plaintiff, the defendant falsely and recklessly attributed an unflattering statement and concocted a false emphasis of plaintiff's role in the transaction. Plaintiff also argued that the Olympic spokesman did not use the word "arrogance" in the interview with the magazine.

The plaintiff did not seriously argue that he was identified as the subject of the story to a large number of people, and did not seek damages for loss of reputation. Rather, he focused merely on those within Kodak who were responsible for his termination.

14. Defendant's Theme(s):

The defendant relied on information supplied by Olympic Committee representatives, and prepared the story responsibly. Defendant also urged strenuously that the article was not the cause of the plaintiff's termination. Defendant argued that article's gist was true, i.e., plaintiff contributed to Olympic Committee's rejection of Kodak sponsorship bid.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

The plaintiff was from upstate New York and there was no local bias against the defendant. Several of the jurors were

readers of the defendant magazine and the only possible problem was its respectability, which could tend to enhance damages and cause the jury to hold the defendant to a higher standard.

b. Sympathy for plaintiff during trial:

Plaintiff was not particularly appealing, but was sympathetic in his claim that he was unable to find employment as a lawyer at all for three years, and now was only employed at a much lower salary than he earned at Kodak.

c. Proof of actual injury:

The proof of loss was based entirely upon plaintiff's loss of employment benefits with Kodak, past and future.

In special verdict responses, the jury found "none" with respect to general damages to reputation and emotional injury, so the verdict was limited to loss of earnings.

Plaintiff's economist testified that plaintiff's economic losses were \$3.5 million. The defense expert testified they were \$500,000. The conflict between the two was based primarily on different assumptions regarding plaintiff's ability to mitigate his damages. The jury obviously discounted the plaintiff's expert testimony. It concluded that the actual losses were \$750,000 in past lost earnings, \$1.8 million for the future, for a total of \$2.5 million. The jury then reduced this award by \$800,000 for failure to mitigate, to arrive at verdict of \$1,600,000.

d. Defendant's newsgathering/reporting and trial demeanor:

Two reporters for the magazine investigated the failure of Kodak to obtain the sponsorship for the 1984 Los Angeles Olympics. One reporter's interview with Kodak was unproductive, in that Kodak declined to discuss the issue and refused to blame anyone. Interviews with the Los Angeles Olympic Organizing Committee indicated that Kodak had an attitude problem, that Fuji offered more money, that the loss of the deal for Kodak occurred partly as a result of conduct by Kodak persons involved before the contract negotiations stage in which the plaintiff participated. The reporter's initial draft of the story quoted sources accurately, except Olympic Committee's spokesman denied "arrogance" quote (but reporter's notes supported the magazine). Before publication, the Olympic Organizing Committee did send Kodak (but not the magazine) a letter stating that it would disown any statements attributed to it. The reporter testified that he attempted to cross-verify information from the LAOOC with Kodak, and this was undisputed. Another reporter testified that she verified the material with the press liaison for the Olympic Committee, who did not back off quotes.

The editor who reviewed the piece rewrote it substantially, which placed greater emphasis on the comment by plaintiff, and his role in the demise of the Kodak sponsorship. The editor did not then attempt to contact the plaintiff to get his comments. Reporter explained that he did not attempt to interview plaintiff because he did know his identity or consider article to be about him personally (as contrasted to Kodak generally). The editor also declared that he "didn't care" about plaintiff's name, which was played upon significantly by plaintiff's counsel. The editor had meant that once he knew the company wouldn't comment further regarding the breakdown of negotiations, he saw no need to further interview this individual. Obviously, the "I don't care" did not play well with the jury. The editor acknowledged that he knew that the article could adversely affect plaintiff's status at Kodak, because it was an unflattering portrayal of the plaintiff.

The jury apparently sympathized with the reporter, but thought the magazine erred in focusing on plaintiff, rather than other Kodak management, and that magazine should have identified plaintiff and published his side of story.

e. Other evidence:

Kodak's General Counsel testified that the article had nothing to do with his decision to terminate the plaintiff, but the evidence also showed that plaintiff had a good performance rating shortly before the article, that the occurrences relied upon the General Counsel for terminating plaintiff occurred before the performance rating, and that nothing occurred after the performance rating that reflected adversely upon the plaintiff. The termination occurred ten days after the article, and the article was the only adverse event after the favorable fitness report. The jury elected to disbelieve the General Counsel's testimony and relied on circumstantial evidence of causation.

Both sides called journalistic experts regarding standards of care, but neither side's presentation was particularly influential with the jury.

f. Trial dynamics:

The judge was intelligent and active in reviewing First Amendment issues but relatively passive in his refusal to rule on the standard of proof until after all the evidence was in.

Plaintiff's counsel was a seasoned trial lawyer who simplified the case for the jury but was not otherwise an active factor.

The jury was given a concurrent causation instruction which essentially told the jury that if the defendant's

article, combined with Kodak's conduct or misconduct in terminating the plaintiff and was a substantial factor, the defendant was liable for all of the plaintiff's damages, regardless of the extent of causation. Thus, although the evidence probably caused the jury to be more upset with Kodak's treatment of the plaintiff than the defendant's, the court's instructions permitted the jury to shift the burden of compensating the plaintiff to defendant.

g. Lessons:

The jury instructions on causation were problematic. Defense counsel feels there should be a way to show that if the article was the straw that broke the camel's back, damages should be limited to the role of that straw. The gist of the article, that Kodak, including its legal department, had an attitude problem, was true; to the extent that the editing process overemphasized plaintiff's role, it was not grossly irresponsible or the main cause of plaintiff's termination, and the damages should be limited accordingly.

Counsel would try to place more emphasis throughout the case on the standard of liability, try harder to obtain a pretrial determination of the standard and obtain mid-trial instructions. Counsel would also seek more evidence concerning Kodak's real reasons for terminating plaintiff.

16. Results of jury interviews, if any:

Defense counsel interviewed several jurors. The jury dealt first with the issue of causation, which under the court's causation instruction it resolved against the defendant. It then reasoned backward from causation to liability. They were apparently confused between the issues of "of and concerning," which relates to the understanding of "a" reader, and defamatory meaning, which involves the understanding of the "average" reader. It decided that a reader, i.e., the General Counsel, was also an average reader, and his understanding of article was sufficient to establish defamatory meaning, even if general readers would not have same reaction. Some jurors apparently reasoned that if the article caused the plaintiff injuries, it must be negative, defamatory, and false. Defense counsel feels that the detailed special verdict, with sequential determination of issues, was, surprisingly, more helpful to plaintiff than defendant.

Regarding the gross irresponsibility standard, the jury simply concluded that the defendant had not done what it should do, and indicated no awareness that gross irresponsibility requires more "fault" than negligence. The jury empathized only moderately with the plaintiff, who was perceived as something of a "wise guy." They found his wife was somewhat sympathetic. The jury concluded that the defendant, primarily the editor, acted unfairly in not interviewing the plaintiff and should do more to prevent the

harm. Defense counsel feels that other than the jury's inattention to the gross irresponsibility, causation and truth standards, the jury was perceptive and conscientious. For example, the jury had prepared charts of the sequence of events. It noted that there were 10 days between the article's publication plaintiff's firing, and the jury therefore dismissed Kodak's General Counsel's statements that the article had nothing to do with it. They seemed more irritated at Kodak than at plaintiff, but because of the Court's instructions, did not feel comfortable in passing the liability to Kodak.

