1993 LDRC LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES
AND IDENTIFICATION OF COMMON FACTORS
BY TOM B. KELLEY

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PART I

Introductory Note

The is a report of resonses to a survey of recent libel verdicts in libel suits against media defendants. The case reports are based primarily upon interviews with defense counsel. The cases reported in paragraphs A through N are based upon in depth interviews. Those summarized in paragraphs O-1 through O-14 are not reported in as much detail. In many cases, I consulted persons other than defense counsel who observed the case, as well as available publicity concerning the case, including press interviews with jurors.

The survey endeavors to be exhaustive for cases tried against news media defendants (excluding supermarket tabloids) from January 1, 1992 through October 4, 1993. The survey also reports cases tried during 1991 that were not included in the prior survey but appear to be of interest. Research sources include *Media Law Reporter* news notes, Media and the Law and similar newsletters, Nexis, Lexis *Jury Verdict file, and* mailings to members of the Defense Counsel Section.

A. Anne Bauer v. Northwest Publications, Inc. (Duluth News Tribune), St. Louis County District Court, Minnesota, May 14, 1993, No. C1-92-600363, David S. Bouschor, J.

1. Date of Publication: January 27, 1992

2. Case Summary: Plaintiff, a free-lance writer, sued the newspaper after the newspaper apologized for a "smart shopper" column in which the writer detailed how to sell a home without a realtor. The apology stated that the column was unfair and did not meet the standards both readers and journalists expect of the newspaper, which it blamed on a "breakdown in the editing process." The claims based on the newspaper's publication were for libel and promissory estoppel, the latter alleging that the newspaper went back on assurances that it would stand by the writer. The apology did not mention the plaintiff's name or the words "she," "her," writer," "author," etc. Instead, the apology placed the blame on the newspaper in general. Plaintiff also sued for slander based on similar statements the newspaper's editor made to television, radio, and print reporters who inquired concerning the apology, but in which the editor emphasized that he personally did not see the article before it was published, implying that errors and bias in the column would not have occurred if he had.

The apology was published shortly after local realtors threatened to withdraw advertising from the newspaper in response to the column, which plaintiff claimed was the true motivation for the apology.

3. Verdict: For defendant. Special interrogatories concerning the elements broken down as follows: 1) falsity and defamatory meaning; 2) malice; 3) proximate cause and fact of damage; and 4) amount of damages. The jury answered no to the first inquiry and, as instructed, did not answer the others.

4. Length of Trial: 3-½ days
Length of Deliberations: 2 hours

5. Size of Jury: 6

6. Significant pre-trial and mid-trial rulings: Motion for summary judgment on defamation claims denied. The judge declined to rule that the plaintiff was a public figure before the trial started, and once it did start, plaintiff admitted that she was seeking presumed damages, so that the *New York Times'* rule applied regardless of plaintiff's status and the issue became moot. Promissory estoppel claim dismissed on defense motion for directed verdict.

The trial court also refused to dismiss Knight-Ridder, the parent company of the Duluth News Tribune, on the grounds that a Knight-Ridder corporate employee in Miami reviewed the apology before publication.

Under Minnesota law, a plaintiff may not demand punitive damages in the original complaint, but must seek leave from the court to do so after developing supporting proof. The court disallowed plaintiff's attempt to claim punitive damages, apparently on the basis that the plaintiff could not prove actual malice in support of them. The court's denial of the defense motion for directed verdict at the close of the evidence appears to have been inconsistent with the ruling disallowing punitive damages.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): None, except for special verdict described above.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None.

9. Pretrial Evaluation: Probable defense verdict on liability; no damages. The significant risk was the appearance that the apology was motivated by threatened loss of advertising revenue.

10. Defense juror preference during selection: Defendants would have preferred professionals, business executives and proprietors, who are well-educated and likely to understand the concept of opinion expression and its distinction from factual reporting. Unfortunately, as is generally true in St. Louis County (Duluth), the venire was dominated by public employees, union members, who are able to get off work for jury service with pay, unemployed persons, and retirees. Counsel also preferred younger jurors, believing they would be more liberal and likely to favor the newspaper's position in this case.

11. Actual jury makeup: 1) WM, late 20's, self-employed in fast food service business, 2 years vocational technical school; 2) WM, 50's, mechanic for heavy equipment leasing company, 9th grade ed; 3) WM, 70's, retired U.S. Steel worker, 11th grade ed; 4) WF, late 20's, receptionist in clinic, some business school after high school; 5) WM, late 30's, railroad engineer, BA Degree; 6) WF, late 30's, in-home nursing assistant, high school grad, late 20's.

This jury appears favorable in comparison to the usual profile (see paragraph 10), particularly insofar as the jurors are relatively young.

12. Issues Tried: Factual falsity; secondarily, actual malice. Much of the testimony focused on whether the newspaper "sandbagged" its contributing author. One of the lower ranking editors did not want to run the apology and expressed that view at trial. The defendant tried to use this testimony to support defendant's position that the decision to publish the apology was made independent of advertising revenue concerns, and that the views expressed in it were matters over which reasonable minds could differ.

13. Plaintiff's Theme(s): Plaintiff claimed the newspaper did not publish the apology because it really believed plaintiff's writing was unfair and inaccurate, but because of pressure from local realtors who were withdrawing their advertising.

14. Defendant's Theme(s): The apology was issued because the newspaper's editors had genuine concerns that the column was inaccurate and incomplete and not due to the withdrawal of advertising by realtors. The apology deflected attention away from the writer by assuming the responsibility and not mentioning the writer's name. The publication did not contain any false and defamatory

statement, but noted correctly that there were certain errors and flaws in the plaintiff's column and expressed the newspaper's opinions concerning those errors, largely assuming the blame itself.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Counsel detected no anti-media bias. All members of the jury were subscribers. All had seen media coverage they disagreed with, none had been the subject of a personal attack.

b. Sympathy for plaintiff during trial: Plaintiff was not particularly sympathetic; she appeared more arrogant, cocky, bitter and vengeful than mortified or distressed.

c. Proof of actual injury: None. Over several months after the defendant's publication, a dozen of plaintiff's pieces were published in three different publications. She claimed no economic loss or medical expense. She did not attempt to prove emotional distress or reputation injury, but relied on the doctrine of presumed damages.

d. Defendants' newsgathering/reporting and trial demeanor: Defendant's work in preparing the apology was without blemishes. When the apology was drafted, it was read to the plaintiff. The plaintiff was livid, retained an attorney, and issued a threat on the Saturday before the scheduled Monday morning publication. The newspaper's lawyer cleared the story that Sunday, and in that process removed the references to plaintiff. (The defendant offered evidence of the fact that the story was lawyered, the changes, but did not waive the privilege.)

The biggest potential blemish on the defendant's position was the appearance that the apology was published to try to reverse a downturn in advertising revenue from the real estate industry. This revenue was approximately $200,000. Even though the promissory estoppel claim was dismissed, there was a potential inference of misrepresentation. As the plaintiff was preparing her column, people from the real estate industry got wind of it and started screaming at the advertising department. Thus, the evidence was that the newspaper knew its advertising clientele was upset, but the editorial department nonetheless assured the plaintiff that they would "stand behind her."

The defendant took great care to show how an editorial department worked independently of the financial end of the newspaper.

There was testimony from one newspaper employee that the editor of the newspaper, in approving the column concerning realtors, instructed that the column be factual rather than an opinion piece. The plaintiff's column as published was very much an opinion piece. This lack of communication between two levels of editing was used by the defendant to support defendant's position that it was motivated by concerns over breakdowns in its own editorial process.

e. Experts: Defendant called an expert in journalism who testified to the traditional separation between the editorial department and the advertising and financial departments of the newspaper, and the independence of the former, as to matters of both news and opinion.

f. Trial dynamics:

i. Plaintiff's counsel - competent and reasonable.

ii. Defendant's trial demeanor - defense counsel felt in control of the trial.

iii. Length of trial - not a factor.

iv. Judge - avuncular, maintained control and decorum in the courtroom. In Minnesota, all examination is conducted while seated at counsel tables, leaving little opportunity for histrionics.

g. Lessons: As to the publication in issue, the newspaper had been presented with a tough judgment call and elected a course of action that was predictably controversial, not only with this libel plaintiff, but with other media who criticized the newspaper derisively. The newspaper felt compelled to defend itself. Counsel would have maintained more control over statements made outside the newspaper by editors, which seemed to exacerbate plaintiff's hostility.

16. Results of jury interviews, if any: None.

17. Assessment of Jury: An unusually good jury for this venue.

18. Post-Trial disposition: Defendant agreed to waive costs in exchange for a release of appeal rights.

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B. Charlotte Covey et al. v. Detroit Lakes Printing Co. (Detroit Lakes Tribune), Clay County (Minn.) District Court, No. C6-91-271, December 9, 1991, Kathleen Weir (no relation to defense counsel), J.

1. Date of Publication: July 20, 1989

2. Case Summary: Defendant weekly newspaper published an article about local reaction to a murder in Lake Park, Minn. Although the murder occurred outside Curtis Covey's trailer, the article did not identify anyone by name, other than to refer to the "Covey Clan" and the "Covey home" as the site of wild, nightly parties, and anonymous statements expressing local fear of "the Coveys." The plaintiffs were Charlotte Covey, Curtis' sister, and her three sons, who were trying to live a normal life in another part of town. After receiving complaints from plaintiffs, who were relatives of Curtis Covey, defendant published a retraction in its sister newspaper Sunday edition (with 3x greater circulation) stating that article referred to Curtis Covey's trailer and apologizing for confusion about identity. Plaintiffs then sued for negligent defamation, infliction of emotional distress, and libel per se. Trial court directed verdict for defendant on all claims but negligent defamation, including the claim for punitive damages.

3. Verdict: For plaintiffs $100,000: Charlotte Covey, $20,000 for reputation injury, $20,000 for emotional distress; each of the three children received $10,000 for reputation and $10,000 for emotional distress. The jury returned a special verdict in which it answered 21 questions on liability and damage issues. Over defense objections, the court instructed the jury to complete the entire form even if it found against the defendant on one or more of the liability questions. During deliberations, the jury reported itself deadlocked 6-2, and the parties agreed to accept a majority verdict. As it turned out, the jury was 8-0 for the defense on "of and concerning," 6-2 for plaintiff on negligence and other issues. It was understood that a finding for the defense on the "of and concerning" issue would result in the court entering a judgment for the defense.

4. Length of Trial: 3 weeks

Length of deliberations: 14 hours.

5. Size of Jury: 8

6. Significant pre-trial and mid-trial rulings: Plaintiffs were held to be private figures to whom simple negligence standard applied. The article was held to involve a matter of public interest, and punitive damages were dismissed at the close of plaintiffs' case.

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

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None.

9. Pretrial Evaluation: Probable defense verdict on quotes "of and concerning" issue.

10. Defense juror preference during selection: High as possible on the intelligence, education, and economic scales.

11. Actual jury makeup: Female, 57, homemaker; male, 32, carpetlayer; female, 38, nurse; male, 27, logger; female, 21, orthopedic care assistant (wife of dairy farmer); male, 21, inventory stocker; male, 28, grain elevator employee; female, 40, operating room aid.

12. Issues Tried: "Of and concerning," falsity, negligence.

13. Plaintiff's Theme(s): Charlotte Covey was a single mother trying to raise her three boys in a small rural community, heretofore untainted by her reprobate brother. By referring to the brother's nefarious den as the home of the "Covey Clan," the newspaper negligently defamed the plaintiff and her family. The article even contained negligent errors concerning Curtis Covey.

14. Defendant's Theme(s): The article could not be interpreted by any reasonable persons as referring to the named plaintiffs. The article pertained to a public concern on which the newspaper had a duty to report which it did in good faith.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: The case was tried in Clay County (Moorhead, Minnesota), the county adjacent to Becker County, of which Detroit Lakes is the county seat. The *Detroit Lakes Tribune* is owned by the Forum Publications Group, which owns the major daily newspaper in the Fargo-Moorhead area, as well as other newspapers and a television station in the area. The predominant position of the newspaper as opposed to the plaintiffs may have pre-disposed the jury towards sympathy for plaintiffs.

b. Sympathy for plaintiff during trial: The plaintiff came across as meek, diffident, and frightened by the judicial process. The testimony of the plaintiff and her three sons as to their efforts to live good lives, untainted by the bad reputations of other members of the family, and their humiliation at the newspaper articles, created significant sympathy. Plaintiff mother said she was so nervous she "scratched her arms into open sores." Defense counsel attempted to maintain a light touch in dealing with the plaintiff on cross-examination and in argument to the jury, acknowledging she had tried all of her life to do right by her boys. Counsel got the plaintiff and the boys to admit that people who knew them would not believe the article was about them but would know it was about the "black sheep" brother. Whatever counsel managed to get out of the plaintiffs on cross-examination was probably at least offset by the appearance that the contest between counsel and these witnesses was unfair.

c. Proof of actual injury: None, except for plaintiffs' testimony as to humiliation, and friends' testimony concerning the same and

reputation injury. All of these people also admitted that they never believed the article was about the plaintiffs. None of the plaintiffs had seen any kind of health care professional.

d. Defendants' newsgathering/reporting and trial demeanor: The defendant used a summer intern to investigate and report this story, arguably without enough supervision. The topic was arguably questionable, since the murder mentioned was four days old, and the real subject of the article was the rowdiness of some members of the trailer court, and inability of other residents of the trailer court to get support from the police in dealing with the problem. The editing arguably should have flagged the vague reference to the "Covey clan." A female reporter testified she read the first draft, told the editors not to run it because "it's unconscionable" and after said to the editor "if a paper could be and should be sued, it's us regarding this." She said the editor called Detroit Lakes the "armpit of civilization" full of "hayseeds and idiots," and said, "if you've never been sued at least once for libel you're not doing your job." Defendants were forced to attack this witness, who was a reporter for the defendant at the time of the publication.

e. Experts: Plaintiffs called Melva D. Moline, Assistant Professor, Deputy Mass Comm., Moorhead State University, Moorhead, MN, on journalistic practices; the defense called Thomas B. Connery, Ph.D., Associate Professor of Journalism, University of St. Thomas, St. Paul, MN.

f. Trial dynamics:

i. Plaintiff's counsel - Plaintiffs' counsel was quite flamboyant and frequently resorted to "golden rule" arguments. As an example, counsel was admonished not to go into the defendants' financial holdings, but nonetheless asked a representative of Forum Publishing Group about its extensive newspaper and television holdings in the Fargo-Moorhead area. Even though punitive damages were dismissed at half-time, counsel made the usual punitive damage arguments.

ii. Defendants' counsel - Both defense counsel are experienced trial attorneys. Defense counsel did their best to treat all of the plaintiffs sympathetically. Defense counsel were aggressive in dealing with plaintiffs' witnesses and did get them all to admit that they understood that the article referred to plaintiffs' relatives and not to the plaintiffs.

iii. Judge - Counsel declined to comment.

g. Lessons: Counsel was startled by the jury's willingness to award large sums of money without significant proof of actual injury.

In hindsight, defense counsel would have worked harder to treat the plaintiffs more sympathetically, and pushed harder for control of the trial from the judge.

16. Results of jury interviews, if any: Counsel did not interview the jury. After the court entered judgment for defendant, two of the jurors wrote the court and asked for a new trial, declaring that they understood they were awarding the plaintiffs $100,000.

Well after the trial, one juror discussed the case with a representative of the defendant newspaper. The juror claimed he was one of the two hold-outs for the newspaper on the negligence issue. This juror indicated that the jury was not significantly angry, but the six jurors who awarded $100,000 felt the newspaper was in the wrong and that the plaintiffs were abused.

17. Assessment of Jury: Counsel was surprised at this jury's willingness to award such a large sum of money without any real proof of injury. Counsel suspects that while the jury was not significantly angry, it felt that this was

a story that was sloppily prepared, and that the plaintiffs had been wronged.

18. Post-Trial disposition: Court granted judgment for Defendant because of jury's finding that article was not "of and concerning" Plaintiffs. Affirmed by Minnesota Court of Appeals, 490 N.W.2d 138 (Minn. App. 1992).

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C. Garrett Frey v. Multimedia, Inc., U.S. District Court, Southern District of Ohio, Civil No. C-1-90-852, February 3, 1993, Herman Weber, J.

1. Date of Publication: December 12, 1989.

2. Case Summary: Plaintiff sued for defamation for broadcast over WLWT-TV 5 Cincinnati, concerning investments by the Sisters of Charity of Cincinnati in Charles Keating's failed American Continental Corp. The report stated that Garrett Frey, a local broker and member of the Sisters of Charity Investment Advisory Committee, had been brokering stock in Keating's company for years and "may be responsible for making that investment singlehandedly [and] . . . may have bypassed the religious order's financial advisory committee in the process." The correspondent quoted Sister Mariana Coyle as stating "the bonds looked at the time like a good and prudent investment," but then added "even so, my source says the purchase was presented to the [Sisters of Charity Investment] committee as *fait accompli*, a done deal." The reporter also said that he had contacted Frey but Frey declined to comment.