17. Assessment of Jury:

The jury was unhappy with but not infuriated at defendant for not interviewing the plaintiff after making the editorial decision to emphasize plaintiff's role in the aborted negotiations between Kodak and the U.S. Olympic Committee.

18. Post-Trial disposition:

On appeal. Prior appeal, 159 Cal. App. 3d 478 (1984).

Plaintiff's Attorneys: Richard J. Archer, Archer & Hanson, San Francisco; Bruce S. Haber, David Brice Toy, Los Angeles.

Defendant's Attorneys: Geoffrey L. Thomas, Paul Hastings Janofsky & Walker, Los Angeles, California, (213) 683-6000.

J. Prozeralik v. Capital Cities/ABC, Inc. (WKBW-TV and WKBW Radio), Niagara Falls, N.Y. (July 10, 1991)

1. Date of Publication: May 7, 1982

2. Case Summary:

Plaintiff sued on a broadcast which misidentified plaintiff as the victim of an abduction and beating and said the FBI was "investigating the possibility" that the victim owed money to organized crime figures, and also sued on what defendant believed was a "correction" of the story. The defendant's reporter and anchorperson for the midday news broadcast sought to follow up a story broken the night before concerning the kidnapping, and contacted the FBI to confirm the identity of the victim, who had been described as a Niagara Falls restaurant owner. According to the reporter, the agent confirmed the plaintiff's name, telling the reporter that if he did not call back that morning she (the reporter) could consider the victim's identity confirmed as that of the plaintiff, who was a prominent restaurateur in Niagara Falls. The FBI agent admitted to having the conversation, admitted to being asked to confirm the identity of the victim, but denied that he confirmed the identity, that he promised to

call back if the identity was not confirmed or that he would ever do such a thing. On cross-examination, he did admit to some commitment to call back, but denied that the failure to call was to be deemed a confirmation. When the misidentification became known, the station carried a correction on its evening broadcasts which stated that, "The FBI earlier today said and confirmed the victim was Prozeralik, but our independent investigation is revealing he is not involved."

3. Verdict: \$ 18.5 million
\$8.5 million actual, \$10 million punitive.

Compensatory: \$ 8.5 million (\$4.0 million for reputation injury and emotional distress, \$4.4 million for pecuniary loss)
Punitive: \$ 10 million

4. Length of Trial: Seven weeks
5. Size of Jury: Six
6. Significant pre-trial rulings:

Motion for dismissal on lack of defamatory meaning.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict on liability and damage issues.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None.

9. Pretrial Evaluation:

Defendant declined to answer.

10. Defense juror preference during selection:

Well educated, if possible, to better understand the jury instructions under which the defendant in this case should not be liable, even though it erred. People with experience with the media, who watched and appreciated the news.

11. Actual jury makeup:

This jury was majority blue collar with two college educated persons.

12. Issues Tried:

Actual malice, damages.

The court instructed the jury that the second television broadcast, which defendant believed was a correction, as well as the first broadcast, was false as to the plaintiff.

13. Plaintiff's Theme(s):

Plaintiff urged that he was injured not only by the original publication, but by the correction, which he claimed left the false impression that plaintiff had been investigated by the FBI and was still being investigated in connection with possible organized crime connections. Much was made of the FBI agent's desire that he had confirmed the name.

14. Defendant's Theme(s):

The defense contended that the original error was, at worst, an honest mistake, that the retraction did not convey the impression complained of, and that the defendant did not intend or have reason to believe that such an impression would flow. Defendants gave equal emphasis to the theme that the plaintiff was not damaged by the broadcast, that the economic problems plaintiff encountered in financing the operating of his airline business were due to economic and other factors.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

The juries in this largely blue collar area are prone to high verdicts.

b. Sympathy for plaintiff during trial:

The plaintiff was a popular restaurateur in the Niagara Falls area and had success with a number of restaurants and hotels he had taken over, sometimes in a failing condition. At the time of the broadcast, he had started a small airline business, and was preparing a public stock offering to finance it.

c. Proof of actual injury:

Plaintiff called 20 more accurate witnesses on damages. All of them testified to the plaintiff's excellent reputation, but were weak on establishing damage to that reputation. None testified to having a lesser opinion of the plaintiff, or knowledge of negative changes in the plaintiff's reputation. Some had minor anecdotes about people discussing the broadcasts in local coffee shops and elsewhere with concern that plaintiff had organized crime connections. Plaintiff called expert and lay witnesses to testify that he suffered the failure of his airline business, due to the failure of the public offering, from which the plaintiff hoped to obtain cash

to purchase equipment needed to make the business profitable.

The court ruled that the evidence of lost profits was too speculative and not properly offered on behalf of Prozeralik, who was a shareholder of the corporate operation (not a party) of the airline, but nonetheless permitted the jury to award damages to the extent the airline was financially unable to recoup plaintiff's \$1.49 million investment, which the court told the jury was the maximum economic loss plaintiff could recover. During deliberations, the jury requested plaintiff's economist's calculations of the economic difference between leased and owned aircraft, which was relevant only to the lost profit damage calculation. The \$4.4 million economic loss award demonstrates that the jury did not follow the instructions.

Defendant called economic experts to testify that the plaintiff business would not have been profitable.

d. Defendant's newsgathering/reporting and trial demeanor:

In addition to the reporter's "confirmation" technique, counsel made hay of the fact that the defendant apparently misplaced the videotape of the first broadcast (but not the FCC audio tape), so that after the passage of the time, no one was able to say for sure whether the broadcast involved only a talking head or possibly background graphics of the plaintiff's restaurant or the like.

e. Other evidence:

Both parties called expert witnesses on journalistic practices. Plaintiff used Prof. Albert Pickerell, defendant used Prof. Doppelt from Northwestern. Plaintiff also called the general manager (at the time) of a competing station, who called the defendant's newsroom a "circus," and declared that one should never go on the air with one source (which Pickerell acknowledged is appropriate if the source is reliable).

Punitive damages went to the jury and the current post-network acquisition statement of Capital Cities was given to the jury. Plaintiff's counsel emphasized the relative "impact" of broadcast media, the fact that the broadcast was during a sweep period, that ratings affect salaries, bonuses, and other aspects of the pejorative "broadcast news" stereotype. In closing, plaintiff's lawyer asked the jury for \$25,000,000 in punitive damages, noting that based upon the Capital Cities/ABC P & L statement, this could be made up in 11 days, and urged them to send a message to the board of directors. The amount of punitive damages (after liability for punitive damages had already been determined) was determined in a separate bifurcated hearing, and the defense

urged that it was a very different company back in 1982, not to consider the network profits, etc.

f. Trial dynamics:

Defendant declined to answer.

g. Lessons: ??

16. Results of jury interviews, if any:

At least two jurors said they believed the plaintiff's reporter and believed that the FBI agent witness was lying. In finding malice on both publications, it is evident that at least these jurors did not understand or correctly apply the instructions.

17. Assessment of Jury:

It is likely that the jury was mildly angered by the aggravating factors in this case. More to the point, they were subjected to a seven-week trial, in which large numbers, particularly the millions in lost profits, were discussed in front of the jury repeatedly. It appears that this jury was conditioned more than angered into awarding a large sum.

18. Post-Trial disposition:

Motion for Judgment N.O.V. pending.

Plaintiff's Attorneys: Frank R. Bayger, Buffalo, N.Y.

Defendant's Attorneys: Earl K. Cantwell II, Andrea Moore, Jaeckle, Fleischman & Mugel, Buffalo, N.Y., (716) 856-0600; Marian Lindberg, Capital Cities/ABC Communications, New York, N.Y., (212) 456-6826.

K. Sprague v. Philadelphia Newspapers (Philadelphia Inquirer), Philadelphia Court of Common Pleas, April Term 1973 No. 3644 (May 3, 1990).

1. Date of Publication: April 1, 1973
Date of Verdict: May 3, 1990

2. Case Summary:

In 1973, defendant published articles linking plaintiff, then an Assistant District Attorney, to an apparent coverup in a 10-year old murder investigation involving the son of an allegedly close friend of plaintiff, which was not prosecuted because the plaintiff determined that the death was caused by a blow inflicted in self-defense. The article was republished in 1976, when the Inquirer sent a reprint to a commission headed by the plaintiff investigating the King and Kennedy

assassinations. At the first trial, plaintiff was awarded \$4.5 million (\$ 1.5 million compensatory and \$ 3 million punitive), but judgment was reversed and remanded for new trial.

3. Verdict: \$ 34 million

Compensatory: \$ 2.5 million
Punitive: \$ 31.5 million

4. Length of Trial: Ten weeks.

5. Size of Jury: Ten.

6. Significant pre-trial rulings:

Summary judgment motions were denied. The verdict in the first trial was reversed because the plaintiff was permitted to make an issue of defendant's reliance on confidential sources. The Court of Appeals reversed on this ground and ordered that the defendants could withhold these sources without inference.

However, the trial court made a number of pretrial evidentiary rulings which considerably affected the trial dynamics. The court precluded the defendants from offering expert testimony in the fields of prosecutorial investigation and legal ethics tending to establish substantial truth of the publications. The defense wanted to show that plaintiff's assumptions concerning the cause of death were not well taken and did not reflect good investigative judgment. The court also excluded the Pennsylvania Attorney General's investigation that concluded that although there was no basis for criminality, the defendant had failed to pursue indicated leads. Defendant also offered other evidence showing that the investigation was lax. All of this was excluded on the grounds that it pertained to information (much of which was in Sprague's investigative file) that was not shown to be known or reviewed by him in making his decision.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict on elements of liability and damages.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Defendant retained consultants, but there was no firm agreement concerning the ideal jury. Some thought it best to use people outside the political and legal process, who would be aware that no quarter would have been given their son had he been the subject of the investigation. Others thought more sophisticated people should be sought who could understand that the newspaper has a duty to point out unanswered

questions such as those involved in this case. Defendant did no former mock trials, but presented informal scenarios to ad hoc groups of employees and friends.

9. Pretrial Evaluation:

Given the results of the previous trial, a verdict of liability and damages in the range of \$5,000,000 was considered likely.

10. Defense juror preference during selection:

See paragraph 8.

11. Actual jury makeup:

Six men and four women, working class background.

This jurisdiction does not allow extensive voir dire, and it is not possible to learn very much about the jury's attitudes or background.

12. Issues Tried:

Substantial truth, actual malice, damages.

13. Plaintiff's Theme(s):

Plaintiff focused on the personality and newsgathering techniques of the defendant's reporter, Greg Walter, and the failure of the newspaper to control him. Walter, deceased at the time of trial, was shown to have had severe depression and drinking problems, including blackouts, all at the time of the articles. The reporter had also been convicted of wiretapping for recording his own conversations during newsgathering in a prosecution brought by the plaintiff. Thus, it appeared that the reporter was on a vendetta. The newspaper dealt with this by assigning another reporter to co-write the story, but this probably seemed too little. The reporter's methods were shown to be overly aggressive. Notwithstanding the wiretap conviction, he continued to record conversations surreptitiously. In one case, he told a source, who wanted to be off the record, that he was not taking notes, but he had a tape recorder on in his briefcase. The story was largely correct, but there were minor things wrong with it that were portrayed as efforts to shade, which, coupled with the horrendous journalistic practices, apparently infuriated the jury.

14. Defendant's Theme(s):

The defense contended it was raising legitimate questions about whether a prosecutor should handle a case involving the son of one of his friends.

The defendant attempted to focus the case not on journalistic practices in 1973, but upon the plaintiff's conduct in 1963. The defense theme was that there were so many unanswered questions in connection with this murder one had to wonder why a competent and aggressive prosecutor like Sprague would have left them unanswered. This, coupled with Sprague's friendship with the father of the suspect in the assault, left the Inquirer with no choice but to raise the obvious questions. However, the defense was severely restricted in presenting this aspect of the case by the pretrial rulings mentioned above and by trial rulings. For example, to show that there were holes in Sprague's investigation, the defense tried to bring out on cross-examination through police photos that the location of the body was inconsistent with the stories of the persons involved. The judge ruled that the defense could not use the photos because Sprague was not at the scene. Nonetheless, the photos were in the police file, and Sprague had testified that the police investigation was thorough. (Inconsistently, the judge allowed plaintiff to cross-examine editor Roberts for days concerning notes and documents of the reporter that he had never seen.) The result was that the defendant's persistent efforts to justify its story appeared arrogant and insulting.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Sprague was known as a tough prosecutor, respected, but not necessarily revered.

b. Sympathy for plaintiff during trial:

Sprague also was an experienced trial lawyer and superb witness. He was credible, and had a photographic memory that did not lend itself to inconsistency or impeachment.

c. Proof of actual injury:

None, except for the testimony of plaintiff and some of plaintiff's witnesses concerning emotional distress and reputation injury.

The evidence was primarily Sprague's testimony concerning his emotional distress and the disruption of his work with the King/Kennedy commission.

d. Defendants' newsgathering/reporting and trial demeanor:

The primary issue tried was the personality of the reporter and his newsgathering techniques. Sprague's case was a savage attack on the morality of the reporter; plaintiff introduced his psychiatric records which indicated depression

and drinking on the date of the publication. As a sampling of the range of evidence against the reporter: The reporter's wiretap conviction came from an investigation concerning the newly elected mayor, Frank Rizzo, former Police Commissioner. During the Rizzo campaign the reporter had written a provocatively negative article for another publication which the publisher refused to publish. Walter then went to work for the Philadelphia Bulletin. Even after the conviction, Walter continued to bug conversations in investigating Rizzo. (The wiretap prosecution for this activity was political, and Sprague testified he did not want to prosecute but was ordered to by the District Attorney.) The conviction resulted in a \$50.00 fine. The reporter was fired by the Bulletin but hired by the Inquirer.