3. Verdict: For defendant, a special interrogatory finding no falsity; jury did not reach other issues.

4. Length of Trial: 3 weeks
Length of deliberations: approximately 5 hours

5. Size of Jury: Seven (originally eight, no alternates, one lost during trial due to child care problem).

6. Significant pre-trial and mid-trial rulings: Motions for summary judgment on issues of public figure and libel-proof doctrine denied, plaintiff ruled to be a private figure; court applied Ohio shield law, which protects source's identity but not information provided, to preclude discovery questions that would narrow the field.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Oral charge, as well as written charge, which, with special verdict form, was given to jury before summation, upon agreement of counsel. The court permitted plaintiff's counsel to pursue inquiries that repeatedly required the reporter to claim the privilege, but then it instructed the jury that it could give no evidentiary weight to the refusals to respond, and the proper assertion of a privilege could not be penalized.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Both court and counsel's jury

questionnaires were completed before *voir dire*; no mock trial or professional profile work.

9. Pretrial Evaluation: Counsel believed that because of the confidential source problem, it was useful if not extremely essential to obtaining a defense victory that the defendant show the jury that the publication was substantially true. Counsel felt reasonably confident that they could do so, and also demonstrate that the station acted responsibly.

10. Defense juror preference during selection: Defense counsel sought people not likely to be blasé about the amounts of money involved. They avoided sophisticated investors and the various types that sit on charity boards who would find the rubber-stamping that occurred by this board to be not out of the ordinary. The defense looked for people most prone to be offended by evidence demonstrating the plaintiff's penchant for putting investors into junk investments. The defense team thought the young jury picked would tend to sympathize more with the young reporting team, and not be unduly sympathetic to a plaintiff who lost his livelihood in his mid-50's.

11. Actual jury makeup: All White, (as were plaintiff and defense representatives) 4M, 4F. One juror was lost during trial because of child care difficulties, concluding with seven jurors. School teacher, teacher's assistant, sculptor, unemployed laborer, probation officer, warehouse foreman and engineering supervisor.

12. Issues Tried: Truth, as evidenced by the fact that this was the only special interrogatory question answered. However, the jury heard the entire case on negligent, actual malice, compensatory and punitive damage issues.

13. Plaintiff's Theme(s): The bonds purchased for Sisters of Charity were handled no differently than any other investments; the Financial Advisory Committee approved it and no member ever questioned it. The paperwork from the clearing agent shows that the purchase was initiated and settled after the Financial Advisory Committee meeting. (Actually these records showed that the purchase was initially done before the meeting, to be settled the date of the meeting, and the transaction was delayed due to the need for a corrected trade confirmation deleting an improper interest charge. In response to this, the plaintiff testified to a conversation with the Sisters of Charity staff member on the Financial Advisory Committee, who died before he could be deposed, in which this person agreed that the bonds were a good investment and authorized Frey to go ahead with the paperwork.) Thus, plaintiff claimed, the broadcast falsely and irresponsibly alleged that plaintiff may have "bypassed" the Financial Advisory Committee when it was not bypassed at all.

14. Defendant's Theme(s): The broadcast was prepared by a seasoned team of experienced reporters, who spent two months working on related stories concerning failed Keating investment schemes. The team did a conscientious job of preparing this story, which the evidence shows is substantially true; this claim exemplifies plaintiff's track record as a finger-pointer, wherein plaintiff has repeatedly blamed business reversals and adversities on newspapers and others, refusing to accept responsibility himself.

15. Factors Believed Responsible for Defense Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Defense counsel did not believe that any particular pre-existing social, economic, political or other issues affected the venire, nor is there any apparent anti-media bias in Cincinnati. Some, but not all, of the jurors were aware of the controversy surrounding Charles Keating's ventures.

b. Sympathy for plaintiff during trial: Frey had his sympathetic moments. His creditors had foreclosed upon his house during the first week of trial, the anguish of which he described to the jury. Frey had a track record of work for Catholic charities, and described himself as a daily communicant, now a ruined man who now had nothing left but his faith, at which point he burst into tears. This played well the first time, but when

it occurred a second time, it appeared contrived. On the other hand, Frey was hostile in the face of defense counsel's questioning, and would not answer questions until forced by reference to documents and deposition transcripts. At one point he called Sister Mariana Coyle, president of the Sisters of Charity, who confirmed that she was accurately quoted in defendants' report, a "liar." All of this aided in the jury's acceptance without offense of defendants' evidence of Frey's finger-pointing propensity and testimony concerning questionable brokerage practices. Frey also denied any memory that the station's reporter called him on this broadcast, although he admittedly had been called on other Keating-related issues. To the surprise of all, Frey also claimed at trial, for the first time, that immediately after the broadcast on the 11 o'clock news, the reporter called him asked, "how did you like the broadcast?" The reporter testified that he has never made such a call after a broadcast and did not in this case. This credibility joust clearly weighed in the defendants' favor, and rendered other testimony from the plaintiff suspect.

c. Proof of actual injury: Plaintiff claimed that after the broadcast, the telephone stopped ringing and he was out of business. He offered the testimony of a economist who projected from plaintiff's prior ten year's earnings what he would have made in the future, and came up with a number in the range of $7 million. The plaintiff, due to failure to meet capital requirements in Ohio, lost his license within three weeks of the broadcast. The problems that led to the license suspension had been building for some time, but the timing created a causation issue. Plaintiff and supporters also testified to general reputation injury and plaintiff's emotional distress.

d. Defendants' newsgathering/reporting and trial demeanor: Other than defendants' reliance on a confidential source, without which they were hampered at trial, the defendants' reporting team looked good in terms of competence, experience, and conscientiousness on this particular report. Defendants were able to show that their the reporters had reason to believe the broadcast on the basis of information received from nonconfidential sources. The members of the Sisters of Charity Financial Advisory Committee could not recall that anything was unusual about the approval of this investment and, thus, did not support the "bypass" allegation. However, the paper trail on the transaction clearly showed that the purchase was initiated before it was presented to the Financial Advisory Committee.

e. Experts: Neither side called an expert on journalistic practices. Defendant called an expert on securities trades to explain the process and to debunk the plaintiff's story. Both sides called damage experts.

f. Other evidence: The defendants offered numerous articles in the local press regarding Frey's involvement in selling various investments in Keating ventures, which were allowed on issues of damages and causation. These also lent support to the defendants' effort to "desympathize" the plaintiff. Plaintiff played videotapes from WLWT-TV5 broadcasts not in issue, which might have had the same effect. Defendants called half a dozen character and reputation witnesses consisting of investors, and former investment clients of plaintiff's, who testified about plaintiff's track record for dumping junk investments on clients (neighbors and another charity board members testified that Frey had on other occasions played it fast and loose with investment decisions). The use of this evidence was a calculated risk that proved to be well advised.

g. Trial dynamics:

i. Plaintiff's counsel - plaintiff's counsel could be described as aggressive and pompous, possibly as a result of celebrity status resulting from his Connaughton victory. The proof did not live up to assurances in plaintiff's opening that Sister of Charity witnesses would deny the truth of the broadcast. Counsel also repeatedly referred to defense witnesses with the epithet "liar," which played into the defendants' finger-pointing theme.

ii. Defendant's trial demeanor - defense counsel attempted to appear prepared, credible and fair, and believed they were reasonably successful.

iii. Length of trial - the length of trial did not appear to inflate the jury's perception of the scope of the case and, therefore, was not a factor.

iv. Judge - the judge, in pretrial hearings, used terms such as "junkyard dog journalism" and "irresponsible" to describe the defendants' broadcast. However, during trial, he was neutral, consistent, and did not permit either counsel to exercise any undue control of the courtroom.

h. Lessons: The trial confirms counsel's view that success with a jury requires the defendant to demonstrate the substantial truth and fairness of the publication. In this case, counsel were faced with rebuilding a story because of their inability to rely upon a confidential source in the principal defamatory allegation. In that regard, counsel relied primarily on documentation (e.g., trade tickets, confirmation slips, wire instructions), obtained from plaintiff's brokerage firm, the brokerage clearinghouse and the bond underwriter, to establish that the subject bonds were purchased by plaintiff for the Sisters of Charity prior to the meeting of the Sisters' Investment Committee.

16. Results of jury interviews, if any: None. Court order prohibited counsel from initiating contact with jurors.

17. Assessment of Jury: Defense counsel believes that the jury picked fit its profile of the best jurors and believed the result tends to confirm their juror preference.

18. Post-Trial disposition: Plaintiff's post-trial motions denied, notice of appeal filed September 8, 1993.

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D. James M. Furgason v. Donrey Media Group d/b/a Alamogordo Daily News, Otero County District Court, New Mexico, No. CV-87-36, November 12, 1991, Robert M. Doughty II, J.

1. Date of Publication: January 23, 1987

2. Case Summary: Plaintiff James M. Furgason owns Fergi's Pub in Alamogordo and was a member of the Alamogordo Mayor's Committee on Driving While Intoxicated and Alcoholism. Furgason's home was burglarized and, among other things, his wallet and a pistol were taken.

Several weeks later, Clausen, a reporter for *Alamogordo Daily News*, saw a police daily arrest report that one James M. Furgason, residing at 1407 Rockwood Drive (plaintiff's home address), was arrested for paint sniffing and carrying a concealed weapon. Clausen confirmed Furgason's name and home address with other city records that reflected his participation on the Mayor's

committee. He also confirmed with police that the address and identity of the person being detained by police on duty were that of the owner of Fergi's Pub.

Clausen also had a police "Crimestoppers" report concerning the Furgason home burglary that said items stolen included Furgason's wallet and a .357 magnum. The reporter asked police about the possibility that the reported theft of the gun was an insurance scam, but police discounted it because the gun reported missing was different from the one found on the arrestee.

Arraignment was set for 10:00 a.m. but was subsequently delayed twice and did not occur until approximately 3:00 p.m.
The newspaper's editorial deadline was 11:00 a.m.

The news story, which was published on the back page of the first section of the Friday newspaper, reported that James M. Furgason had been arrested for paint sniffing and carrying a concealed weapon, as reflected by the arrest report, and contained the further information that Furgason was the owner of Fergi's Pub and served on the Mayor's Committee on Driving While Intoxicated and Alcoholism.

During the press run, which started shortly after 12:30 p.m., a circulation employee who was a friend of Furgason's advised the sports editor, who was the only person in the editorial department at that time, that the article appeared to be in error because Furgason had been seen at his bar the night before. The press continued to run as the sports editor recontacted the police. She told the duty officer that *News* employees had seen Furgason at his bar the night before; the duty officer reconfirmed the identity of the arrestee and responded "they must be drunk, cause he is in jail."

Later on Friday afternoon, at the arraignment and after the arrestee had identified himself as "James Furgason", the police realized that the arrestee apparently had been carrying plaintiff's wallet and had altered his driver's license, but was not Furgason, and so advised the *Daily News*. By this time the press run had been completed. The newspaper did not attempt to halt distribution, but published a front page retraction on the following Sunday, since the paper does not publish on Saturday.

3. Verdict: $5,700,000

   Compensatory: $700,000

   Punitive: $4 million against newspaper, $1 million against reporter

4. Length of Trial: 7 days

   Length of deliberation: 3-½ hours

5. Size of Jury: 6

6. Significant pre-trial and mid-trial rulings: Summary judgment was granted on the grounds that the publication was protected by the Fair Report Privilege and on the grounds that the plaintiff was a public figure and could not show actual malice. The New Mexico Court of Appeals, Furgason v. Clausen, 109 N.M. 331, 785 P.2d 242 (Ct. App. 1989), reversed on the grounds that the record before it did not show that the plaintiff was a public figure, and the article was not protected by the Fair Report Privilege because it reported information not in the arrest report concerning plaintiff's occupation and official position, that further erroneously identified plaintiff to be the same individual as the person arrested and charged. The court reasoned that the added (albeit truthful) facts conclusively identified the person arrested as plaintiff and enhanced the damages.

At the commencement of trial, the defendant tried once again attempted, unsuccessfully, to persuade the judge to dismiss punitive damages from the case. Defendant also resisted producing a Donrey financial statement for use at trial, inasmuch as this financial statement covered all of the assets owned by the company, of which *Alamogordo Daily News* holding (not a separate corporation) was

a small part, and which indicated financial numbers for assets and income related to holdings in different parts of the country totally unrelated to Alamogordo Daily News. After threatening to hold defendant's counsel in contempt for refusing to authenticate the financial records, the trial court permitted this financial statement to be offered after the plaintiff had otherwise closed its case, and, after indicating some doubt about the question, permitted punitive damages to go to the jury.

The judge excluded evidence that after the publication the plaintiff was indicted by a federal grand jury for RICO violations in connection with a failed thrift, which clearly affected plaintiff's reputation even though the charges never went to trial. The judge excluded this even though the plaintiff claimed continuing damage to his reputation after the publication and until the time of trial.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):
The trial judge rejected special verdict forms and other requested jury instructions based upon his belief that he was bound to use judicially-approved pattern jury charges.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None.

9. Pretrial Evaluation: Defendants felt strongly that the case should not go to the jury because of the public figure defense, but these had been rejected by the court of appeals. The defense believed the plaintiff had a borderline *prima facie* case on negligence, and not a significant case on damages. Defendants hoped to convince the jury that the newspaper could not reasonably have been expected to discern the error prior to publication, and hence stood a good chance of prevailing even under a negligence standard.

10. Defense juror preference during selection: Defense counsel preferred people who read, were literate and understood business practices, because they would be more tolerant of honest mistakes and skeptical of lawsuits against a business for making them; working and family people who were likely to disdain the fast-lane lifestyle of the plaintiff and many of those who patronized his bar; and people who for one reason or another were likely to disapprove of alcohol consumption.

11. Actual jury makeup: Defense rated jurors on a 1-5 scale. The jurors selected and rating they received are: 1) WF 60's, widow, may have worked, knew Alamogordo police captain (rating: 4); 2) WM, school teacher, 40's, knew defendant's editor when she was sports editor and had positive impression of her (rating: 5); 3) WM, 25, geological engineer at local airforce base, well-read, lived on base (foreman) (rating: 4); 4) WF, 66, housewife, husband worked at auto shop, lived in Alamogordo five months, does not drink (rating: 3); 5) WF, 65, former corporate secretary, husband retired, was business consultant with own firm (rating: 5); 6) HF, housewife, 31, did not drink, had six kids and felt kids should not drink, a "bible believer" (rating: 4); 7) (alternate) HF, 30's, tax analyst at insurance agency (rating: 3).

12. Issues Tried: Defendants' negligence in failing to discover the error and actual malice for failing to cease publishing after the error was noticed.

13. Plaintiff's Theme(s): Plaintiff emphasized that he was innocent, minding his own business, and victimized first by a burglary and then more significantly by the defendants' news article. The plaintiff's abuse at the hands the newspaper came as a result of the newspaper's heedless desire to get the sensational story into print, in the face of obvious red flags indicating that the story was implausible and false. The arrest report indicated that the arrestee gave a different age than stated in the driver's license, was unemployed, and had only 34 cents, which should have caused the reporter to investigate further to determine whether Furgason was the arrestee. Once the newspaper learned from an employee that the publication was false, it could and should have stopped the press run and distribution of the newspaper. Instead,

it ran a retraction two days later in which it took no responsibility and attempted to blame the police. Plaintiff emphasized the wealth of the defendant, which included numerous properties other than this newspaper.