The defense tried to shift the focus from its 1973 investigation (prompted by a tip from Sprague's ex-wife) to the unsolved questions regarding the 1963 homicide. The paper acknowledged Sprague's good reputation for good thorough investigations, but asserted that such was not done here, and asked why not? Thus, Sprague introduced much about how thorough and good he was in response to the defendant's questions; but then the defendant was not allowed to cross further concerning matters pertinent to this investigation, such as important clues at the scene that were ignored. The judge reasoned that Sprague was not at the scene, and believed that the only issue was whether Sprague knowingly engaged in a fix and, hence, the evidence was limited to things he actually knew at the time.

The jury was probably swayed by the fact that Walter's medical records showed that he was essentially a madman at the time. The tape recordings show how Walter was trying to move witnesses around. When the tapes are compared to the stories written, Walter's motivation is evident. For example, he called on (without warning) one person present at the incident ten years earlier, in front of that person's wife, and got him to talk. At first, this person denied something which he later admitted. From the tape it is very clear that this was a slip of the tongue, but the article questions his credibility. The editor did not review any of the tapes, and the coauthor only reviewed some of them.

The defendant's Executive Editor (not the editor of the story), Gene Roberts, was on the witness stand for 17 days, and in this role was out of his element. According to jurors' comments, they did not find him to be forthright. In addition, the defense was limited in that it was not allowed to discuss what it knew after the date of publication. Roberts was repeatedly asked whether in view of the actual facts, he did not now owe Sprague a retraction or an apology. Roberts was not allowed to explain why, on the basis of information known as of the present time, he did not feel he owed Sprague a retraction or an apology.

Undoubtedly, the court's blocking of the defendant's proof contributed to the jury's extreme anger at the defendant in not acknowledging its mistake and in continuing to attempt to justify the articles.

e. Other evidence:

The newspaper had a net worth of \$103,000,000 and a circulation of 2,300,000.

f. Trial dynamics:

Plaintiff's lawyer, James Beasley, was effective and well liked by the jury. The judge attempted to maintain even-handed control over the trial, but his rulings played into Beasley's hands and permitted him to appear to be in control and to inflame the jury in presenting his trial themes. The jury was obviously moved by Sprague, a powerful witness. They were visibly infuriated when one of the reporter's tapes was played and it was painfully apparent how he was leading or misleading sources into saying things the reporter desired.

Defense counsel thinks that any jury in this jurisdiction would be likely to award a large sum in view of the way things played at trial.

g. Lessons: ??

16. Results of jury interviews, if any:

Following the ten-week trial, the jury deliberated for all of two hours. After the verdict, as Sprague was leaving the courtroom, the jury called him into the deliberation room, where they shook his hand and hugged and congratulated him.

Counsel did not interview the jury, but an interview was reported in a July 1990 issue of Philadelphia Magazine.

One who asked not to be named reported that within minutes of entering the jury room the jurors each gave their opinions briefly and were prepared to vote. The juror speaking to the magazine asked the other jurors to consider the case in more detail, to "pick out something in the article they don't think is right." The response was, "We got good enough reason, let's go into money." The juror reported, "We never looked at the articles," but he was overruled by his fellow jurors.

Another juror, a 43-year old computer technician, was the lone holdout on the question of awarding compensatory damages. This juror was willing to award \$11,000,000, but couldn't see any basis for awarding compensatory damages, absent proof that the prosecutor had suffered financially because of the article. (Sprague had become successful in law practice after

the article, but evidence of his financial success was not admitted.)

According to the anonymous juror reporting to Philadelphia Magazine, the technician went home and discussed the case with his wife and was instructed by her, "He can never run for office." The juror the next day capitulated on the issue of compensatory damages, and the figure of \$2.5 million was determined, the jury calculating that this represented a dollar for each person likely to have read the main article. (This juror's conduct is one ground being asserted for appeal.) The Philadelphia Magazine article further reported that several jurors told the magazine that the jury decided to set punitive damages by multiplying the \$2.5 million figure by the number of years the suit had been in progress which was 17. But when that figure seemed too high, the jurors settled on multiplying \$2,000,000 by 17 for a total judgment of \$34,000,000, \$2.5 million in compensatory, and \$31.5 in punitive damages.

Concerning the verdict, the computer technician said, "You can't go to anything in that article and say 'that's a lie.' But you can go to the total article and say with the information the reporter had at the time, they should not have been leading the readers to this conclusion."

Five of the jurors reported to the magazine that they were much more impressed with Sprague than the editor Gene Roberts. One juror stated, "Mr. Roberts, he needs to go into another kind of work . . . if you could have heard this man up on the witness stand, you would have got up and slapped him yourself. This man ran around questions. He tried to avoid questions any way he could." However, another juror said, "Everybody took a disliking to Mr. Roberts, which I didn't think was fair. He is not executive editor of the Inquirer to act like this. He is an intelligent man." However, this juror also said, "I thought, 'He is treating us like we are five year old kids.' Like he was trying to pull something over our eyes." Concerning plaintiff's lawyer Beasley, one juror said, "He is just a beautiful lawyer." The jurors also said that lie detector tests relied upon by Sprague to bolster his case were deemed critical evidence (so that Judge's decision to exclude evidence questioning those results was significant). The juror who spoke anonymously said he felt bad about the jury's haste and the size of the judgment: "My opinion is, Mr. Sprague just wants an apology, which he is entitled to. I think the money is ridiculous." As for the jury, he said, "It was ten fools, I believe."

17. Assessment of Jury:

See above.

18. Post-Trial disposition:

On appeal. Prior appeal, 357 Pa. Super. 570, 516 A.2d 706 (1986), aff'd, 518 Pa. 425, 543 A.2d 1078, appeal dismissed, 488 U.S. 988 (1988).

Plaintiff's Attorneys: James Beasley, Ellen Suria, Beasley, Cagey, Collieran, Erbstein, Thistle & Kline, Philadelphia.

Defendant's Attorneys: Samuel E. Klein, Michael Levy, Kohn, Savett, Klein & Graf, Philadelphia, (215) 238-1700.

L. Srivastava v. Harte-Hanks Television, Inc.
(KENS-TV), Bexar Co. (Tex.) District Court No. 85-CI-15150 (May 15, 1990).

1. Date of Publication: Series broadcast February 1985.

2. Case Summary:

The plaintiff was a heart surgeon when, in 1985, he became involved with a political and economic dispute with local hospital administrators. The suit was based upon defendant's series of broadcasts reporting the revocation of plaintiff's privileges at two San Antonio Hospitals, which gave the details concerning the plaintiff's mishandling of several cases. The defendant's reports allegedly triggered an investigation by the state medical board, but this cleared the plaintiff of charges of unnecessary surgery. The reports, were based in large part upon information, including confidential medical reports, secreted by the plaintiff's secretary to the defendant's reporter.

3. Verdict: \$ 31.5 million.
(\$ 29 million before addition of
prejudgment interest)

Compensatory: \$ 14 million.
Loss of Earnings: \$1,750,000.
Loss of Earning Capacity:
\$5,000,000
Past emotional: \$1,000,000
Future emotional: \$500,000
Past emotional: \$1,000,000
Future reputation: \$1,750,000

Punitive: \$ 17.5 million.

4. Length of Trial: 12 trial days.

5. Size of Jury: 12 (10 may carry a verdict).

6. Significant pre-trial rulings:

Plaintiff was ruled to be a private figure. A motion for summary judgment directed to claims that the reporter acted properly in gathering and reporting information notwithstanding its protection under the Medical Practices Act was denied.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict interrogatories on liability issues, followed by a single finding of damages suffered by the "airing" of the broadcasts, broken down only into above elements.

This verdict form allowed damages to be awarded upon an olio of legal theories without segregating damages flowing from any false and defamatory statement.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

None.

9. Pretrial Evaluation:

The defendant felt liability was close going into trial, but feels that rulings by the trial court tipped the balance unevenly. The size of the verdict, obviously, was unanticipated.

10. Defense juror preference during selection:

Unavailable.

11. Actual jury makeup: N/A

12. Issues Tried:

Libel and false light privacy based upon negligence standard, disclosure of private facts privacy, intrusion, intentional infliction of emotional distress, and entitlement to punitive damages based upon the dual standards of actual malice and the state law "conscious awareness" standard. The jury interrogatories on defamation were in terms of whether the broadcasts caused ordinary persons to believe it was performing unnecessary surgery, was an incompetent heart surgeon, etc., and whether or not such were false.

13. Plaintiff's Theme(s):

That defendant did a hatchet job on plaintiff by intrusively gathering private information, known to have been provided by a source bearing a grudge, and publishing it without adequate investigation, and understanding of the

medical issues, and thereby creating the false impression that plaintiff knowingly performed unnecessary surgery and was an incompetent surgeon.

14. Defendant's Theme(s):

That defendant reasonably believed its initial source of information that lead to the investigation was legitimately concerned about harm to plaintiff's patients, that defendant truthfully reported the status and issues in proceedings against plaintiff, which were of significant public concern.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Not believed to be a factor.

b. Sympathy for plaintiff during trial:

The plaintiff himself was not overly sympathetic, but his wife and mother-in-law made very sympathetic witnesses.

c. Proof of actual injury:

The compensatory damage award of \$14,000,000 was consistent with the plaintiff's damage plea. Plaintiff claimed that he lost the ability to practice medicine as a result of defendant's broadcast. He claimed that his practice would have survived the two hospital suspensions, that he would have been able to practice at other local hospitals, and probably would have prevailed on appeal of the suspensions. He established the latter after his own testimony and that of his attorney in the proceedings, but not otherwise. Plaintiff offered economic evidence that the loss of his practice was worth in the range awarded.

The defense theory was that the damages were not caused by the broadcast, but by the facts being reported, including the suspension of the plaintiff's privileges. The defense was limited in that it was not allowed to show that the San Antonio Express News (largest circulation in Southern Texas) had reported the suspension in an article that preceded the broadcast. This evidence was excluded on the theory that the defendant and the newspaper were joint tortfeasors producing a common injury, and hence the evidence would not go to reduce damages awardable against the defendant.

Plaintiff called an economist who established loss of income from medical practice.

d. Defendants' newsgathering/reporting and trial demeanor:

The aggravating factor on the defendant's side was the reporter's tactics in gathering information from the plaintiff's secretary, when he knew that the information was privileged and its disclosure unauthorized.

The reporter obtained much of the information used from medical records secreted to him by the plaintiff's secretary. The secretary was a confidential source until approximately a month before trial, when the plaintiff happened to take her deposition and learned that she was the source. The secretary testified that she provided the information because she was concerned about the apparent problems in the plaintiff's practice, and the fact that he was continuing to practice notwithstanding the suspensions and concerns within the profession. The plaintiff presented evidence that the secretary's boyfriend had business dealings with the plaintiff and had a falling out, that the records turnover was done for revenge. It appears that the jury was angry over the reporter's utilizing this information, and that this was the primary aggravating factor.

e. Other evidence:

Journalistic practice experts.

f. Trial dynamics:

There were no key witnesses, rather, the outcome is the result of the cumulative effect of the evidence. The major factor was the trial judge who gave plaintiff free reign on evidence, but drastically limited defendant's evidence (for example, defendant could not show the Express News story shortly before the broadcast as an alternative source of damages either directly or in cross-examination of damage witnesses, as information relied upon to rebut fault or malice, or to cross-examine plaintiff's journalistic practice expert on the issue of "hot news"), and made prejudicial comments during the charge.

g. Lessons:

In hindsight, the defense counsel feels that too much of the defense presentation was aimed at defending the reporter's use of the information provided by the plaintiff's secretary, and not enough at attacking the apparent medical malpractice that occurred in many of the plaintiff's cases. The defendant recognizes that this approach has risks, but now questions the utility of attempting to justify the journalism involved in this case to a jury.

16. Results of jury interviews, if any:

Defense counsel interviewed one juror who indicated that the jury spent almost no time discussing liability. After one and one-half hours of deliberation, the jury asked for the plaintiff's economic expert's flipcharts. The juror did not discuss the jury's rationale concerning punitive damages.

17. Assessment of Jury:

Defense counsel feels that the jury was at least moderately infuriated at the defendant's newsgathering technique involved in this case, and for this reason accepted at face value the plaintiff's proven claim of damages, and awarded a nearly matching sum in punitive damages. However, the result on compensatory damages is not out of line with the plaintiff's proof, assuming that one bought the plaintiff's theory that the loss of income was caused by the publication as opposed to other factors.

18. Post trial disposition:

Settled, amount undisclosed.

Plaintiff's Attorneys: James Branton, Clayton Trotter, Carol Lomax, Branton & Hall, San Antonio.

Defendant's Attorneys: Mark Cannan, Laura Cavaretta, Lang, Ladon, Green, Coghlan & Fisher, San Antonio, (512) 227-3106.

M. Cramlet v. Multi-Media, Inc. (Phil Donahue)
United States District Court, District of Colorado, Civil
Action No. 80-C-1737 (Friday, May 13, 1983).

1. Date of Publication: April 1980

2. Case Summary:

Plaintiff was the mother of a child who was abducted by the non-custodial father. The father appeared on Phil Donahue to discuss the issue of mistreatment of fathers and non-custodial parents by the system in a panel discussion in which the father appeared in disguise. The Donahue producers arranged for the father to travel to Chicago, and to stay in a hotel under an assumed name, and arranged for a Donahue employee to babysit the child at an off-studio location during the taping. After the program was aired, the Donahue production staff declined to cooperate with the mother's efforts to locate the child. The mother sued on several theories, two of which were permitted to go to trial: Conspiracy to commit the tort of interference with a parent/child relationship, and intentional infliction of emotional distress through outrageous conduct.

The case was first tried in October 1981, resulting in a hung jury reported to be 5 to 1 in favor of Donahue (see attached article).

3. Verdict: \$5.9 million

Compensatory: \$1.7 million
Punitive: \$4.2 million

4. Length of Trial:

5. Size of Jury: Six

6. Significant pre-trial rulings:

Claims for negligence and actual interference with a parent/child relationship dismissed, claims brought by mother on behalf of minor child dismissed.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):

Special verdict on individual claims, but not elements thereof, and components of damages; opening statements given to venire before selection (second trial).