14. Defendant's Theme(s): Defendant reporter conscientiously and accurately reported what the arrest report showed about the arrest of James M. Furgason, 1407 Rockwood, whom other public records confirmed was a member of the Mayor's Committee on Driving While Intoxicated and Alcoholism. The reporter even inquired of police concerning discrepancies in the police report, such as the suspect's age, which a clerk discounted as a math error by the investigating officer. The reporter went beyond what blotter reporters normally do by checking the phone book for the plaintiff's address, which showed that this was the only Furgason the way plaintiff spells his name; and went to city hall and checked the mayor's records for other facts reported in the article. The newspaper acted in good faith in immediately reinvestigating the matter when an error was called to its attention. The newspaper did not attempt to interrupt distribution of the printed editions, but on the next publishing day ran a page 1 retraction of the story after the error was confirmed.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Such attitudes were not detectible during voir dire, but post-verdict interviews indicated that several jurors were of an anti-defense pre-disposition, because of deep-seated animosity that many of the locals felt towards their daily newspaper, and because of various subtle class and ethnic struggles that play out in small and medium-sized towns in New Mexico. (See assessment of jury under paragraph 17, supra.)

b. Sympathy for plaintiff during trial: Plaintiff was not a very sympathetic character, and was shown to be a hard drinker and a womanizer, who enjoyed a fast-lane lifestyle which reputedly involved occasional drug use. (The latter aspect of plaintiff's reputation did not come into evidence.) However, the plaintiff was unquestionably an innocent victim in this the scenario, and thus his tearful testimony to his embarrassment, teasing by others, people leaving plastic bags of paint outside his business, and loss of some favored clientele generated some sympathy.

c. Proof of actual injury: The actual injury was limited to anecdotal occasions of unpleasant teasing about the article, but no proof of any business losses. The plaintiff's business records showed that the plaintiff's profits increased after the article, so the judge did not permit evidence from which the jury would infer loss of profits or revenue from the plaintiff's business and liquor store.

d. Defendants' newsgathering/reporting and trial demeanor: The reporter did not suspect or hypothesize the possibility that the person in custody was an imposter who had stolen Furgason's gun and identification to identify himself when arrested; the reporter did not attempt to make visual identification of Furgason in jail, or attempt to call him at home or in his bar, to make sure Furgason was the person in jail; the newspaper did not halt the presses or stop distribution once the claim of error was first made by an employee; the correction did not report discovery of the error by Daily News employees, but instead stated that reporters received information from the police that conflicted with earlier police reports two hours after the paper was printed.

e. Experts: None.

f. Other evidence: The defendants' financial statement was admitted, and believed this information considerably fueled the jury's hostility towards the defendant, and caused it to feel righteous or at least comfortable in rendering this excessive award.

g. Trial dynamics: Counsel believe that the News Mexico pattern instructions are confusing in defining negligence, and constitutional malice, and in assigning these burdens to the compensatory and punitive

damages aspects of the case, respectively. This is borne out by the juror interviews.

i. Plaintiff's counsel - Plaintiffs' counsel was an experienced insurance defense lawyer who was within bounds throughout the trial. He was assisted by his daughter, who was less experienced and more emotional, but also within bounds.

ii. Defense counsel - were David Olive, in-house at Donrey Media, with extensive libel trial experience in his prior life; and Frank Wilson, an experienced trial lawyer in Alamogordo. Defense counsel believed they were effective and came across well to most jurors, but were unable to overcome the jury's gut reaction to the facts of this case and what they learned about the defendant's wealth.

iii. Judge - the judge was unpredictable and frequently chastised counsel on both sides for perceived transgressions in ways that could not be anticipated. The result was that both sides were kept under control.

iv. Other factors - The jury charge, based on New Mexico pattern instructions, was too unfocused and confusing to be of any help to the defendants.

The time delay between publication of the article and the trial, caused in large part by the appeal of the initial summary judgment ruling, added to the punitive damages award which was requested by plaintiff's counsel as $1 million for each year since the newspaper story was published.

h. Lessons: Defense counsel believe that they could have fared better if they had brought in an outside expert witness to explain why there was no negligence in this situation, and why it is not reasonable to expect a reporter to take the extra steps demanded by the plaintiff. The expert would be one with a background with a small town newspaper, but with some form of recognition such as an award in journalism or promotion within a newspaper chain. The other lesson is that any case can be lost big. The reaction of a jury in a venue such as this one to media conduct may well be very counterintuitive even to non-lawyers.

16. Results of jury interviews, if any: Four of the six jurors plus one alternate were interviewed several months after the conclusion of the trial. Several of the jurors apparently misunderstood the instructions. Their comments reflected the belief that the defendant had the burden of justifying the article, and a lack of understanding of the distinction between negligence and subjective recklessness as to the truth. Most jurors believed the newspaper made a mistake, but was not reckless (and nonetheless awarded punitive damages).

Jurors found the plaintiff to be only moderately likeable, but were convinced that he had been victimized by this article.

On liability, the jurors were unanimous in the view that the newspaper should have taken additional steps to check Furgason's identity, by checking for him at the bar or doing something else to positively confirm Furgason's whereabouts. The attitude of several of the jurors was that since the truth could have been discovered, the newspaper should have discovered it.

The jurors sympathized with the reporter, feeling that he was young, honest, and scared during the trial. As to the reporter's demeanor, the prevailing view was he "knew he made a mistake," and "had his head down." Some were impressed to the detriment of Clausen by one police witness' suggestion that Clausen was reputedly untrustworthy as a reporter. At least one juror felt that the reporter may have been interested in advancing his career with a sensational story. Several of the jurors expressed some anger at the newspaper for not halting distribution after notice of the error was given by employees during the

press run. They did not accept the newspaper's claim that distribution of the story could not have been prevented. Others were undecided on this issue.

Women jurors found the female sports editor who testified to be an arrogant "know-it-all." Three female jurors resented defense counsel's cross-examination of a former female employee of the defendant and current "friend" of the plaintiff who allegedly noted the error during the press run, but other male jurors seemed to feel she deserved it. Although this witness had been a drug user, the offended jurors did not feel this was relevant and that her limited role as a witness in this case did not call for an attack upon her character.

The jury was totally perplexed by the damage issue. Having determined liability, and that the plaintiff had been damaged, they found that no evidence or even argument had been presented on the damage issue other than the plaintiff's request during closing argument. The following portion of the interview with the jury foreman is telling:

Interviewer:	Did the closing arguments have any uh, weight on your deliberation?
Juror:	Well, it did, it had no weight on the verdict, it may have had weight on the uh, the damage amounts.
Interviewer:	Okay. In what aspect of it?
Juror:	Well, me personally, I had no idea of what the dollar amounts would be until you know, the lawyer on, on the, plaintiff, mentioned what she thought it should be, what they were asking for.
Interviewer:	And was, was it he or she that did that?
Juror:	Uh, no, she wasn't convincing to me, but that's, it was an eye-opener I think, . . .
Interviewer:	In what aspect?
Juror:	Well, it seemed like at that time that I hadn't, you know, we had no instructions at the time and uh, I wasn't thinking about dollar amounts, they hadn't been mentioned in the whole trial and then it kind of, when she mentioned that it kind of hit me, you know, goll, a lot of money we are talking.
Interviewer:	Okay.
Juror:	It was more of a surprise factor, I guess than . . .
Interviewer:	Based on the evidence that you had heard?
Juror:	Well I, the evidence I heard uh, I used that to form a verdict but I didn't have any idea at the time on the kind of damages we were talking.
Interviewer:	And did that surprise you?
Juror:	I think it did. M-mmm.
Interviewer:	You weren't quite thinking in those terms?
Juror:	No.
Interviewer:	Were you thinking substantially less?
Juror:	Well, I wasn't really thinking. But it was less I'd say yeah, but the surprise factor, but I wasn't thinking of dollars.

The jury's award was substantially what the plaintiff requested. (In closing, plaintiff asked for $1.2 million for the value of plaintiff's business that was jeopardized, and $1.0 million in punitives for each of the five years since the publication.) Two jurors indicated that compensatory award was a quotient verdict; one said this was also true of the punitive award. Two indicated that the punitive award was intended to be enough "to make them think twice about doing it again."

It appears that the high damage award was driven by two jurors who felt that the media generally assumed a license to interfere with people's lives and were angry at the *Daily News* in this case for not acting more decisively once the error was called to its attention. Three of the jurors expressed regret for having gone along with such a high damage award.

17. Assessment of Jury: From the jury interviews (see above), it was apparent that most of the members of this jury held significant biases and hostility toward the local newspaper that were not disclosed during *voir dire*. Some of it was based on personal experience, and some on the common small town hobby of disliking the local messenger. In other cases, it may have been a result of class and ethnic consciousness of the lower-middle class and minority populations in New Mexico. All of these hostilities were believed fueled by the evidence of the vast holdings and earnings of the Donrey Media Group.

In *voir dire*, several of the jurors who had expressed strong hostility towards the newspaper were removed. Defense counsel does not believe they could have discovered the more subtle biases of the jurors selected. For example, one juror, during the post-trial interview, declared that one's reputation is all one has, and destroying it is something a newspaper should not be permitted to do. This person's comments during *voir dire* would not have lead anyone to suspect she would apply such a point of view to the facts of case. Indeed, once selection was completed, defense counsel believed they had a pretty good jury. This judgment proved wrong but this was due to the foibles of the jury selection process in this type of venue.

18. Post-Trial disposition: Court granted Motion for J.N.O.V. on punitive damages for insufficient proof of actual malice, and granted a new trial on liability issues. Both sides have appealed.

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E. Gail Harrison v. Hartford Courant, Litchfield Superior Court, Connecticut, August, 11, 1993, David L. Fineberg, J.

1. Date of Publication: May 10, 1986

2. Case Summary: Defendant newspaper reported that members of an Indian tribe spent federal grant money and private funds in questionable transactions without sufficient accounting. Plaintiffs, three members of the tribe named in the article as principally involved, sued for defamation. The defendants were the newspaper, its reporter, and three other tribe members who allegedly were the sources for the story.

3. Verdict: For defendants.

4. Length of Trial: 5 weeks. (1-1/2 weeks in pre-trial motions and individual *voir dire* of jurors.)

Length of Deliberations: 4 hours.

5. Size of Jury: 6

6. Significant pre-trial and mid-trial rulings: Defendants' motion for summary judgment, or in the alternative, *in limine*, granted in part (determining that the plaintiffs were public officials), but denied on the issue of actual malice.

In response to order granting defendants' motion for more definite statement, the plaintiff designated 42 statements in the lengthy article that it claimed were false and defamatory. Several arguably defamatory statements, e.g., that the plaintiffs had "lined their pockets" with the federal grant money, were not designated as defamatory. Throughout the trial, the court rejected the plaintiff's attempts to show the defamatory character or falsity of statements not in issue.

The defendant tribe members were dismissed at the close of the plaintiffs' case for lack of evidence of publication.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The trial court granted the defendants' motion to bifurcate the trial between liability and damage issues. The trial judge deferred determination of the fact of damages as well as the extent of damage, so the plaintiffs were not permitted to offer evidence concerning the effect of the publication on plaintiffs or on third persons, severely limiting the plaintiffs' sympathetic appeal.

The trial judge gave introductory instructions on case elements. The judge declined the defense requests for special interrogatories as to each of the 42 statements in issue. The plaintiff argued libel by implication and requested a very liberal charge on that issue. Defendant requested a charge based on Strada (no liability for libel by implication except where defendant deliberately omits facts that would change the tone of the article). The court did not charge on this issue.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None. However, in Connecticut, the parties are entitled to unlimited *voir dire* of jury panel members on an individual basis, not in the presence of the other jurors. Defense counsel, in agreement with Connecticut trial lawyers generally, believes this procedure enables counsel to get candid answers from the jurors concerning their biases and prejudices that are not likely to be given in front of the entire panel. This benefit, most Connecticut trial lawyers believe, outweighs any benefits that accrue from educating the entire panel with questions and answers during group *voir dire*.

9. Pretrial Evaluation: Probable defense verdict.

10. Defense juror preference during selection: Litchfield County, Connecticut, at the northwest corner of the state, is the legal residence for a number of theatre and literary figures, celebrities, and leisure class members who gravitate to New York City. There is also a significant number of upscale retailers and service people who cater to this wealthy group of individuals. There is also an unusual number of highly regarded independent secondary schools in the county. In addition to the wealthy, highbrow, and well-read population elements, there is a working lower and middle class of eastern and southeastern Europeans, who generally are Catholic, conservative, but not wealthy. There is also a group of old time Yankees who occupy this socio-economic status.

The defendant believed that well-read, educated people, would favor the defense side of this case. However, defendants were also aware that many among the literate and highbrow would be guilt-prone to sympathize with the plight of the Native American plaintiffs. Defense counsel thus would have avoided the "wine and cheese" intellectual, if any had been in the venire.

Defendants favored the lower class group, particularly those who were older and had worked for most of their lives that would likely be skeptical of people who had received a public funds grant, were unable to account for their

use of it, and were seeking personal damages for an article about their stewardship of taxpayer funds.

11. Actual jury makeup: 1) WM, late 60's, factory worker laid off because of plant closure due to bankruptcy; 2) WF, 62, secretary to executive in management company; 3) WM, 20, mech. engineering student at New Hampshire State Technical School; 4) WF, mid-60's, retired housewife; 5) WM, 23-years-old, claims adjuster, graduate of Fairfield University (Catholic) (foreman), 6) WF, mid-50's, from Germany, ran an antiques business. Those who did not deliberate: 7) WF, teacher of remedial English (juror during all testimony; excused for emergency before deliberations; replaced by alternate); 8) WM, 19, astronomy student (juror who failed to show up after few days; replaced by alternate); 9) BF, domestic worker, husband retired from Pratt & Whitney Aircraft, only appearance in newspaper was when her daughter graduated from college (did not deliberate); 10) WF, son recipient of Hartford Courant delivery boy scholarship (did not deliberate).

Defendant had difficulty finding any jurors who were regular newspaper readers. The clear trend in Connecticut (and elsewhere) is for young people to get their news from television.

12. Issues Tried: Substantial truth, actual malice.

13. Plaintiff's Theme(s): The article implied, through artful word selection, that the plaintiffs stole grant money when they did not, and the defendants knowingly created this maliciously false impression.

14. Defendant's Theme(s): The article never said that the plaintiffs stole money; the gist of the article was that these people had received public money grants from the federal and state government and a private foundation, and they were unable to explain how the money was used. The plaintiffs' lack of accountability may be due to the fact that records were stolen, but this circumstance was disclosed in the article. The secondary gist of the article was that government agencies do not monitor whether monies granted are used according to the representations made to get them. In both respects the gist of the article was true in all material respects, and the defendants' investigation was thorough, and the article added to the public's knowledge on an important issue.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Counsel detected no significant anti-media bias. Some jurors expressed feelings that the media sometimes goes too far and pries into what is not their business, but most of these views were in reference to the electronic media, and its perceived penchant for shoving a camera in the face of an unsuspecting, embarrassed, or grieving individual. Some of the questioned venirepersons said they did not believe much of what they read in the newspapers, but counsel felt that this reasoned skepticism favored the defense side of the case.

b. Sympathy for plaintiff during trial: The first of the three plaintiffs to testify, Trudy Richmond, had a B.A. and two M.A. degrees, was director of research of the Indian Archeological Institute, and made a reasonably good witness. She was calm and direct even in response to cross-examination. On the witness stand 4-1/2 days, Richmond broke down and cried only once, which required a recess. However, counsel feels that this fleeting display of emotions was defused during *voir dire*, when counsel told the jury to expect this type of thing to happen, and asked the jury if they could still find for the defendants if they found the plaintiff more sympathetic and "nicer" than the defendant reporters.

The second and third plaintiffs did not in any way appear to be American Indians, and did not present as well.

In general, the sympathy factor was kept in check because of the bifurcation ruling limiting all evidence to liability issues and deferring

questions of damage and proximate causation. This meant that no proof of actual injury was permitted. The only exception to this was that plaintiff Richmond gave testimony of difficulty finding a job after the publication, before the judge clarified his ruling deferring such evidence until a later trial if necessary. On cross-exam, it was brought out that Richmond had no way of knowing if the persons to whom she had applied for employment even knew of the article.

c. Proof of actual injury: None: Damage issues bifurcated.

d. Defendants' newsgathering/reporting and trial demeanor: As noted above, the defendants' investigation on this matter was thorough and complete. The only potential wart on the defendants' case was imprecise use of language. In particular, the article used words that implied a deviance from an accepted standard when the standard itself was not articulated. For example, the article used the words "misspent," implying that there was some criteria for judging what expenditures were proper, without defining it.

e. Other evidence: The defendant had accumulated amassed all documents available concerning the plaintiffs' expenditures, and had tape recorded and transcribed an interview with one of the plaintiffs. When the plaintiff began to attack the defendants' allegations and confront the reporter with questions about documentary support, defense counsel offered two large banker's boxes consisting of documents supporting the article, including interview transcripts actually used by reporter in writing story, with testimony that reporter had reviewed but not copied another two boxes' worth of documents. This exhibit was introduced, and the box sat in view of the jury throughout the trial, and defense counsel referred to it frequently. For the most part, the plaintiffs dropped any attack upon the preparation of the article and focused on the defendants' choices of words.

Shortly after the case was filed in 1987, defendant submitted a request for admissions with respect to a list of factual propositions which were included in the article. Plaintiffs claimed insufficient knowledge. Counsel used the numerous lack of knowledge denials effectively to discredit plaintiffs' claims that the statements in issue were false, showing, inconsistently, that in 1987, when the events were fresher and memories were clearer, plaintiffs claimed that they didn't know whether these statements were true or not.

f. Trial Dynamics:

i. Plaintiff's counsel - Plaintiffs' counsel was aggressive, inflammatory and pushed limits.

ii. Defendant's counsel - Defense counsel was well prepared on evidentiary issues, and probably appeared that way, as well as fairer and more in control than plaintiffs' counsel.

iii. Length of trial - This trial lasted nearly four weeks after the selection of the jury, but because it focused strictly on liability issues, the length of trial was probably not a factor.

iv. Judge - The judge was very much in control of the case, not only because of a strong judicial temperament, but because he had prepared himself by thoroughly studying applicable law and preparing himself for the jury charge.

v. Other factors - In addition to media counsel, there was an additional defense lawyer representing the three individual Indians named as defendants. Because these three defendants were arguably the instigators of the investigation that lead to the story, there was bad blood between them and the plaintiffs which played out during the trial. This in turn played into the defendant's theme that the plaintiffs were blaming the messenger.

g. Lessons: When trying a media libel case to a jury, more can be gained by focusing upon advantages offered by the rules of discovery and local rules than the finer points of the First Amendment law.