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):

Informal mock presentations, psychologist jury consultant employed and utilized during trial.

9. Pretrial Evaluation:

Even chance on liability, damages unpredictable.

10. Defense juror preference during selection:

Mature women likely to be among Donahue's audience, avoiding women with strong maternal instincts; males who are secure and satisfied, and unlikely to feel competitive with Donahue.

11. Actual jury makeup:

Juries in both trials consisted of working men and women who fit the pre-selection profile as far as defense counsel were able to determine under the limited court conducted voir dire in Federal Court.

12. Issues Tried:

Conspiracy to interfere with a parent/child relationship; intentional infliction of emotional distress through outrageous conduct.

13. Plaintiff's Theme(s):

Defendants, producers of a sensationalistic program, conspired and assisted the father in keeping the child from the mother, and acted outrageously, causing her severe emotional distress.

14. Defendant's Theme(s):

Defendants sought to utilize the father in this program to underscore the depth of feeling and difficulties associated with problems of child custody disputes that lead to parental kidnapping and the failure of the system to respond, all without in any way interfering with the status quo, or furthering the father's ability to elude the plaintiff; that the defendant's conduct was consistent with traditions of journalistic practice.

15. Factors Believed Responsible for High Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues:

Unknown.

b. Sympathy for plaintiff during trial:

A mother who has not seen her child for years and fears she may never see him again is obviously a sympathetic plaintiff.

c. Proof of actual injury:

None, other than plaintiff's testimony and her treating psychologist's testimony concerning emotional injuries.

d. Defendants' newsgathering/reporting and trial demeanor:

The defendants' conduct in producing the program was the focus of the plaintiff's case and the defense.

e. Other evidence:

In the first trial, the plaintiff offered the testimony of Robert Green of Newsday, and Daniel Shore of CNN, and others to the effect that the defendants' conduct here was consistent with the traditions of journalism in cooperating with and maintaining confidentiality with wrongdoers to obtain information for publication, without disturbing the status quo, in order to expose a larger societal problem. This testimony was permitted during the first trial, but rejected in the second. (See attached newspaper clippings.)

f. Trial dynamics:

The presiding judge in the first trial had a more favorable attitude towards the defense case than did the judge presiding in the second. The difference in judicial demeanor created an entirely different impression as to who was in control during the trial, and contributed to the alienation of the defendants in the second trial.

g. Lessons: ??

16. Results of jury interviews, if any:

See attached articles.

17. Assessment of Jury:

See attached articles.

18. Post-Trial disposition:

Shortly after the verdict was rendered in the second trial, the child was located and returned to the mother. A new (third) trial was granted, but the case was settled before it commenced.

Plaintiff's Attorneys: Timothy J. and Gregory A. Fasing, Denver, Colorado.

Defendant's Attorneys: Thomas B. Kelley, Cooper & Kelley, P.C., 1660 Wynkoop Street, Suite 900, Denver, Colorado 80202, (303) 825-2700.

N. Significant Cases Not Included (Either Because They Have Already Been Studied or Because Counsel Would Not Comment on the Record).

1. Bressler v. Time, Inc. (Fortune Magazine), United States District Court for the Eastern District of Tennessee (February 1991)

a. Case Summary:

Plaintiff was an engineer employed at a Tennessee Valley Authority nuclear power plant. The plant was accused of covering up safety violations concerning the piping in a reactor building. Defendants' story covered allegations that plaintiff pressured inspectors to approve pipes after they had been installed without being properly tested. The primary source, the chief inspector in charge, essentially recanted at trial.

b. Verdict: \$ 550,000

Compensatory: \$ 250,000 (reputation and emotional distress)

Punitive: \$ 300,000

Plaintiff's Attorneys:

Defendant's Attorneys: R. Louis Crossley, Jr., Long, Ragsdale & Waters, P.C., Knoxville, Tennessee, (615) 690-2144; Robin Bierstedt, Esq., Time Warner Communications, New York, New York (212) 586-1212.

2. Connaughton v. Harte-Hanks Communications (Hamilton, Ohio Journal-News)

a. Case Summary:

Plaintiff was candidate for municipal judge and defendant supported plaintiff's incumbent opponent. Defendant published front-page story one week before election quoting a grand jury witness in an investigation into bribery at municipal court as saying that plaintiff had used "dirty tricks" and had offered the witness and her sister jobs and a trip to Florida "in appreciation" for their help in the investigation. Jury found that the witness' charges against plaintiff were false.

b. Verdict: \$200,000

Compensatory: \$ 5,000

Punitive: \$195,000

c. Post-trial disposition:

Affirmed by Sixth Circuit Court of Appeals, 842 F.2d 825, and U.S. Supreme Court (9-0), 491 U.S. 657 (1989).

Plaintiff's Attorneys: John A. Lloyd, Jr., Cincinnati, Ohio.

Defendant's Attorneys: Richard L. Creighton, Jr. and Kevin E. Irwin, Cincinnati, Ohio; Lee Levine, Ross, Dixon & Masback, Washington, D.C.

3. DiSalle v. Pittsburgh Post-Gazette
Washington Co. Court of Common Pleas Sept.
1979 Term No. 367 (December 17, 1986)

a. Date of Publication: September 10, 1979
Date of Verdict: December 16, 1986

b. Case Summary:

Plaintiff was attorney in private practice who defendant reported was the subject of allegations of misconduct in drafting the will of a Pennsylvania millionaire, allegedly motivated by love affair with interested party.

c. Verdict: \$ 2.21 million

Compensatory: \$ 210,000
Punitive: \$ 2 million

d. Post-Trial disposition:

Affirmed, 375 Pa. Super. 510, 544 A.2d 1345 (1988),
appeal denied, 521 Pa. 620, 557 A.2d 724, cert. denied,
492 U.S. 906 (1989).

Plaintiff's Attorneys: Daniel Berger, (412) 281-4200.

Defendant's Attorneys: Fred Egler, Sr., 2100 The Lawyers Building, 428 Forbes Avenue, Pittsburgh, Pennsylvania 15219, (412) 281-9810 (Subst. for Tom McGough ((412) 288-3088)), who was conflicted out).

4. Haun v. NEC Microcomputer, Inc.
Santa Clara Co. Superior Court No. 175898
(May 20, 1985).

a. Case Summary:

Plaintiff was former sales representative of defendant who was terminated in May 1980. Defendant republished an electronics industry newsletter article about plaintiff's dismissal which implied that plaintiff was unsuccessful in managing his office. Plaintiff sued for libel, fraud, breach of contract.

b. Verdict: \$ 47.5 million (libel only; a total of \$61 million was awarded on all claims)

Compensatory: \$ 4.5 million (\$ 6 million on all claims).
Punitive: \$ 43 million (\$ 55 million on all claims).

c. Post-Trial disposition:

Libel award set aside by trial judge on June 4, 1985.

Plaintiff's Attorneys: Bernard J. Allard, Popelka, Allard, McGowan, Jones & Howard, San Jose.

Defendant's Attorneys: Conor D. Reilly, LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C. office, (202) 457-7500.