16. Results of jury interviews, if any: None.

17. Assessment of Jury: This jury was a hard working, conservative group of people who, for the most part, had sufficient life experience to see through the plaintiffs' story. Based on the result, counsel believes it picked a solid defense jury for this type of case.

18. Post-Trial disposition: Post-trial motions denied, time for appeal has expired; no appeal.

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F. Sandra Holtzscheiter v. Thomson Newspaper, Inc. d/b/a Florence (South Carolina) Morning News, Court of Common Pleas, Florence County, South Carolina, February 11, 1993, Ralph Anderson, J.

1. Date of Publication: July 26, 1986.

2. Case Summary: The defendant newspaper ran a story reporting statements made by the family physician that a murdered 17-year-old girl was "a drifter," "wasn't the image of sweet sixteen, definitely not a cheerleading type," who ran "with the wrong crowd," was "the product of a broken home" and "had no family support to encourage her to continue her education." Plaintiff, the girl's mother, sued for libel and intentional infliction of emotional distress, contending that she was a good mother who encouraged her children to continue their education.

3. Verdict: For plaintiff, $2 million

Compensatory: $500,000

Punitive: $1.5 million (remitted to $500,000)

4. Length of Trial: 4 days.
Length of Deliberations: 1 hour, 25 minutes.

5. Size of Jury: 12

6. Significant pre-trial rulings: The case was first tried in 1987, resulting in a directed verdict for the defendant on the grounds that the publication was not libelous *per se* and the plaintiff had no special damages. The judgment was reversed by the Supreme Court of South Carolina, 306 S.E. 297, 411 S.C.2d 664 (1991), which held that the publication was libelous *per se* under South Carolina law. The Supreme Court affirmed the dismissal of the claim for intentional infliction of emotional distress.

On remand, the case was tried by Judge Ralph Anderson whose bombastic use of language in written rulings was lambasted as "ridiculous" in a column by James Kilpatrick. As an example, Kilpatrick cites the following from the court's ruling on post-trial motions:

"It would be hebetudinous and obtuse to fail to be cognizant of the adverse consequences of a ruling in this case. However, a

> decision by a court should not be infected with pusillanimity and timidity. The karma of this case must not be aleatory or adventitious, but a pellucid and transpicuous analysis of the law and facts.
>
> "With certitude and intrepidity and hopefully, with some degree of sagacity, sapience and perspicaciousness this court disposes of the relevant and germane issues."

More to the point, this judge showed no solicitude for the defendant's efforts to focus the jury on the constitutional elements of the case and to limit prejudicial evidence.

Judge Anderson did disallow the plaintiff's attempt to amend the complaint before retrial to allege invasion of privacy, and remitted the punitive damage award.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): None. The defense requested a special verdict but this was denied. The defense also requested that the sizeable financial statement of defendant Thomson Newspapers, Inc. be admitted only if the jury first determined to award punitive damages, or alternatively, that it be admitted with an appropriate limiting instruction. The court denied both requests.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None.

9. Pretrial Evaluation: Probable defense verdict.

10. Defense juror preference during selection: Upper-middle class, well educated.

11. Actual jury makeup: 8F, 4M; 7W, 5B; all working class.

12. Issues Tried: Falsity, negligence, damages.

13. Plaintiff's Theme(s): The defendant's article charged that the plaintiff was an unfit, uncaring, irresponsible mother and as such, contributed to her daughter's untimely and tragic death. Further, the defendant falsely and without support charged that the plaintiff was derelict as a mother in not encouraging her daughter to obtain adequate education. As a practical matter, the plaintiff's real theme was that the defendant had abused an individual who believed her daughter was "sweet sixteen" and was in the process of grieving over the loss.

14. Defendant's Theme(s): The article concerned matters of important public interest, including but not limited to the role of the family in encouraging education of youngsters; the publication was substantially true, and prepared and published according to the journalistic standard of care.

As evidence of plaintiff's lapses in parenting, the defendants introduced evidence that plaintiff had an affair while her husband, a convicted felon, was incarcerated; that during the course of dealing with her own problems, the plaintiff had declared "what scares me is I can't seem to love anyone. I care about my children but I can't seem to love them," that plaintiff is on welfare (which, she explained, enabled her to be at home), that the plaintiff's children (including the deceased) had histories of truancy, delinquency, and bearing children out of wedlock; that two years before the publication, the victim had run away with a carnival, eventually returned home, but had not re-enrolled in school. The plaintiff explained "she had missed so much until there was no reason for her to go back. She wouldn't have passed." Plaintiff admitted she had not sought help from the school system to encourage the daughter's education, since plaintiff's "did not have much faith in the public school system." Plaintiff rejected the Department of Youth Services' advice that the daughter be required to attend school. Shortly before she was killed, the daughter again moved out of the family home to live with a boyfriend.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: This jury had the typical tendency of denizens of medium-sized towns to resent the local newspaper. In addition, there was xenophobia in this Bible Belt venue towards the defendant Thomson, which had corporate offices in Chicago and Toronto, making it not just a Yankee, but a foreigner.

b. Sympathy for plaintiff during trial: The plaintiff offered no proof of reputation injury. However, she was good at controlling her own cross-examination and inflaming the jury. The judge refused to admonish the plaintiff against her unwillingness to answer cross-examination questions and frequent emotional outbursts. Indeed, the trial court declared in front of the jury that he would not condone a trial of bland responses with no emotion whatsoever, and never attempted to neutralize the emotional impact of the plaintiff's interjections and unresponsive answers. The plaintiff was allowed to give long speeches, full of pathos, about the death of her daughter, delivered with pointed pauses. At one point during cross, she interjected:

> HOLTZSCHEITER: But it doesn't matter that your daughter's dead because her mother -- she didn't care and she didn't try to help her. She wasn't sweet-sixteen. you -- You *hurt me*. That hurt me. And for why? Why? And I want my daughter back, and I want people to know this isn't true. And I want you to -- everyone that saw that to know I did love my daughter, and I did -- Why? She was sweet-sixteen, and she --
> And I don't want to talk any more.
> Tr. P.279, L.12-21). (Emphasis supplied).

Defendant's motions for mistrial were denied.

c. Proof of actual injury: None, other than the above.

d. Defendants' newsgathering/reporting and trial demeanor: The family doctor who was quoted in the article denied using the word "family" and instead claimed she had said that the victim had "no financial support to encourage her to continue her education." The contemporaneous notes of the reporter show that she recorded the word "family" and not "financial".

e. Expert witnesses: Plaintiff called no experts. Defendants called Dean Shoquist, U. of South Carolina School of Journalism, who emphasized the public interest aspects of the story. He acknowledged that the article did not portray the family "in a particularly favorable light, but -- I don't think -- it deals with the family in a significant way. It did with the crime itself and the victim. The public had a right to know who this girl was and where she came from." He also testified that the article was prepared and published according to the standard of care.

Defendants also called Donald W. Stewart, Professor of Journalism at Francis Marion College, who testified roughly the same as Shoquist.

f. Other evidence: Shortly after the publication, the doctor quoted in the story, through her attorney, demanded a retraction of the statements attributed to her. The demand did not refer to the statement in which she later claimed she was misquoted as saying there was no "family" [rather than no financial] support.

Plaintiff's witnesses testified to their interpretation of the words "image of sweet sixteen" and "cheerleading types" as suggestions of promiscuity, and inflammatory post publication "letters to the editor" and other opinions that the article was "in bad taste" were admitted.

g. Trial dynamics:

i. Plaintiff's counsel - Plaintiff's counsel was aggressive but was assisted in this regard by his client as described above. In closing argument, he did not urge falsity or harm to reputation, but instead argued the newspaper's disregard of plaintiff's rights and the emotional damage experienced when she read the doctor's opinion that the murdered girl was not "the image of sweet sixteen" and "not a cheerleading type." He also played on the jury's xenophobic predisposition.

ii. Defense counsel - Defense counsel did his best to approach the plaintiff delicately, but during much of the trial, and particularly the plaintiff's examination, the plaintiff, her attorney, and the judge, appeared to have cast defense counsel in the role of being the "bad guy."

iii. Judge - This judge maintained reasonable control, but on occasion it appeared to the jury the plaintiff's side was in control.

In one part of the charge, the judge told the jury that the defendant had the burden of proving that the factual statements in the article were substantially true, and spoke of "vindication of private rights which have been invaded" as a factor in awarding damages. The judge declined to instruct the jury concerning limitations on consideration of Thomson's net worth.

iv. Other factors - It appears that this case was tried as a private facts and outrage case rather than a defamation claim.

16. Results of jury interviews, if any: None.

17. Assessment of Jury: The jurors that heard the evidence in the first trial, primarily upper and middle class, said afterwards they would have found for defendant. This working class jury, believed to have had some preexisting biases against the newspaper and its owner, was willing to inflict wholesale punishment against this wealthy defendant for publicity hurtful to a grieving mother.

18. Post-Trial disposition: On appeal.

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G. Jeffrey Masson v. The New Yorker Magazine, Inc. and Janet Malcolm, U.S.D.C, N.D. CA., June 3, 1993, Eugene F. Lynch J.

1. Date of Publication: December, 1983 (two part series).

2. Case Summary: Masson, a womanizer in his private life, and an iconoclast in his professional life as a psychoanalyst, had been dismissed as the Projects Director of the Freud Archives. Janet Malcolm, a free-lance writer, conducted several interviews with Masson, which resulted in the two-

part series edited by and published in *The New Yorker*. Masson originally claimed he was libeled by numerous inaccurate and fictitious quotations attributed to him in the articles. Most of Masson's contentions of inaccuracy were dropped when it was shown that the challenged statements were in fact made by Masson during tape-recorded interviews.

At trial, the statements attributed to Masson that remained in issue were: 1) Masson was like an "intellectual gigolo" to archive officials; 2) Masson wanted to turn Freud's house into a place of "sex, women and fun"; 3) people would say Masson was the "greatest analyst who ever lived" since Freud; 4) that his former employers "had the wrong man" if they expected Masson to keep silent about his dismissal; 5) "I don't know why I put it in" in reference to a comment at the end of a speech that psychoanalysis had become a sterile profession. The first three quotes do not appear on tape, but are in four pages of notes typed from handwritten notes (not now available) made at a meeting. The fourth quotation was on the tapes but a transcript showed that Malcolm had edited and left out phrases that arguably changed the meaning of it. (As reported, the statement was in response to a suggestion that silence would "be the honorable thing to do" to spare the feelings of Anna Freud; the tape showed the remark to be in response to a suggestion that silence would be the "honorable thing to do" to save face and perhaps get the job back someday.) The fifth quotation had attenuated support in the tapes but was based primarily on the author's memory.

3. Verdict: In a special verdict, the jury found that five quotations were falsely attributed to Masson and that the attributions were defamatory; that Malcolm published with awareness that the "sex, women and fun" and "wrong man" attributions were defamatory, and with knowledge of or reckless disregard for whether they were false; that *The New Yorker* was not Malcolm's employer; that the magazine was aware that one statement was defamatory but did not publish that statement with knowledge or recklessness as to falsity. The jury was "hung" on damages.

4. Length of Trial: 4 weeks
Length of Deliberations: 3-½ days

5. Size of Jury: 8

6. Significant pre-trial and mid-trial rulings: Knowing alteration or fabrication of statements attributed to sources within quotation marks may constitute malice, but only if the variance from the words actually uttered results in "a material change in the meaning conveyed by the statement" the "bears upon its defamatory character". Masson v. The New Yorker Magazine, Inc., 111 S. Ct. 2419 (1991). Where a magazine's fact checker "learns facts casting doubt on the accuracy of quotations," they "must act reasonably in dispelling it"; reasons to doubt accuracy of publication and failure to take reasonable steps to confirm may establish actual malice. Masson v. The New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992).

Trial court orders: denying plaintiff's false light claims; granting defendants' motions *in limine* to exclude testimony of linguistic experts; granting defendant's motion in limine to bar references to errors in quotes other than the five quotes at issue (with limited exceptions of very similar situations to show M.O.); compelling testimony due to plaintiff's waiver of attorney-client communications; barring reference to or evidence of any alleged misquotations of anyone other than plaintiff; ordering jurors to avoid press or media coverage of the trial; order barring reference to appellate proceedings or proceedings before the United States Supreme Court; excluding defendant's post-publication conduct, granted, with exceptions; order denying plaintiff's motion in limine to preclude introduction of evidence regarding complaints about plaintiff's book Final Analysis; granting defendant's motion in limine to exclude speculative evidence of lost profits from teaching, with exceptions; and excluding evidence as to second-hand reactions to articles.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Rule 49(a) Special Verdict. See ¶ 3 above. Significantly, neither the charge nor the special verdict form

required the jury to find material falsity as to the publication[s] as a whole, disregarding details that would not produce a different effect upon the reader than the whole. The court ruled on multiple occasions and in varied contexts that the trial was only on the five quotations and neither the plaintiff nor the defendants could argue or put on evidence outside that limited parameter. The jury was instructed to consider, as to each of the five quotations, the elements of defamatory meaning, falsity, knowledge of defamation meaning, knowledge or recklessness as to falsity, in that order, and to proceed to the next issue only if the plaintiff had met his burden of proof on the preceding issue. The charge was formulated before the trial began and counsel were permitted to refer to it in both opening and summation.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): The court submitted a juror questionnaire which it prepared after reviewing questions submitted by counsel.

9. Pretrial Evaluation: Because the case is now set for retrial, this information is not available.

10. Defense juror preference during selection: Educated individuals; people not involved with psychoanalysis; women (less likely to sympathize with Masson).

11. Actual Jury Makeup: 1M - 7F: 1) WF, 34, 13 month old child, insurance investigator, Petaluma; 2) HM, 37, bank teller, San Francisco; 3) Vietnamese F, 27, well-educated, accountant, Urban; 4) WF, 46, home health care nurse, suburban. 5) WF, 45, legal secretary, suburban; 6) WF, registered nurse, foreperson, 38, San Francisco; 7) WF, school teacher, 47, suburban; 8) WF, 48, physical therapist, Captain Naval Reserve, involved in Desert Storm, suburban. No readers of *The New Yorker*.

12. Issues Tried: Whether quotes were false and defamatory; whether either defendant knew the quotes were defamatory and published with knowledge or recklessness as to their falsity; whether plaintiff was injured; whether Malcolm was employee of *The New Yorker*.

13. Plaintiff's Theme(s): Janet Malcolm libeled Masson in the articles she wrote that were published in *The New Yorker* by making up quotes, changing their meaning, or using them out of context so as to make Masson look foolish and unscholarly. After the articles were published, Masson became a laughing-stock and an object of ridicule, and was unable to secure employment. Upon reading galleys of the articles, Masson put *The New Yorker* on notice of the falsities and requested specific changes, but received no satisfaction.

Masson's counsel also stressed this theme: if Malcolm (as she admits) was willing to fabricate details in the narrative and structure of the article (what Masson said, when and where he said it), it can be assumed she was also willing to fabricate quotes to make the story sound good.

14. Defendant's Theme(s): Malcolm: No quotes were made up and the ones used are contained in interview tape recordings, notes or memory. Malcolm portrayed plaintiff as he portrayed himself; she believed what she wrote would be warmly received by both the plaintiff and the public, that it was not defamatory and was true.

Masson was not credible in his purported memory of the interviews, since time after time he denied saying things which tape recordings later proved he said. Many of the alleged misquotations were not challenged until late in the suit. Masson, if injured at all by the article, was injured as a result of his earlier firing by The Freud Archives, and the admittedly accurate characterization of Masson as a womanizer, and as a boastful, bombastic narcissist. The compression of quotes from several conversations and venues is an acceptable and established practice in non-fiction, particularly at *The New Yorker*.

The New Yorker: In addition to the above, Janet Malcolm was an established author with a reputation for competence; the magazine's proper role with such an author is not to "shadow write" or reinvestigate (because this

would indicate lack of trust and unduly complicate and even confuse the process) but to do limited fact checking and primarily to edit. The magazine defendant explicated the journalistic process for this kind of contributed article to show that it acted with no reason to believe the quotations were fabricated.

The magazine also contended that the author was not an employee of the magazine. Defendants were careful to assert this position without compromising their support for Malcolm and assertion that she was trustworthy. Defense counsel treated it as an issue that was presented to defendants and the jury by law, which entitled defendants to a separate evaluation. As to the marital relationship between Malcolm and her editor Botsford, Charles Kenady, the aging but credible statesman of the defense, defused the issue in opening when he said, "I'd have thought we've come further, in this society, than if two people who work together get married, one of them has to quit, particularly if it is the woman."

The New Yorker purposefully assumed a secondary role on most issues, but did take the lead on its own witnesses and on damages.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: None identified.

b. Sympathy for plaintiff during trial: It appears, surprisingly, that Masson was able to generate significant sympathy with this predominately female jury. This may have been due in part to the judge's rulings limiting evidence of Masson's unattractive traits that would have permitted the jury to get to know him better.

Masson was least credible in his disputed version of the telephone call with Franklin.

c. Proof of actual injury: This was limited to testimony of plaintiff and supporters concerning emotional distress and general damage to reputation. Defendants raised a significant question about whether the five quotations in issue had any impact on the plaintiff's reputation, given the contents of the balance of the articles in issue and more importantly the extent to which plaintiff's own conduct had affected his reputation. This evidently is what caused the jury to deadlock on the question of damages, and it appears that some of the jurors were holding out for a no damage or nominal damage award.

d. Defendants' newsgathering/reporting and trial demeanor: Malcolm admitted that she weaved together quotes from interviews that took place at different times and different settings, but insisted that the meaning was not changed. *The New Yorker's* late editor, William Shawn, testified through deposition that Malcolm had assured him all of her interviews with Masson were tape recorded. Malcolm denied that conversation ever occurred. *The New Yorker* editor assigned to the series was Malcolm's husband, Gardner Botsford.

After the articles were published in 1984, a magazine staff memorandum said in response to furor over author Alistair Reid's writing, "We do not permit composites. We do not rearrange events. We do not create conversations."

Nancy Franklin, *The New Yorker* fact checker, received well over 100 hours of preparation, with video tape review and critique. She was confident but self-effacing, likeable, and did well on her facts and in explaining her methodology. She demonstrated that in her telephone conversation with Masson (with the aid of *The New Yorker's* complete records that included Franklin's editing suggestions) she confirmed nearly 100 facts, which made the errors which Masson claimed he called to her attention seem insignificant. She also explained the limitations upon the scope of her work. Both Franklin and editor Botsford described how Franklin called the relatively few claimed errors (which were not the ones

in issue but which allegedly put the magazine on notice of the author's propensity) to Botsford's attention, and how he determined there was no objective basis for change, with a reasonable explanation for each. Botsford also did well in demonstrating his belief that the quotes in issue were on tape or in Malcolm's notes. Expert Fred Taylor also did well as a witness, see ¶ 15(f) infra.

e. Other evidence: *The New Yorker* offered its fact checkers' "bible," which instructs fact checkers to check facts within quotations, but not the quotations themselves.

f. Experts: Masson called none.

Malcolm called Nicholas Pileggi to testify concerning general acceptance of the practices of "compression" and "conflation" quotations. This witness was allowed to describe the standard of care, but was not permitted to testify concerning the valuable works of authorship in which he utilized these techniques. Defense counsel feels this detracted substantially from the support this witness might have given the author.

The New Yorker called Frederick Taylor, an editor of *The Wall Street Journal*, who explained that journalists generally do not confirm quotes with the persons who utter them because invariably they either disbelieve they said what they said or want to improve on it.

g. Trial dynamics:

i. Plaintiff's counsel - Plaintiff's lawyer, Charles Morgan, is an experienced trial lawyer, very folksy and sometimes corny.

ii. Defendant's trial demeanor - Janet Malcolm's lawyer, Gary Bostwick, is dynamic but down to earth. Lead defense counsel for *The New Yorker*, Charles Kenady, is experienced and traditional. James Wagstaffe, co-counsel for *The New Yorker*, is younger and exudes competence.

Both defendants believed it was in their best interests to maintain the appearance of separateness between the defendants in the courtroom.

iii. Judge - The judge maintained tight control of the trial, so that no stylistic tendency on the part of any lawyer was dominant.

During the trial, Gary Bostwick sought to introduce lengthy portions of Malcolm's tape-recorded interviews with Masson, which depicted his sometimes obnoxiously bombastic character, dirty talk, male cynicism towards sex, and willingness to discuss his prolific sex life, all of which contributed to Malcolm's depiction and tended to demonstrate that the depiction of Jeffrey Masson in the two-part series was correct. At the beginning of the trial, the judge limited this effort, in part because the defense had limited the plaintiff's evidence of falsity to the quotations in issue, and in part out of a desire to prevent an attack on the plaintiff's character on matters not directly in issue. Some observers feel that these rulings helped induce myopia in the jury in which they were willing to consider only the quotations in issue in determining liability. This may be what caused the jury to discount evidence that Masson was not to be believed on the five quotes because he had made similar denials with respect to many other quotes in the story which tape recordings proved were statements he in fact made. In addition, some but not all of the jurors discounted the defense showing that Masson's own conduct, and the other statements in the story, had affected his reputation to a point where the five misquotations did not cause any harm. This apparently caused the deadlock on in damages. See Jury Interviews, ¶ 16.

iv. Other factors - The jury was asked to read the entire two-part series before the trial began.

h. Lessons: Counsel would attempt to more successfully focus the jury's attention on the "subjective awareness" elements of the case.

16. Results of jury interviews, if any: Counsel were permitted to interview the jurors. In post-trial media interviews, one juror indicated that the group took the judge's charge seriously and focused only on five quotations, pushing aside extraneous evidence such as that pertaining to Masson's reputation for womanizing. This juror, a 47-year-old home health care attendant, who appeared to be asleep during portions of the trial, said the jurors did not doubt the authenticity of Malcolm's reconstituted notes, but believed that she had confused her own observations about Masson with words that he had actually spoken. But with two of the quotes, "There were flags. And sometimes in our exuberance we see flags and don't pay attention." One such flag, this juror stated, was raised by the "sex, women and fun" quotation because before the series was published the quotation had been challenged by the magazine's lawyer, and Malcolm assured her editor that the words were in her notes. After a question was raised, this juror said, Malcolm had the opportunity to rethink whether Masson had actually said it. As to the "had the wrong man" quote, the element of deliberation occurred when Malcolm trimmed the quote in a way to change the meaning. This juror said the group gave little weight to Masson's earlier complaints of made-up quotations which he withdrew after listening to the tapes.

As for damages, this juror stated, "If a person was up to their hands and knees in mud, they're pretty dirty. But if you go and step on them and put the rest of the face and body in, you've made them dirtier. . . so you've damaged them." The juror said "putting a dollar amount on what a damaged reputation is worth is very, very hard," and said that the exact gulf that separated the jurors on damages was "a sizeable amount". She said, "I'm sorry for Janet," "I know she didn't mean to do it." She wanted to award Masson "close to" $1 million, and was upset that the trial ended inconclusively.

A juror who spoke to the press but requested anonymity said the range was one dollar to several million dollars.

From on and off the record statements made by jurors after the trial, the following is evident:

1. The jury attempted to carefully follow the instructions and thus focused exclusively on the five quotes.

2. The jury did not buy the defense argument that Masson's lack of credibility was shown by his denial of numerous or similar quotations which tapes showed that he in fact made, leaving him to complain only about four for which there was no actual tape and one statement on tape that had been edited.

Rather than inferring from Malcolm's accuracy in reporting 415 of 420 quotes from 40 hours of tape that she was right on the other five too, the jury seemed to feel that because the support was there for 415 but not there for five, Masson must not have said the latter.

3. The jury did not disbelieve Malcolm's account of the transcribing of her notes after the fact or even the displacing of the contemporaneous notes, but concluded that Malcolm honestly, but mistakenly, erred when she prepared the transcription.

4. Some of the jurors bought the argument that the plaintiff's reputation had been sullied by his own conduct before the argument, and could not be significantly affected by the five misquotations found. Other jurors (including the one male) did not buy this and were willing to award money. This is what resulted in the hung jury.

5. The jurors did not understand, and did not give much consideration to, the "subjective awareness" aspect of the constitutional malice charge. They felt that if something came to Malcolm's attention that ought to have caused her to re-examine the quotes, that was enough to establish awareness of defamatory meaning and of falsity.

6. This jury was calm and deliberate. It approached each issue without any result orientation. If anything it was myopic in its refusal (caused in part by the charge that focused them on the five quotations) to consider the "big picture," i.e., the relative insignificance of the quotes in issue in relation to the article as a whole.

17. Assessment of Jury: See above. Defense counsel still would prefer women, hope for a better educated group.

18. Post-Trial disposition: *The New Yorker* dismissed and awaiting judgment; new trial ordered for Malcolm on all issues.

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H. Meyer v. Crain Communications, Inc., U.S.D.C., N.D. Ill. No. 88-C-10373, November 21, 1991.

1. Date of Publication: October 17, 1988

2. Case Summary: Meyer was the president and CEO of Beecham Cosmetics (Jovan Perfume). He sued *Advertising Age* and its reporter Joseph Winski for a lengthy article that focused on litigation brought by Oleg Cassini against Meyer and Beecham and how Meyer ran Beecham during his tenure. Plaintiff claimed that numerous particular statements and the article as a whole were false and defamatory, but the trial focused on statements that the plaintiff had been fired, had used cocaine in management meetings, and the alleged implications that he was a tyrant who had a drinking and drug problem, ran his company into the ground, and was terminated for those reasons.

3. Verdict: For the defendant. On special interrogatories, the jury found that two of six statements in issue were false (and that four and the article as a whole were not) and published with reckless disregard, but found all six not defamatory.

4. Length of Trial: 4-½ weeks
Length of deliberations: 10 hours

5. Size of Jury: 6

6. Significant pre-trial and mid-trial rulings: By agreement, the parties bifurcated discovery between liability and damage issues, with the understanding that the defendants would file a motion for summary judgment once discovery on liability issues was complete. However, before the damage discovery began, the plaintiff announced he was dying of cancer, and requested an immediate trial date. The court declined to consider or rule upon defen-

dants' motion for summary judgment on constitutional malice before trial, and ordered the case to be tried 60 days hence. The judge ordered the plaintiff to submit a brief showing his proof of actual malice and permitted the defendants to respond with a similar brief (without affidavits) contending why they felt a motion for summary judgment would be meritorious.

Shortly before trial the judge indicated that a jury question was presented, and during the trial explicated the grounds for this ruling. The judge cited principally the evidence (1) that the reporter had altered a quotation reporting that Meyer admitted he was a "cocaine user," and that such use "started . . . in March, 1980, and continued until January, 1982," by deleting Meyer's qualification that his use was "infrequent;" and (2) the reporting of a statement from a source that said he had seen Meyer, "in management meetings," "take his hand and run it across his nose, and I saw his head jump back," and that at such meetings Meyer had a runny nose and "I could see the way he was bouncing off of walls that he was high," when the reporter's notes of the source interview indicated that the source was referring to one meeting only, and that the reporter omitted, without ellipses, the source's additional statement, "I never saw white powder on his fingers, so I can't ever say that I did actually see, but I know what was involved." The court relied upon the Masson rationale as to the quotes and generally upon Connaughton for the proposition that cumulative defects in the reporter's investigation could demonstrate that the reporter intentionally blinded himself to the truth, particularly by failing to contact the plaintiff and the plaintiff's boss.

Before trial the defendant moved for summary judgment based upon the California retraction statute, and filed an elaborate brief that persuaded the judge that *Advertising Age* was a "newspaper" rather than a magazine based upon a functional analysis, and therefore fell within the statute. The court also agreed that California law, the state of plaintiff's domicile, governed the issue, but found the defendant had waived the defense by failure to plead it as an affirmative defense, even though the pleadings placed in issue whether the defendant was a magazine.

Defendants filed a motion and brief *in limine* to exclude (1) defendants' alleged editorial policy of sensationalism (granted in part); (2) reporter's violation of policies against reliance upon confidential sources and other policies (granted in part); (3) arguments or questions going to "fairness" (granted); (4) defendants' conduct after the article (granted but admissible in bifurcated trial on punitive damages); (5) evidence of revenue to be derived from this special issue (granted); (6) defendants invocation of statutory and constitutional privilege re confidential sources at outset of litigation (source's consent obtained by time of trial) (granted); (7) defendants' selection of an unflattering photograph to accompany the article (denied); and (8) evidence of plaintiff's medical condition (granted).

Later, the court ruled that California law governed all issues except those relating to punitive damages, as to which he applied Illinois law, which provided that evidence of attorneys' fees are admissible, there is no requirement of proof of common law malice in addition to actual malice for an award of punitive damages, and no requirement of proportionality.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The defendants moved for bifurcation of damages issues from the liability issues, and for sequential issue determination of liability issues by special interrogatories. The trial court granted the motion to the bifurcate punitive damage issues (which eliminated evidence of the defendants' net worth, attorneys' fees and other prejudicial evidence relevant to punitive damages), and granted the request to submit the case upon special interrogatories, but denied sequential issue determination.

The jury was given special interrogatories which inquired as to each statement in issue and the article as a whole: (1) whether the statement was defamatory; (2) whether it was false; and (3) whether it was published with knowledge of falsity and reckless disregard for the truth. In response to special interrogatories, the jury answered "no" to the questions of whether any

of the particular statements or the article as a whole was defamatory. The jury found that four of the six statements in issue and the article as a whole were not false and were not published with constitutional malice, but found the statements concerning firing and cocaine use on the job were false and published with constitutional malice. Because the instructions told the jury not to answer with respect to damages unless the jury answered "yes" to all three questions, the damage blank on the verdict form was not completed.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None. The parties submitted questions for the judge conducted *voir dire*, but none were given except a few general questions concerning attitudes about media and drug use. The judge qualified, at least preliminarily, approximately 35 veniremen and the entire jury selection process was completed in 2-1/2 hours. In short, the defense did not learn very much about this jury before the trial began.

9. Pretrial Evaluation: There was a significant risk of liability on portions of the article, but not a significant likelihood of a verdict of $1 million or greater. Potential but unlikely exposure exceeded $5 million. Because of the alteration of quotations mentioned above, and *Advertising Age's* net worth, possible exposure on punitive damages, if awarded, was significant.

10. Defense juror preference during selection: Defense counsel had trouble deciding upon a preference between two incompatible types: (1) older blue collar workers likely to disapprove of cocaine and other drug use and not be prone to give a large amount of money to a person who used drugs and abused his talent and position in the business world, but who might also be anti-media; and (2) better educated business people and professionals, who would be likely to understand the business issues involved in the case and might be more sympathetic to the media. Counsel sought to avoid younger people and others who might have a tolerance for use of illegal drugs and sympathize with the plaintiff's young wife.

11. Actual jury makeup: (three men/three women). (1) WF, 32 years old, from suburban Evanston, initially a vocational development teacher but returned to the home to raise children; (2) WM, 40's, from the town of Frankfurt (outside of Chicago and suburbs), middle class engineering type employed in the removal of asbestos, scout master, involved in child's little league, news from paper and TV, anti-cocaine; (3) WM, 55, chemist, worked for large pharmaceutical company, separated, children in college, civic organizations, "because of children," it is important to "stop the use of drugs."; (4) WM, 30's, single maintenance man at Chicago Stadium, news from papers and TV, anti-cocaine; (5) WF, suburban Aurora, Illinois, widowed, housewife, grown children, watches TV news, believes alcohol can ruin families; and (6) WF, 50's, divorced (from corporate lawyer), grown children, reads newspapers, TV, cocaine "a waste."

12. Issues Tried: Primarily falsity and constitutional malice with respect to Meyer's drug use and the circumstances of his termination from Beecham. The parties also tried Meyer's general character, as this was placed in issue by Meyer's challenge of the article as a whole, which Meyer claimed portrayed him as a mean-spirited and tyrannical business executive, with a hedonistic lifestyle that included cocaine use.

13. Plaintiff's Theme(s): This was a sloppily prepared, damaging piece motivated by the magazine's desire for sensationalism. There was a heedless rush to publication, no editorial controls, reliance upon biased and unreliable sources who were not verified, and no effort to achieve balance. The defendants skewed the facts and altered quotes to fit a preconceived story line. The article was replete with errors, showing a lack of concern for the truth.