5. Newton v. NBC

United States District Court, Central District of California No. CV-88-5848-MDC (December 17, 1986).

a. Date of Publication: October 6, 1980 and other dates.

b. Case Summary:

Plaintiff was Las Vegas entertainer who asked known Mob figures to intercede to protect his daughter from death threats. Defendant in 1980 reported on plaintiff's connection with organized crime figures in relation to plaintiff's statements to state gaming officials during plaintiff's effort to purchase Las Vegas hotel-casino.

c. Verdict: \$ 19.3 million (reduced to \$ 5.3 million)

Compensatory: \$ 14.271 million
Punitive: \$ 5 million

d. Post-Trial disposition:

Reversed, 913 F.2d 652 (9th Cir. 1990), modified, 930 F.2d 662 (9th Cir. 1991).

Plaintiff's Attorneys: Morton R. Galane, Las Vegas.

Defendant's Attorneys: Floyd Abrams, Cahill, Gordon & Reindel, New York, (212) 701-3000; Rex Heinke, Gibson, Dunn & Crutcher, Los Angeles, CA, (213) 229-7000.

6. Pittard v. National Convenience Stores, Inc., \$640,000 actual, \$6.0 million punitive.

a. Case Summary:

b. Verdict: \$6.640 million

Compensatory: \$ 640,000
Punitive: \$6,000,000

c. Post-Trial disposition:

Plaintiff's Attorney: N/A

Defendant's Attorney: Edward C. Mainz, Jr., Thornton, Summres, Biechlin, Dunham & Brown, San Antonio, Texas, (512) 342-5555.

7. Tavoulareas v. Piro (Washington Post)
United States District Court, District of Columbia
No. 80-3032 (August 1982).

a. Case Summary:

Plaintiff was president of Mobil Oil. Defendant published story stating that Plaintiff set his son up in a business that received lucrative non-bid contracts from Mobil. Defendant's information came from Plaintiff's son-in-law, who was involved in bitter divorce with Plaintiff's daughter, and from Plaintiff's former business partner.

b. Verdict: \$ 2.05 million

Compensatory: \$ 250,000
Punitive: \$ 1.8 million

c. Post-Trial disposition:

JNOV reversed and judgment reinstated, 759 F.2d 90 (D.C. Cir. 1985) (2-1), but JNOV reinstated, 763 F.2d 1472 (D.C. Cir. 1985) (en banc) (7-1).

Plaintiff's Attorneys: John J. Walsh, Edwin D. Robertson, Joseph A. Artabane, Cadwalader, Wickersham & Taft, New York

Defendant's Attorneys: Irving Younger, Williams & Connolly, Washington, D.C.

8. Weller v. ABC, (KGO-TV) (Marin County Superior Court, No. 120451)

a. Date of Publication: February and March 1984.

b. Case Summary:

Broadcast implied that dealer in antique silver sold candelabras to museum that were stolen or sold at inflated value, resulting in dealer's "tarnished" reputation.

Jury found that defendants were negligent, and also that statements were privileged, but also found actual malice which defeated privilege. However, no punitive damages were awarded. The jury also found that a retraction was insufficient.

c. Verdict: \$2.3 million. \$1 million for mental suffering; \$500,000 for reputation (proven); \$500,000 for presumed damages to reputation; \$300,000 to corporate plaintiff.

d. Post-Trial disposition:

Affirmed, 232 Cal. App. 3d 991, 283 Cal. Rptr. 644 (1991).

Plaintiff's Attorney: Charles O. Morgan, Jr., San Francisco, California.

Defendant's Attorney: Linda Shostak, Morrison & Foerster, 345 California Street, San Francisco, California 94104, (415) 677-7000, Paul Pflum.

TV journalists defend Donahue's ethics

By CHARLES M. SEIGEL
News Staff

Two television journalists, one from Denver and the other a network news reporter, testified Wednesday that Donahue and his staff acted properly when they granted confidential status to a man who abducted his child and then appeared as a guest on the Donahue show. The reporters — former CBS correspondent Daniel Schorr and Pete Webb, now a public relations consultant who previously worked as a reporter at both Channel 4 and Channel 7 — said in Denver U.S. District Court they would have taken the same actions to protect the guest — his 3-year-old son, who the Donahue staff watched while the taping occurred. The testimony came near the end of the trial involving charges against Donahue's production company by the man's ex-wife, Willow Lynn Cramlet of 9642 W. 52nd Avenue in Arvada.

CRAMLET ASKED for \$10 million in the suit, claiming Donahue and his staff effectively hid her husband, who was fleeing an arrest warrant issued by a Golden district judge, and prevented her from finding her boy, Eland Cramlet Anderson.

The interview was aired April 10 and 11, 1980, on seven-minute "Donahue on Today" segments on NBC's "Today" Show.

Meanwhile Wednesday, Denver U.S. District Judge Zita L. Weinshienk dismissed two of the four claims made by Cramlet against the production company, Multi-Media Inc., of Cincinnati and dismissed Eland as a plaintiff in the suit.

Weinshienk ruled that only Cramlet could be a plaintiff because Eland's whereabouts and condition are unknown.

And she ruled that the six-man, two-woman jury won't be able to consider claims made by Cramlet that Donahue and staff had committed an injury to her and had technically participated in the abduction by continuing to permit it. The judge also voided claims of negligence.

CRAMLET STILL will be able to argue that the group committed conspiracy by helping Anderson keep Eland and not calling the police, and that they were guilty of "outrageous conduct."

She also tentatively approved the issue of punitive damages to be decided by the jury.

Schorr, a veteran CBS reporter who became senior correspondent for the Cable News Network in Washington

in 1980, testified that he believed the group's conduct was completely ethical.

Schorr said that during his tenure at CBS, he interviewed wanted felons and had given them confidentiality. He said he thought the issue of child-snatching was "illuminated" and that, "Nobody was better or worse off than before (the show) was done."

BUT SCHORR was criticized by Cramlet's attorneys for an incident which led to his reprimand by a U.S. House committee for releasing a classified document to the Village Voice, a New York City newspaper.

Webb, an investigative reporter during his time with the two Denver stations, said he thought the actions of Donahue and his staff were "not out of the ordinary."

And an expert in child-snatching who was a guest on Donahue's segment said he felt sure that Anderson was wanted by police, but didn't report him because he felt the value of his participation was worth it.

For the first time since the jury was selected Sept. 30, Donahue was present in the courtroom Wednesday.

He is expected to testify as the last defense witness Thursday, and the case could go to the jury as early as late Thursday.

Mistrial jury reported 5-1 for Donahue

By CHARLES M. SEIGEL
News Staff

The U.S. District Court jury deciding an Arvada woman's claims against talk show host Phil Donahue's producers was split 5-1 in Donahue's favor when a mistrial was declared, jurors said Tuesday.

"We knew on Friday (the first day of deliberations) that ... we weren't going to be able to change his mind," said one juror, who asked not to be identified.

The jury deliberated about eight hours — two hours Friday and six hours Monday — before Judge Zita L. Weinshienk declared a mistrial.

Unless the two sides agree to a settlement — Weinshienk urged them to do after the mistrial was declared — the case will be retried.