14. Defendants' Theme(s): The plaintiff was a petulant, tyrannical executive who misused his power and abused people, was a cocaine user, a liar, and undeserving of recovery. The defendants' article may have contained certain mistakes, but they got a complicated story essentially right under difficult circumstances.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: None detected by counsel during the trial.

b. Sympathy for plaintiff during trial: The plaintiff had difficulty concealing a generally arrogant demeanor, and was shown to have been a drug user and to be untruthful. The plaintiff's unsuccessful effort to gain sympathy included his own testimony in which he ticked off the statements in the story that he claimed to be false; showing that the truth would have been revealed if the reporter had called him or persons at Beecham in the know; that he, a self-made man from humble origins who graduated from the University of Michigan on a basketball scholarship, made money as a tap dancer, built his career in the advertising business, and engaged in a number of charitable activities and received awards in the community; that he was devastated and rendered nonfunctional by the article; that he felt shunned and afraid of the outside world; and that he was unable to develop his new business projects or obtain a job after the publication. This showing was defused by the defendants' proof supporting the negative portrayal of Meyer in the article and, in particular, a showing that Meyer was for all practical purposes involuntarily terminated, even though the company attempted to package it as a resignation; that, notwithstanding technical inaccuracy of the reporting on Meyer's cocaine use, Meyer used cocaine much more frequently than he admitted, both at work and on social occasions; that Meyer lied in several aspects of his testimony and was generally untrustworthy. Meyer also called his current wife, who cried throughout in testifying to the changes in her husband and other aspects of the damage case.

c. Proof of actual injury: After termination from Beecham, Meyer tried unsuccessfully to establish careers in record and movie production, but failed. He then unsuccessfully attempted to develop new start-up cosmetics companies and raise money. After failing at these efforts, he started looking for a job, and claimed this effort was curtailed when the article was published. Meyer testified that there were five or six opportunities that probably would have been offered to him had the article not been published. Meyer acknowledged he had no special damages and sought only general damages supported by this testimony. The defendants offered deposition testimony from the people involved, and each said the article had nothing to do with it. Although Meyer attempted to explain this as the witness' natural reluctance to admit to such influences, this evidence had a substantial negative impact on Meyer's credibility. He and his wife also testified at length on the physical and emotional impact of the article.

d. Defendants' newsgathering/reporting and trial demeanor: The reporter altered quotes on the drug use issue (as evidenced by his own notes), did not contact the plaintiff's boss to see if he could confirm that the plaintiff had been fired, and published the article without reaching the plaintiff for comment, relying on biased sources. Nonetheless, everyone concerned with the trial agreed that the reporter came across as decent, honest and credible at trial, particularly because of his low-key demeanor and his willingness to admit mistakes.

e. Experts: N/A.

f. Other Evidence: Plaintiff also attempted to demonstrate that the defendants intentionally used unflattering graphics to convey a negative impression of plaintiff. Another factor was that defendants were forced to put in much of their evidence through deposition testimony of non-party witnesses located out-of-state.

g. Trial dynamics:

i. Plaintiff's counsel -- plaintiff's counsel was a 62 year old, charming veteran of hundreds of trials, who is flamboyant in a humorous and friendly way, excels at storytelling, but is not a

master of detail. Plaintiff's second chair lawyer cross-examined defendant-reporter (who came across as humble and likeable) in a strident manner. Although this was effective substantively, its tone and manner may have alienated the jury and left them feeling more compassion for the reporter than they might have otherwise.

ii. Defense counsel -- lead defense counsel was also an experienced trial lawyer who exuded self-confidence, and was clever, but not humorous, and better able than plaintiff's lead counsel to assimilate and manage a complicated case. Both advocates were aggressive and pushed the limits of propriety, and in this sense tended to offset each other.

iii. Judge -- the trial judge clearly remained in control in a manner typical of the federal bench tradition. Overall, he was fair, but inconsistent in evidentiary rulings. After trial, however, he consistently took pro-plaintiff positions on legal issues, relying on unprecedented interpretations of the law.

iv. Other factors -- Defense counsel attacked the plaintiff's character throughout the trial, but the evidence was directly relevant to the truth of the relatively broad charges in the article. Frequently, such evidence was received in the form of hearsay on the issue of reporter's state of mind, but there was plenty of eyewitness testimony as well. The result was that the jury was well acquainted with the plaintiff's dark side, without it appearing that the defendant was pursuing a gratuitous attack.

h. Lessons: Defense counsel believe that this jury, if required to choose, would have found for the defendants because they believed the plaintiff was undeserving of recovery. However, they were also unhappy with the journalistic practices that lead to the story, and probably felt plaintiff was victimized by the "cocaine user" and "fired" aspects of the story, and thus chose to "pigeonhole" the result in the issue of defamatory meaning as a compromise. Had a general verdict form been submitted, defendants may well have prevailed or suffered a very modest plaintiff's verdict, possibly not faced a retrial, and at worst would have had a retrial on all issues and not one limited to damages. See 18 on post-trial rulings, *infra*.

16. Results of jury interviews, if any: Counsel were not permitted to interview the jury. Defense counsel heard through a newspaper reporter acquaintance that the reporter had spoken to Juror No. 2 and that according to this report, the jury really disliked Meyer, and did not like what he did. The juror also said that the jury did not buy Meyer's argument that he left Beecham voluntarily, but also did not believe that he had been fired. Arguably this tends to support defense counsel's thesis that the verdict finding falsity and constitutional malice was a compromise from a jury that determined that plaintiff was not entitled to a monetary recovery but was uncertain of how to express this in the verdict.

In addition, the judge's clerk spoke to a number of jurors and reported that they did not think much of Meyer, that he was "too rich and too thin." However, they also did not like the defendants' conduct even though they did not particularly dislike the reporter. According to the clerk's report, this jury was not likely to award much money even if liability had been found.

17. Assessment of Jury: Probably as good as can be expected.

18. Post-trial disposition: When the jury came back, the plaintiff complained of the apparent inconsistent verdict and demanded that the jury be told to deliberate on damage issues. The defendant resisted this, and the judge who took the verdict, substituting for the trial judge who had a speaking engagement, declined to accede to this extraordinary procedure. The defendant took the position that the parties had argued the defamatory meaning instruction

and the verdict submission at length, and the visiting judge declined to question the trial judge's determination of how to submit the case.

Upon plaintiff's post-trial motions, the trial judge ruled that under California law the statements in issue were libelous *per se*, and hence it was error to have submitted the issue of defamatory meaning to the jury. The judge concluded that the plaintiff would have won on liability but for his error because the jury answered the other two questions (falsity and constitutional malice) affirmatively in favor of the plaintiff with respect to two of the statements in issue. The judge rejected the defendant's convincing arguments that even if he erred and decided to hold a new trial, the new trial should be on all issues since the answers on falsity and constitutional malice were likely a compromise in a case where the jury had determined that the plaintiff was not deserving of recovery. The court instead entered judgment on liability in favor of plaintiff, and ordered a new trial on damages only.

The court also ruled with respect to the new trial that evidence showing that any injury from any technical falsity in the article was no worse than the injury which would have been caused by publication of the truth on the same subject, i.e., that plaintiff was a regular drug user. (Such evidence was not admissible on the issue of substantial truth, since that issue was deemed determined adversely to defendants.) The court held that the only evidence admissible on damages was that the plaintiff had a bad reputation prior to publication. In so ruling, the court relied upon California law (Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1930)), which it acknowledged was contrary to the prevailing view, Crane v. New York World Telegram Corp., 308 N.Y. 470, 126 N.E. 2d 753, 52 A.L.R. 2d 1169 (1955). The case was settled before the new trial began.

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I. Carl Pesta D.O. v. CBS and Ed Bradley, United States District Court for the Eastern District of Michigan, August, 1992, Paul Gadola, J.

1. Date of Publication: October 30, 1983

2. Case Summary: Plaintiff, an osteopathic physician, claimed he was libeled by a 1983 "60 Minutes" segment entitled "Tragic Assumptions", which reported on instances in which Reye's Syndrome, a deadly childhood disease, had been misidentified or misdiagnosed. The broadcast detailed the circumstances of the tragic death in 1972 of 16-year-old, John Haisenleder. When John became severely ill, his mother contacted their family doctor who suspected Reye's Syndrome and agreed to meet the family at St. John's hospital. Reye's Syndrome includes symptoms of vomiting, disorientation and combative or even violent behavior, and the mother called the police for assistance. The police determined the boy was on drugs and, ignoring the mother's pleas, took him to Harrison Hospital, which handled drug cases. The doctors at Harrison, where plaintiff was the treating physician, could not diagnose the boy's illness, and he died several days later, of Reye's Syndrome. By the time of trial, the only aspect of the broadcast that remained in issue was a statement by a medical expert who opined that doctors at Harrison made a "critical mistake" by failing to order liver function studies. Plaintiff claimed he did order liver function studies and defendants withheld this information from the medical expert when they solicited his opinion.

3. Verdict: For the defendants.

4. Length of Trial: 14 days.
Length of Deliberations: 2 days.

5. Size of Jury: 10

6. Significant pre-trial and mid-trial rulings: Summary judgment was granted for the defendant in 1986 but this was reversed on appeal in 1988 based on Rouch v. Enquirer and News of Battle Creek, 427 Mich. 157, 398 N.W.2d 245 (1988), in which the Michigan Supreme Court held that reports involving matters of public concern but not public figures are governed by a negligence standard. See Pesta v. CBS, 15 Med. L. Rptr. 1798 (E.D. Mich. 1988).

Plaintiff originally sued over a variety of statements in the broadcast. Through a series of pre-trial summary judgment motions, defendants narrowed the case to a dispute over only one statement. The trial court rejected efforts of plaintiff to reintroduce evidence concerning those previously dismissed claims.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Numerous evidentiary issues were resolved before trial after hearings before a magistrate-judge. The judge gave a brief "mini-charge" at the beginning of the trial that defined "libel," "of and concerning," but did not focus on the constitutional elements of the case. There were no unusual mid-trial instructions. There was a special verdict form, but no sequential determination of issues. The judge did not formulate the instructions before trial.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): The Eastern District of Michigan utilizes a procedure that originated in some districts in the southeast whereby the jury is chosen approximately two weeks before the commencement of trial before a magistrate-judge. This gives counsel time to prepare the case for the jury selected. Counsel are permitted to examine the venire.

9. Pretrial Evaluation: Probable defense verdict based on substantial truth. Exemplary damages were not in issue because of the prior ruling of no actual malice.

10. Defense juror preference during selection: Preferable jurors: mothers (empathy); young people (same); intelligent, well educated people (to understand the complex medical proofs).

11. Actual jury makeup: The jury consisted of eight men and two women. Eight jurors were Caucasian and two were African-American. All but two of the jurors were under 40 years of age. They resided in a variety of communities and held a variety of jobs. The foreman was an upper middle-aged African-American male, plant manager for Chrysler.

12. Issues Tried: Substantial truth. Secondarily, the defendants' good faith and due care, defamatory meaning, "of and concerning," damages.

13. Plaintiff's Theme(s): Plaintiff attempted to convince the jury that he had been misled concerning the subject matter of his interview. He argued that defendants edited his interview, and the interview of the expert physician who appeared in the broadcast, in such a way as to make it appear that he had failed to provide adequate medical care to John Haisenleder. Plaintiff's principal contention was that the expert stated plaintiff failed to order liver function studies when in fact he had done so.

14. Defendant's Theme(s): The defendants primarily emphasized the truth of the broadcast and introduced evidence to demonstrate that plaintiff had, indeed, made critical mistakes in the diagnosis and treatment of John Haisenleder. Defendants also introduced expert testimony supporting their journalistic practices, and contended they had no reason to believe their medical expert was misreading the chart.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: For differing reasons, jurors in the venue, particularly those from inner-city Detroit, tend to have more than the usual bias against large organizations and the media.

b. Sympathy for plaintiff during trial: Plaintiff and his witnesses portrayed plaintiff as having earned his way through medical school and achieved a distinguished career in which he had saved thousands of lives; plaintiff testified he was ruined by the broadcast, forced into a non-clinical practice but did his best to keep his head high by becoming a medical educator. Plaintiff's wife testified to how the broadcast had destroyed the plaintiff emotionally and removed his ability to be a good doctor. Plaintiff's colleagues testified to how referrals dried up and nobody wanted to use the plaintiff after the broadcast.

c. Proof of actual injury: Plaintiff's business records and referral data had been destroyed, and evidence of damages to plaintiff's practices was disjointed and not very credible.

d. Defendants' newsgathering/reporting and trial demeanor: Outtakes were offered by both sides. For plaintiff, they showed some degree of editing unfavorable to the plaintiff; for the defense they tend to show plaintiff as not credible nor likeable. On balance, counsel feels the outtakes favored the defense.

Because of plaintiff's elaborate showing as to his own background, defendants were permitted to and could comfortably offer Bradley's background which included summers working in Detroit.

e. Experts:

Plaintiff - Clark Mollenhoff was initially designated as the plaintiff's expert, but he passed away prior to trial. James G. Wieghart, currently Associate Professor & Chairperson of the Department of Journalism at Central Michigan University, former Editor and Executive Vice President of *New York Daily News*. Louis J. Slyker, Assistant Professor in Communication Studies at the University of Detroit-Mercy, former Station Manager and Program Director for Detroit public broadcasting station.

Defendants - Robert Mulholland, currently Professor of Journalism at Medill School of Journalism, Northwestern University in Evanston, Illinois and Chairman of the Broadcast Program. Former President of NBC.

f. Other evidence: The most compelling evidence the defense introduced was the testimony of a doctor retained to evaluate the care received by John Haisenleder according to standards extant in 1972. He testified that Pesta's care fell well short of the standard of care and that proper care could have prevented the boy's death. This testimony was not only credible but had most of the jurors in tears. There was also evidence through this witness and others that, although plaintiff ordered some liver function tests as part of a larger battery of tests, he was not aware he had done so, was not looking at the results, and had not ordered them in a manner that would have given him timely results.

The defense also called a forensic expert to testify that some of the medical records had been altered. Although defendants could not show who had done it, this cast a shadow on the plaintiff's claim he had ordered the tests.

g. Trial dynamics:

i. Plaintiff's counsel - an experienced trial lawyer, occasional flourishes but frequently disjointed. Had himself been scucessful libel plaintiff.

ii. Defense counsel - Experienced team, well prepared, probably appeared to jurors to be in control.

iii. Judge - Reasonable but did not maintain rigid control.

iv. Other factors - Prior to opening statements the entire broadcast was shown to the jurors at defendant's request. This caught the plaintiff off guard, demonstrated the defendant's pride in its work, and showed Ed Bradley as likeable, sincere and competent, and showed essentially the opposite with respect to the plaintiff.

h. Lessons: The defendants were able to win this case by attacking the plaintiff's care of the boy and appeared to be taking the high ground in so doing because the proof went to the gist of the defamation in issue.

16. Results of jury interviews, if any: The last juror seated (after peremptory challenges had been exhausted) was a young WM who was a technician at U. Michigan computer laboratories and whom counsel suspected of anti-media predisposition. He, apparently, was responsible for keeping this jury out for two days. This juror felt that the network should be held to a standard requiring absolute accuracy. Eventually the others prevailed with the notion that defendant had been right in condemning plaintiff's care and that the broadcast was substantially true.

The jurors generally liked Ed Bradley. The evidence on Bradley's background was well received, and made him appear to be an accessible human being.

The jury found the testimony of the defense medical expert to be compelling and believed that the plaintiff had been inattentive.

The jury said they believed defense counsel and thought plaintiff's attorney did not know the case well enough to be very credible.

17. Assessment of Jury: Except for the one juror identified above, this was a good jury.

18. Post-Trial disposition: A notice of appeal was filed, but subsequently dismissed. The defendant agreed to waive costs.

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J. Jim Robinson, et al v. KTRK TV and Wayne Dolcefino, Harris County District Court, Houston, Texas, No. 90-63728, November 23, 1992, Don Wittig, J.

1. Date of Publication: December 1989; October 1991

2. Case Summary: Robinson and three affiliated companies filed a libel claim against KTRK-TV arising out of a three-part series (with a recap on a weekend show) concerning a low-income housing development sponsored by plaintiffs. The project was largely financed by loans and grants from the Texas Housing Agency and the City of Houston at a time when the brother of plaintiff Robinson was a city councilman and mayor *pro tem* of Houston. At the time of the broadcasts, the plaintiffs had defaulted on a purchase money loan from the Texas Housing Agency, which had posted the property for foreclosure. The suit also was based on a re-broadcast of portions of the 1989 series in a 1991 story concerning related events. Plaintiffs complained of the implications that the plaintiff was not a good business risk for the loan and that the deal resulted from Robinson's relationship with his brother and that the project failed due to plaintiffs' mismanagement.

3. Verdict: For defendant. Special verdict: 11-1 that defendants had not negligently broadcast libelous statements that were false; 11-1 that the defendants did not tortiously interfere with plaintiff's business relationships; 10-2 that the broadcasts did not portray plaintiff in a false light; 12-0 that the broadcasts were not "reasonable and fair comment".

4. Length of Trial: 4-½ weeks
Length of Deliberations: 5 hours with evening break

5. Size of Jury: 12

6. Significant pre-trial and mid-trial rulings: The trial court (a) denied defendants' motion for summary judgment; b) ruled that plaintiffs were not public figures; c) admitted into evidence a report prepared by the United States Department of Housing & Urban Development after the broadcasts (and therefore not relied upon in the broadcasts) which was critical of plaintiffs and generally consistent with the theme of defendants' broadcasts.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): As is customary in Texas state court litigation, the case was submitted to the jury on special interrogatories. The judge permitted jurors to take notes and to submit questions to witnesses. The questions were to be submitted to the judge in writing, and asked only with approval by the judge, after review by counsel and opportunity to object outside the presence of the jury.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): The defendants employed a jury consultant and conducted a mock trial. Plaintiffs' counsel reported doing the same. The trial judge submitted a questionnaire to the venire, which was drafted by the joint efforts of counsel, subject to revision and approval by the judge. Each side was permitted two hours of *voir dire* of the jury panel members.

9. Pretrial Evaluation: Slightly better than even chance of defense verdict, but coupled with concern that large damages were possible if jury found liability.

10. Defense juror preference during selection: Generally, the defense favored jurors who believed the government agencies should be vigilant in ensuring the recipients of governmental financial assistance spent the money wisely. It was also important to the defense that jurors be able to distinguish a critical story from a false story.

Going into the *voir dire*, defendant had several categories of likes and dislikes. For example, wage earners and businessmen were considered preferable

because of their likely loathing of government inattention to wasteful spending. Government employees, and persons from a liberal background, because of their relative tolerance of government spending and likely sympathy for a government-sponsored low-moderate income housing project, were considered presumptively unfavorable. However, the opportunity for extensive *voir dire* of individual jurors permitted a more fine tuned evaluation, and counsel found that some jurors from presumptively disfavored backgrounds nonetheless possessed the desired predispositions and attitudes. See paragraph 11 for actual jury makeup.

11. Actual jury makeup: 8 men, 4 women; 6 White, 2 Black, 2 Hispanic, 2 Asian-American. Jurors' occupations were a mix of various white-collar and blue-collar occupations. Education level of jurors was probably slightly greater than average.

12. Issues Tried: Libel, false light, tortious interference with business. The tortious interference claim did not involve the broadcast itself, but was based upon reporter Dolcefino's interview with the chairman of the Texas Housing Agency, alleging that during that interview Dolcefino had bad-mouthed the plaintiffs and caused the Texas Housing Agency (the first lienholder on the project) to pull the plug on the project. That claim failed because the housing agency chairman denied that the broadcast had anything to do with this decision.

13. Plaintiff's Theme(s): The broadcasts falsely accused the plaintiffs of mismanagement, fraud, and even criminal activity in the course of the Co-op Houston housing project. The plaintiffs argued that difficulties with Co-op Houston were caused by a depressed real estate market, and that despite its difficulties, the project could have been resurrected after 1989 but for the defendants' broadcasts.

14. Defendant's Theme(s): The Co-op Houston project had failed long before the broadcasts in question, would not have been saved in any event, and that the broadcasts were a substantially accurate report of a matter of public concern and a matter involving the expenditure of public funds. The defendants also argued that the focus of the broadcast was not the plaintiffs' management of Co-op Houston, but the City's lack of oversight over the project.

The defendants were careful to deal with the potential warts on their case during *voir dire*, opening statement, and throughout the evidence. They admitted that the broadcast tended to emphasize the negative side of the issue more than the facts tending to favor plaintiffs (such as the overall poor health of the Houston real estate market, which arguably contributed to the failure of the project, and that one of the sources for the story, the former city housing director, had been fired from his job and arguably had an ax to grind against the mayor and city administration, which was not reported), but that this did not establish that it was false, or caused the plaintiffs damages; admitted that the broadcast contained minor factual errors, in particular as to some of the dollar amounts of expenditures, but that this did not necessarily render the gist or thrust of the article anything but substantially true. As to all of these items, the defendants admitted upfront that they would, in hindsight, have done all of these things differently, but from the beginning prevailed upon the jury to accept the distinction between a story that is critical and (at least from the plaintiffs' perspective) unbalanced but yet not untrue. The special verdict indicates they were successful.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: In post-trial motions, plaintiffs' counsel called the special verdict "schizophrenic," which, counsel argued, could only have been based upon racial prejudice. Plaintiffs' counsel urged that since the plaintiffs were Blacks directing their cooperative housing efforts to meet the needs of poor Blacks and received government loans on which they defaulted, "the potential for all the traditional stereotypes applied to Blacks . . . to come into play was enormous in a situation where you had ten non-Black jurors in the Deep South passing judgment on Black plaintiffs." The motion was supported by an affidavit of one Black juror who said racism played a part.

Defense counsel feels very strongly that prejudice played no part in the verdict, and that the result would have been the same had the plaintiffs been White Anglo-Saxon Protestants. In response to plaintiffs' post-trial motions, the Defense pointed out that on only one of the five special interrogatories did the two Black jurors vote differently from the other ten. On the remaining four special interrogatories, two were answered unanimously and two were answered 11-1, with one of the two Black jurors voting for the defense. Defense counsel did not think that any particular pre-existing attitude of the venire was a factor in the verdict.

b. Sympathy for plaintiff during trial: Plaintiff Robinson was a calm, well-spoken and sincere witness who was likeable if not sympathetic to the jury. Robinson urged that the project failed because he could not overcome all of the hurdles he faced, including market conditions, and the continuing illegal practice of lenders to redline certain projects. Defendants countered this by acknowledging to the jury that the plaintiff was a nice person, but urged them to focus on the defendants' story, in which the plaintiff's character as a person or family man was not an issue; regardless of the plaintiff's character or motives, the gist of the story was that his company got funding for a project at least in part because of Robinson's political contacts, and the project failed while the plaintiff was at the helm.

c. Proof of actual injury: Robinson offered evidence of his personal anguish and damaged reputation from himself and supporters. Plaintiffs had economic experts to support a theory that this project would have succeeded, despite two years of economic difficulties; that it was a prototype and would have paved the way for numerous other projects in Houston and elsewhere from which plaintiff's businesses would have benefitted from economies of scale and reaped significant profits. The judge allowed this testimony as to projects planned for the Houston market but not from other cities.

d. Defendants' newsgathering/reporting and trial demeanor: The defendants reporter Dolcefino was well prepared and did well. The defendants' news director was present throughout trial but did not testify, except through a brief deposition excerpt read by the plaintiff. Consistent with the defendants' trial theme, the reporter readily admitted he would have done some things differently, but maintained that the gist of the publication was fair and true. The plaintiff Houston Cooperative Foundation was represented by separate counsel, and managed to distance itself somewhat from the other plaintiffs. Their attorney brought out the failure of the reporter to interview anyone from their organization, which was the only thing not anticipated in *voir dire* and opening statement. The defendant local station was active in the community and appeared to be generally well regarded.

e. Experts: Plaintiffs called Joe Goulden and Michael Kittross as journalistic expert witnesses. The emphasis of their testimony was a count of the positive and negative bites and the conclusion that the reports were unbalanced against the plaintiffs. They helped the defendants in their inability to find fault with the investigation of the truth of what was actually reported. This tended to support the defense trial theme of emphasizing the distinction between a report that was arguably imbalanced but nonetheless substantially true. Defendants designated two journalism experts, Dwight Teeter and Martin Gibson, but did not call either one at trial because defense counsel believed that plaintiffs' experts had not been damaging to defendants' theme.

f. Trial dynamics:

i. Plaintiff's counsel - The plaintiffs' trial team, particularly lead counsel for Robinson, tried to dominate the scene with a booming voice, stalking around the courtroom, inflammatory inflections, etc. The judge gave Robinson's counsel some leeway,

but came down on him enough to maintain the appearance of control. During trial, defense counsel wished the judge would exert more control, but in hindsight feels that much more control could have resulted in a sympathy factor in plaintiffs' favor. Plaintiffs' counsel was prepared, competent, and appeared to the jury to be a worthy match for defense counsel. However, plaintiffs' counsel was bombastic and overstated the plaintiffs' demand for money during opening statement, from which the plaintiffs retreated by the time of summation (due in part to the judge's ruling limiting evidence of damages).

ii. Defendant's trial demeanor - Defense counsel, Tom Williams, exudes a down-to-earth style, which in light of his preparedness and focus, portrayed to the jury an advocate who was comfortable with this case and in control.

iii. Judge - This was an experienced trial judge who was not afraid to control the trial and limit counsel where necessary. He imposed time limits on both sides. His rulings were generally evenhanded, and did not give the impression of favoring either side.

g. Lessons: 1. In these times, it is helpful if the subject matter of your publication is public spending, and a story critical of prolific spending is likely to be defensible even if arguably unfair or unbalanced.

2. If you are defending on the basis of substantial truth and seek to distinguish that issue from issues of minor inaccuracies or unfairness, admit, upfront and throughout the trial, those things which the defendant would do different. Own up to what the defendant wishes it had done to make the story more balanced, fair or accurate, but separate these from the issue of material falsity.

16. Results of jury interviews, if any: Media reporters quoted one juror, "obviously, the publicity and big wig witnesses that made it all very fascinating. Then again, alot of it was like watching paint dry." Another juror said that while the group did not think the broadcasts were "totally fair," they also did not believe the reports were libelous or damaged Robinson.

17. Assessment of Jury: From interviews with jurors, counsel had the impression that these jurors were able to understand and apply the distinction between a broadcast that is critical and arguably unfair and one that is untrue. They were also impressed that the jury seemed to have favorable predisposition towards a visibly aggressive investigative reporter such as Dolcefino at least as to investigations involving government spending.

18. Post-Trial disposition: Post-trial motions denied; plaintiffs' appeal dismissed on procedural grounds unrelated to merits of the case. Case is now concluded.

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K. John M. Short and John T. Moorman v. St. Petersburg Times, Hillsborough County Circuit, Florida, Nos. 89-21510 and 88-17624, March 27, 1991, John G. Hodges, J.

1. Date of Publication: Series, December 3, 1983 - May 1984.

2. Case Summary: Short was the popular sheriff of Pasco County since 1977. In April 1983, Donahue, one of Short's top deputies, was indicted by a federal grand jury, along with Santos Trafficante and other mob figures, for taking bribes in exchange for fingering undercover vehicles. Donahue was found dead two weeks later, after it was disclosed that his claimed former work history with the New York Police Department was bogus. Short's investigation concluded that the death was a suicide.

The mob's apparent infiltration of the sheriff's office caused the *St. Petersburg Times* to investigate. The resulting articles focused on Short's hiring of Moorman, an independently wealthy individual, as a part-time deputy, in exchange for favors and money that was used to fund what was officially referred to as "CUP" (Clean Up Pasco) but in fact was a secret investigation of Short's and Moorman's political enemies. The articles also detailed Short's personal loans from banks that received sheriff's office deposits, numerous business transactions between Short and his own employees, including Moorman, and the growth of Short's personal holdings while in office. In addition, defendants reported on Short's leasing of property to persons with ties to the Gambino organized crime family; facts indicating a shoddy investigation of the suspicious circumstances of Donahue's death; and Short's apparent cover up of a note made by Donahue before his death indicating that Donahue had agreed to give the government information on Short. Finally, the series disclosed the hiring of numerous deputies with criminal records, and the use of runaway teenage girls as undercover informants in drugs-for-sex stings.

In 1985, the newspaper and reporters Lucy Morgan and Jack Reed won a Pulitzer Prize for the series. Short lost the 1984 sheriff election in the wake of the articles. He was indicted on various counts involving misuse of public office and public funds, but was acquitted. Having lost the 1984 election for sheriff in the wake of the articles, Short sued the newspapers shortly before announcing his candidacy for the 1988 election, which Short lost as well. Short also sued the newspaper for articles in connection with both indictments, but dismissed these claims before trial. The newspaper counter-claimed alleging abuse of the judicial system for political purposes.

3. Verdict: For defendant. The jury was given a general verdict form, with a single special interrogatory, "are any of the statements sued upon false in any material respect?" The jury answered, "no."

4. Length of Trial: 19 days
Length of deliberations: 2-½ hours

5. Size of Jury: 6

6. Significant pre-trial and mid-trial rulings: The trial judge never gave serious consideration to the defendant's motion for summary judgment, but indicated verbally the view that the case appeared complex and should be sorted out by a jury. The judge was unwilling to make rulings to shape the trial.

At the close of the plaintiff's case, dismissed the claim for punitive damages, on the grounds that under Florida law liability against a corporation requires culpable wrongdoing at the corporate management level, at least in the form of negligence, and probably in the form of reckless disregard, neither of which had been shown.

The court dismissed the counterclaim at the close of the evidence.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The judge gave no "mini" charge or mid-trial instructions.

The defendant requested a Sharon type sequential determination of issues, or alternatively, special verdict interrogatories. The trial court refused this, and utilized the general verdict form tendered by the plaintiff, but included one special interrogatory inquiring whether any of the publications in issue was false in any material respect. As noted above, the jury answered "no."

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Plaintiff employed Harvey Moore, Trial Practices, Inc., Tampa, a litigation consultant whose background is primarily in sociology. Moore did attitude surveys for the case, and arranged for mock trials and focus group studies.

Defendant used the preselection jury work primarily to identify trial themes. Moore's study results and recommendations indicated that the principal themes should be the fact that the plaintiff sheriff's office had been infiltrated by the Mafia and, secondarily, the theme that the sheriff had abused the public trust by hiring persons with criminal records as deputies, and hiding these backgrounds from the public. Even though the plaintiffs' case focused on statements about Short and Moorman's collaboration in the Operation CUP political enemies investigation, defense counsel determined it was important for the jury to see the evidence on these more particular matters through the filter of the apparent organized crime connection and more general abuse of public trust. Counsel emphasized these themes beginning in *voir dire*, with questions such as, "How would you feel if you were told your sheriff's office had been infiltrated by the mafia or used runaway teenage girls in undercover operations?"

During *voir dire*, counsel also asked questions about whether the jurors would expect their local newspaper to publish information such as that received by the defendant reporters. The questions were couched so that more often than not the answer was either, "yes," or "I'm not sure." In the case of the latter, counsel would add more relevant facts to the hypothetical until a "yes" answer was received. It would appear that counsel got away with more in jury *voir dire* than most of us can expect to in our respective jurisdictions.

The preselection studies also showed that readers in Hillsborough County (Tampa) thought the *St. Petersburg Times* was the better paper, while readers in Pinellas County (St. Petersburg) thought the same of the *Tampa Tribune*, and for this reason counsel consented to trial in Tampa.

9. Pretrial Evaluation: The case probably should and could be won, but could easily be lost on the basic issue of defamatory meaning. The investigation on this piece was solid, it won a Pulitzer Prize, and would likely leave the newspaper in a good position on appeal even if the case was lost in the trial court.

10. Defense juror preference during selection: Defendants' consultant's attitude survey showed that approximately 15% of the venire had a strong anti-media bias, and the trick was to somehow get these people to identify themselves in *voir dire*. Defendant wanted to have newspaper readers on the jury, but subscribers or regular readers of newspapers are becoming a rarity on this venue's jury panels. Counsel looked for people willing to pay attention and able to assimilate the defendants' more complicated side of the case, and likely to embrace the right to know about government even if the news is bad. No other preselection preferences.

11. Actual jury makeup: 1) WF, 20's, truck driver, 2) BM, 40's, can company employee, high school education; 3) WF, 40's, accounts payable manager; 4) BF, 60's, on welfare, husband receiving disability payments; 5) WF, 60's, housewife, husband mid-level executive; 6) WF, 20's, cosmetic company sales representative, attractive and demonstrative; 7) (alternate, did not deliberate) WM, 30's, worker for City of Tampa.

12. Issues Tried: Truth, primarily, and actual malice, secondarily.

13. Plaintiff's Theme(s): The series was the product of Lucy Morgan's malice toward John Short, and unfairly created the clear but false impression that plaintiffs were crooks. Plaintiffs denied that there was a list of political enemies that were investigated, and denied that the targets of the CUP investigation were chosen on the basis of political animosity. Defendants knew they had never seen the supposed enemies list, and knew they had no direct factual support for the defamatory implication that Operation CUP was motivated by political animosity.

14. Defendant's Theme(s): These stories served the most valuable function performed by journalism in pointing out unacceptable official conduct, and for this the defendants were honored with a Pulitzer Prize. The series was meticulously researched and an accurate report of a broad variety of questionable official and personal transactions on the part of Short and Moorman. (Defendants placed the reporters' research documents in twelve bankers boxes and prominently displayed the boxes at counsel's table.) As to the Operation CUP allegations which were the primary focus of the case, proof is clear that there was an Operation CUP and that some of CUP's targets had earned plaintiffs' "enmity, animosity or wrath"; although the apparent connection between the two was not conclusively established, the newspaper left it to the reader to make that connection. The defense also offered the other stories that the newspaper had written about Short's department, from hiring and firing to extensive business dealings by Short with his employees, to poor crime scene investigations, and use of teenage girls as undercover drug informants and asked in closing arguments "in light of all of this, how can they say these statements [in issue] ruined their lives?" The defense aggressively attacked the plaintiffs' characters as broadly as did the entire series of articles, and was more daring than the articles in raising the theme of mob connections.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: The case began before and finished after the Desert Storm ground assault, which made the venire aware of the role of the media and probably less tolerant of anti-establishment bias but more likely to support the function of outing a bad sheriff. Other than one or two believed to have a strong anti-media bias, there was no pre-existing anti-media sentiment in the venire.

b. Sympathy for plaintiff during trial: Short testified he received the Carnegie Medal of Freedom for personal bravery for a dramatic rescue, and as Sheriff had become one of the most respected and popular law officers in the state. Today he cleans garbage out of parking lots blaming the *Times* for ruining him both economically and socially. On cross, he admitted to owning a Corvette and a Lincoln, and had income from a title company he owned. This was probably enough to make the hard luck story appear contrived.

c. Proof of actual injury: An economist testified that combined lost salary and retirement benefits were $1.1 million, assuming Short had been re-elected in 1984 and 1988.

d. Defendants' newsgathering/reporting and trial demeanor: Counsel made reporter Morgan part of the defense team during discovery and trial prep. She attended many of the depositions. The reporters were extremely well prepared and made good witnesses. Lucy Morgan admittedly did not like Short, but her work was unquestionably professional. The defense also called a 27-year editorial page editor, and the then retired Editor and President, Gene Patterson, who added grey-haired dignity and credibility.

e. Experts: Plaintiff called James Hawkins, Florida A&M U., on journalism standards. Defendant called *Chicago Tribune* retired editor, Jim Squires. Plaintiff's counsel did not cross-examine Squires, and defense counsel feels he came out well ahead. Defendants' consultant's research indicated that across most demographic lines the most credible lawyer is a female attorney with a file folder in hand (indicating

organization and preparation). Counsel would advise any defense team to include a female attorney.

f. Other evidence: Plaintiffs, remarkably, produced former Pasco deputies who said they saw a list at some point during CUP, and confirmed various people as being on it.