ANOTHER JUROR, Larry L. Unger, 32, of 409 E. 109th Ave., Northglenn, said the majority believed that attorneys for Willow Lynne Cramlet of 942 W. 52nd Place didn't prove that Multi-Media Program Productions Inc.

of Cincinnati, producers of Donahue's shows, had caused Cramlet any damage.

Neither juror reached by the News would identify the dissenting juror. One other juror was contacted by the News Tuesday but refused to comment, while the remaining three couldn't be reached.

Cramlet filed suit in November 1980, seven months after seeing Donahue interview her former husband, Wayne Ronald Anderson, in a disguise on the "Donahue on Today" segment of NBC's "Today" Show.

Anderson had kidnapped the couple's 3-year-old son, Eland Cramlet Anderson, three months earlier. A Golden district judge had issued an arrest warrant for violation of custody days after the kidnapping.

Anderson appeared on the two seven-minute segments aired April 10 and 11, 1980, disguised in a wig, glasses and a false mustache. While the shows were taped, Donahue's secretary watched Eland.

Donahue and his staff said during the trial that they didn't know where Anderson was or where he came from.

Donahue's producer, Wendy Roth, contacted Anderson through his mother in Goodland, Kan., who would give Anderson the message when he called.

The jury's five-member majority reportedly believed there wasn't any liability proven by Cramlet's attorneys against Donahue and his staff.

"WE THOUGHT SHE sued the wrong people," said Unger. "She should have sued Anderson's mother, or the Jefferson County court officials or maybe even her own attorneys."

And the other juror said he "didn't think Donahue had done anything to harm (Cramlet). ... They didn't prove the conspiracy (argument). They didn't do anything wrong."

Unger and the other juror said they were concerned with the issues of First Amendment privilege claimed by Donahue. Unger said he thought reporters didn't have a "blanket protection" in such cases but that the issue didn't reach the level of violating their protections.

The Denver Post Tuesday, May 10, 1983

Donahue Defense Is Barred

By JOHN TOOHEY
Denver Post Staff Writer

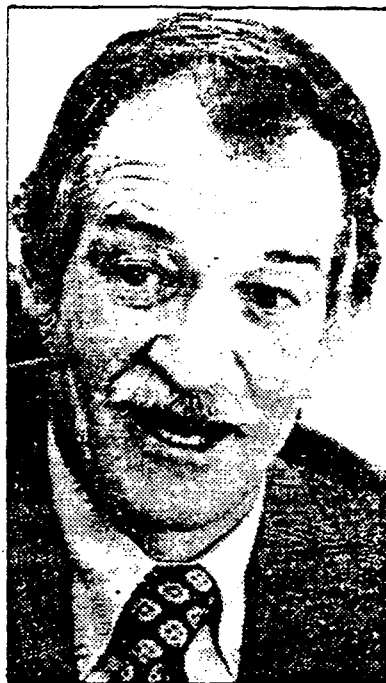
A federal judge ruled Monday that the producers of the Phil Donahue television program can't use the First Amendment or accepted journalistic ethical standards as a defense against a damage suit stemming from a 1981 show dealing with parental child-snatching.

The journalistic standards of ethics "are irrelevant in this case," U.S. District Judge Jim Carrigan ruled in granting a motion by lawyers for the plaintiff, Willow Lynn Cramlet of Arvada, to strike that defense.

Ms. Cramlet is suing Multi-Media Program Productions Inc., a Cincinnati corporation, for \$10 million in damages. She claims the firm and its Chicago production staff conspired to interfere with her custody of her 3-year-old son, Eland, and committed outrageous conduct in program production.

During a March 1981 taping of the television program, Donahue interviewed Eland's father, Wayne R. Anderson, who appeared in disguise and used the name "Joe." During the interview Anderson defended his taking of the boy from his Arvada home around New Year's Day 1980. The mother hasn't seen the boy since.

Her suit claimed the production company knew the father had taken Eland and was keeping the boy from his mother. The company's staff at Chicago rented a hotel



U.S. District Judge Jim Carrigan

room for Anderson, paid for his air fare and baby-sat the boy while the father was at the television studio appearing on the program.

The mother wasn't told of the visit and didn't discover the father had been in Chicago until a month later when the tape-recorded program was telecast nationally. Ms. Cramlet saw the program and immediately recognized her ex-husband despite the disguise. She tried unsuccessfully to get information from the production company until the suit was filed and pretrial discovery was held in late 1981.

In the company's defense, lawyer Thomas Kelley attempted to use testimony from three journalism experts that Donahue and the program production staff acted within the scope of ethical standards. That argument was thrown out by Carrigan.

The trial is expected to go to the jury today after final arguments from both sides.

Sat., May 14, 1983, Denver, Colo.

Rocky Mountain News—7

\$5.9 million awarded in Phil Donahue case

By MARK THOMAS
Rocky Mountain News Staff Writer

A Denver federal jury, agreeing that press freedoms don't permit participation in possible crimes, Friday awarded \$5.9 million to an Arvada woman who sued Phil Donahue's production company for withholding information on her kidnapped son.

Willow Lynn Cramlett claimed employees of Multi-Media Program Productions Inc. cared for her son Eland while her ex-husband appeared on two televised Donahue segments in 1981, just a few months after abducting the boy from her custody.

The broadcasts dealt with parental kidnapping and were seen by Cramlett, who testified that Multi-Media officials refused to give her any information on the whereabouts of her son and ex-husband.

Her former husband, Wayne Anderson, abducted Eland, now 6, on March 3, 1979. Anderson has been a fugitive since a warrant was issued for his arrest in 1981 by a Jefferson County judge, charging felony interference with child custody.

Cramlett's attorneys argued during the two-week trial that the producers refused to help the woman even though they knew Anderson had abducted the child. They said the case was similar to a reporter

holding a bank robber's loot while interviewing him.

Multi-Media attorneys said the producers were merely attempting to air a subject of wide national concern, and that the baby-sitting was nothing more than a professional courtesy. Donahue, who took the witness stand May 6, adamantly defended the decision to interview Anderson and noted that he would do it again.

The four-man, two-woman jury deliberated for nearly 1½ days before returning the verdict, which found for Cramlett on all three claims.

Donahue, who was present in the courtroom when the verdict was read by Denver U.S. District Judge Jim R. Carrigan, left the courthouse without comment.

Federal court observers said the \$5.9 million in damages was one of the largest awards ever returned by a federal jury in Colorado. The award contained \$1.7 million in actual damages, and what one attorney called "an unheard of" \$4.2 million in punitive damages.

The case first came to trial last fall, but ended in a mistrial when the five-woman, one-man jury was unable to reach a verdict.

Multi-Media attorney Thomas Kelly said



Willow Lynn Cramlett
Will use award to find her son

he was "disappointed by the adverse verdict, and shocked by the size of the award.

"Almost certainly there will be an appeal," Kelly said.

Cramlett's attorneys, Gregory and Timothy Fasing, said they believed the jury clearly saw that "where children and their families are concerned reporters are never immune."

Cramlett, who also has a 2-year-old daughter, said she realized it may be years before she receives any of the award money, but that if she ever does she'll use it to find her son.