The dramatic high point came during reporter Morgan's cross-examination, when she produced her notes of a phone conversation seven years earlier with the very attorney questioning her, during which he had said he saw "nothing untruthful" in the stories.

g. Trial dynamics:

i. Plaintiff's counsel - Plaintiffs' counsel were experienced and aggressive (both were criminal defense types) but not well prepared tactically due to inexperience with this type of case.

ii. Defense counsel - Defense counsel was aggressive and sometimes pushed limits with moral conviction, and had the tactical advantage of experience with this type of case.

iii. Judge - Notwithstanding his unwillingness to take charge of the case with legal rulings, the judge was fairly tough on both sides throughout the trial.

iv. Other factors - Defendants called a sheriff of an adjoining county as an expert on procedures. This made it clear to the jury that the newspaper was not anti-law enforcement in general. To control the courtroom and prevent jury confusion, and to accommodate for different learning styles, counsel displayed extraordinary graphic displays, including a fabric covered collapsible ten-foot high wall used in opening and closing, a chart of a timeline, a graphic in the editing process, and blow ups of all stories which were mounted on the wall as counsel went through them. Defendants used these materials to illustrate the journalistic process, and implicitly conveyed to the jury the newspaper's legitimate pride in its ability to communicate.

h. Lessons: Be straight with jurors and explain journalism -- not the First Amendment -- to them.

16. Results of jury interviews, if any: The jurors declined to speak to defense counsel or their consultant.

17. Assessment of Jury: Solid, middle-class people.

18. Post-Trial disposition: Verdict affirmed, *per curiam*, by appellate court.

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L. Southern Air Transport v. Post-Newsweek Stations of Florida, Inc., Dade County Circuit Court, Florida, July 30, 1991, Robert Paul Kaye, J.

1. Date of Publication: April 1987

2. Case Summary: The defendant, operator of WLPG TV Channel 10 Miami, broadcast a four-part series describing the plaintiff air cargo carrier's involvement in the Iran-Contra Affair. The trial focused on the third segment of the four-part series, broadcast April 30, 1987, which detailed an eyewitness account of two exchanges of cocaine for weapons at the airport in Barranquilla, Colombia. The witness, Wanda Palacio (shown in silhouette in the broadcast and referred to as "Wanda Doe"), identified one of the persons present as a pilot, since deceased, who flew aircraft owned by the plaintiff, and confirmed that one of the aircraft carried the plaintiff's insignia. The trial focused on the eyewitness' credibility, and plausibility of the account.

3. Verdict: For defendant. Special verdict: The jury answered "no" to special interrogatories inquiring whether 1) plaintiff had proved that the broadcast segment in issue was substantially false (by preponderance of the evidence); 2) the segment was defamatory; and 3) by clear and convincing evidence, the defendants knew the segment was false or acted in reckless disregard whether it was false or not. As instructed in the event of a no answer to any of the above, the jury left blank those parts of the special verdict form that addressed actual and punitive damages.

4. Length of Trial: 6 weeks
Length of Deliberations: 8 hours

5. Size of Jury: 6 (3 M, 3 F)

6. Significant pre-trial and mid-trial rulings: The trial judge entered summary judgment on the grounds that plaintiff was a public figure and actual malice could not be proven, 15 Med. L. Rptr. 2429, but this was reversed by the Florida Court of Appeals on the grounds that the plaintiff could prove actual malice, 568 So. 2d 927 (Fla. App. D.C.A. 1990).

The trial court denied the defendant's motion to compel discovery when plaintiff refused to respond to discovery on the grounds of national security privilege. The court denied the motion after exploring the grounds for the claim of privilege, which presumably would tend to support the defendant's allegations of plaintiff's involvement with the CIA, through *ex parte* communications with the plaintiff. The defendant then moved to recuse the judge, and this motion was denied. The relationship between the defendant and the judge was strained thereafter.

Defendants pursued a defense that Southern Air was still controlled by the CIA and, therefore, the claim was barred by the Seditious Libel doctrine. The trial judge declined to instruct on this basis, even though evidence of Southern Air's relationship with the CIA was introduced at trial.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The special verdict form contained inquiries directed to substantial falsity, defamatory meaning, clear and convincing proof of actual malice, fact of actual damages, amount of actual damages, entitlement to punitive damages on the basis of state standard of ill-will, hostility or intent to harm, and amount of punitive damages. There were no mid-trial instructions or other trial management innovations. Because of the controversial subject matter, the judge did allow extensive voir dire by the attorneys, which lasted approximately 1-1/2 weeks. The defendant found this very useful, but the examination was conducted in chambers on an individual basis, so defendant lost the opportunity to have the entire panel hear individual answers, which the defendant felt would have benefitted its side of the case.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Defendant ranked jurors during *voir dire* examination on a 1-5 scale, and developed a system of positive and negative

attributes based upon age, cultural background, employment, etc. The system is elaborate, and the details are beyond the scope of this survey. Responding counsel are willing to share it with interested defense counsel.

9. Pretrial Evaluation: Counsel were sensitive to the one troublesome aspect of the defendant's position, namely, reliance on an impeachable source who told a story that was difficult to prove true or false, since other known witnesses to the event were dead or in prison in Colombia. Nonetheless, counsel deemed the story defensible on both substantial truth and fairness grounds, and were reasonably sanguine the case could be won.

10. Defense juror preference during selection: In general, the defense preferred better educated jurors, with financial or accounting experience, who would appreciate the overreaching nature of the complicated damage case which the plaintiff presented. Obviously, the defense favored jurors who expressed suspicion of the CIA, willingness to question authority, and the like. Attitudes considered negative included blindly patriotic views and "ends justify the means" notions in dealing with communist regimes. In particular, counsel were concerned about the older community with ties to pre-Castro Cuba that is notoriously conservative on these issues.

11. Actual jury makeup: 1) 45-year-old WF loan recovery manager for S&L, married two weeks; 2) 36-year-old WM, plant manager for formica manufacturer; 3) 19-year-old HF, high school graduate, to start Duke University, pre-med, to become a cardiologist; 4) 41-year-old BF, bank customer service representative; 5) 58-year-old WM, business degree, food sales executive; 6) 55-year-old WM, retired former bank officer, 3 years college education.

12. Issues Tried: Most of the evidence and argument focused on the issue of substantial truth. The plaintiff, hoping to exclude evidence of its extensive involvement in the Iran-Contra affair, tried to restrict the proof by amending its complaint on the eve of trial to limit its claim to the eyewitness account in the third segment of the series. The defendant attempted to offer evidence justifying the entire broadcast, which dealt with a broad array of allegations concerning plaintiff's involvement in Iran-Contra, all of which had been challenged by plaintiff until the commencement of trial. The trial judge initially accepted defendant's broad view of the scope of relevance, but by the end of the trial decided that the case should be more limited to the allegations contained in the third segment of the series. Both sides focused on damage issues, as to which defense counsel feels plaintiff may have harmed itself with proof that lacked credibility and in some cases even caused jurors to laugh.

13. Plaintiff's Theme(s): Wanda Palacio was not a credible source, and her account was implausible. Plaintiff called as adverse witnesses all of the defendants' management and staff that were involved in preparation of the piece, confronted each with inconsistencies in the stories that Palacio told the station, other media, and representatives of law enforcement authorities, and browbeat them with questions such as "How could you believe this crazy woman from Puerto Rico?"

14. Defendant's Theme(s): The defendant's reporters met with Wanda Palacio, spoke to her at length, concluded she was credible, and then made impressive efforts to check her story which they were unable to disprove. Each of the persons responsible for the broadcast "looked the witness in the eye" and believed her. The defendants also urged that Southern Air had not been honest with its own employees or the public about its role in the Iran-Contra affair, which the investigation of that affair revealed. The allegations in issue paled in comparison to the revelations that came from that investigation.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: As noted above, defendants were concerned about the older Hispanic community in the Miami area with ties to pre-Castro Cuba, which defendants managed to avoid in the jury selection. The defendants did not identify any other problems with attitudes or biases on the part of the venire.

b. Sympathy for plaintiff during trial: The plaintiff had some good days. The company performed services of significant value to the Third World, with aircraft that could land in rough terrain. They showed a promotional video showing food relief operations, bug spraying in Alaska, and refugee airlifts. Here, plaintiff claimed, it was just doing what the President asked it to do. However, the defense showing as to the nature and scope of plaintiff's involvement with the CIA and in the Iran-Contra affair, and publicity concerning it, may have been effective in desympathizing the plaintiff. Defense counsel were aware of the risk of this tactic of attacking the plaintiff, but believed it was well calculated. The tactic dovetailed well with the defendants' aggressive defense that the whole of the series was not only very important but the defendant got it right.

c. Proof of actual injury: Plaintiff's profits increased after the broadcast. Plaintiff attempted to show economic loss by showing that its margin had been reduced, and called an expert who had studied the effects of bad morale upon factors effecting profit. Some of this expert's testimony may have been difficult for the jury to accept, e.g., his determination that an increase in fuel cost was due to pilots with poor morale engaging in fuel wasteful maneuvers such as steep climbs. Defense counsel offered what they felt was a more credible explanation for the decreased profit margin, namely, the company's expansion of its fleet. Plaintiff also called an expert on aircraft finance who said its new aircraft loan was at a higher interest rate due to the broadcast. The lenders that considered plaintiff's loan request generally did not support causation on this theory of damage.

d. Defendants' newsgathering/reporting and trial demeanor: The only troublesome aspect was defendants' decision to rely on the eyewitness account of Wanda Palacio. At trial defendants took great care to justify this decision through its reporter and producer witnesses.

e. Experts: Neither side called a journalism expert. Defendant called former U.S. Customs Commissioner William Von Raab, who testified that Palacio's account was very plausible. Both sides called damage experts. Plaintiff's cross-examination tried to show Von Raab to be without knowledge about Southern Air; asked who owns Southern Air, Von Raab responded that he had heard Southern Air was owned by the CIA. Miami Customs Director Pat O'Brien also testified that incidents like the described were common.

f. Other evidence: Both parties showed defendants' outtakes and a "safety tape" that the defendants made of the Palacio at her request in the event she was murdered. This evidence tended to help plaintiff in that it showed some inconsistencies in Palacio's statements to the station and the inconsistency of those statements with other statements to law enforcement officers (the latter tended to show that the witness was untruthful, but not that the defendants knew it.) On the plus side, the outtakes and particularly the safety tape gave the jury a feel for Palacio, who was portrayed in the broadcast for only a few seconds in silhouette, and tended to support the reporter's testimony that Palacio was of credible demeanor.

Because the judge initially ruled that the scope of the evidence would be consonant with a claim based upon the entire four-part series, the defendants were initially permitted to offer a broad range of evidence concerning Southern Air's alleged activities involving the CIA and, in particular, the Iran-Contra affair, including flying planes to Israel with missiles for Iran, and flying explosives to Central America for the Contra rebels. This was in support of the defendants' theme that any harm from the broadcast as a whole resulted from what plaintiff actually did and not how the defendants portrayed it. In addition, the defendants offered thousands of newspaper articles concerning Southern Air including some that reported allegations of Southern Air's involvement in guns-for-drugs transactions.

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiff's counsel was tenacious, intelligent, and occasionally inflammatory. He used the normal libel plaintiff's buzzwords, e.g., "send a message," the media shouldn't be allowed to get away with cheap shots like this. Plaintiff's counsel was also persistent in playing for the judge's favor.

Plaintiff's counsel attempted to control the courtroom, but defense counsel feel the judge assumed adequate control and prevented plaintiff's counsel from dominating to the point that the jury would look to him for cues.

ii. Defendants' counsel: Because of the complexity of the case, defendants divided the trial functions in this case among four experienced trial lawyers. Counsel feels that all four were good communicators, but they gave up the rapport that might (or might not) be established between a single advocate and the jury.

iii. Length of trial: The trial was lengthy, but clearly had stalled on the issue of substantial truth so the length of the trial did not subconsciously nudge the jury toward a large award.

iv. Judge: As noted above, the judge had initially permitted the defendants to offer a broad range of evidence on the issues of substantial truth of the entire broadcast, causation, and damages. Well into the trial, the judge modified his view and determined that the evidence should be limited to that relevant to the claim as based upon the third broadcast only. Thus, by the end of the trial, the judge's rulings were reflecting his perception of the need to control the scope of defendants' inquiries. It is not clear how this judicial demeanor effected the jury, but it does not appear that there was any effect detrimental to the defendants.

h. Lessons: The defense team, including clients, non-excluded witnesses, paralegals, met at the end of each day, reviewed the day's developments, compared detailed notes and observations. Counsel found this exercise extremely valuable. The defendant station covered the trial on a daily basis, and no other station covered the trial at all. This resulted in daily complaints and even motions for contempt proceedings from plaintiff's counsel, and further strained the defendants' relationship with the judge. However, it may also have contributed to Southern Air's willingness to drop the case and not go through another trial.

16. Results of jury interviews, if any: Counsel conducted no formal interview of the jurors. Statements reported in the media suggested that some of the jurors were not sure that Wanda Palacio was being truthful, but concluded that the defendant had reported Palacio's allegations accurately and the allegations were not defamatory.

17. Assessment of Jury: Counsel feels that the jury picked was at the top end of its rating scale. Counsel believe the verdict validates its assessment regarding jury preference.

18. Post-Trial disposition: The trial court granted a new trial, primarily over concern about the broad range of evidence the court allowed near the beginning of the trial, involving transactions other than the one alleged in the third segment. The defendants filed an interlocutory appeal, but before any briefing occurred, the case was settled on the following basis: The President of Post-Newsweek Stations sent a letter to Southern's President indicating that, although the Station had broadcast the allegations by Palacio and Southern's denial, it did not intend to endorse either side of the controversy.

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M. John F. Street v. Philadelphia Inquirer, Pennsylvania Court of Common Pleas, Philadelphia, June 18, 1993, C. Craig Lord, J.

1. Date of Publication: February 1988

2. Case Summary: Plaintiff, an African-American, was a popular city councilman in Philadelphia. In a column written by W. Russell Byers, a local "blueblood", the newspaper criticized plaintiff for owing money to the Philadelphia Gas Works while serving as a member of the Philadelphia Gas Commission. The column stated that an earlier *Inquirer* editorial calling upon Street to either pay his gas bill or resign from the Commission was too lenient. Referring to Judge Harris, who had just been convicted of accepting bribes, the column stated, "Just as Harris, Street is effectively saying that once you get to the top in this city you gain two powers simultaneously: You can write or interpret the laws while you simultaneously choose to break them when convenient." The column suggested that if Street could put such problems behind him, he could be an effective advocate for social progress.

3. Verdict: 8-0 For defendant. In response to special interrogatories, the jury failed to decide whether the allegedly defamatory column would have been understood by an ordinary reader to have alleged as fact that Street had violated criminal law, but concluded that the newspaper and the author did not know, or have a high degree of awareness, that readers would interpret the column as making that factual assertion.

4. Length of Trial: 7 days
Length of Deliberations: 3 hrs., 20 mins.

5. Size of Jury: Eight (6M, 2F)

6. Significant pre-trial and mid-trial rulings: Motion for Summary Judgment and Motion for Directed Verdict denied.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The judge granted a motion to preclude the use of the term "actual malice" during the trial, and instead the term "state of mind evidence" was employed.

Counsel for both sides met with the judge for three days just before the trial, to discuss and argue the law applicable to the case. The judge endeavored to learn and to formulate the special interrogatories and jury charge for counsels' benefit, all before opening statements.

The judge excluded "unrelated" misconduct evidence, such as plaintiff's three prior bankruptcies, a fight on the floor of city council, and reneging on obligations to repay law school tuition loans.

The court read a preliminary charge to the jury before the case started that included some of the significant legal elements instructions. After three hours of deliberation, the jury sent a note asking if there was nonagreement to Question 1 (Did the article imply criminal conduct?), could they go to Question 2 (Did the plaintiff demonstrate by clear and convincing evidence that the defendant knew or acted with a high degree of awareness that the article would imply criminal conduct?). After the court permitted it to do so, the jury returned within 20 minutes with a verdict for the defendants.

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Counsels' preferred jury profile, discussed in paragraph 10 below, was based upon instinct. However, during jury selection, counsel made use of the background of a paralegal investigator who had worked for years as a policeman, and understood the dynamics and attitudes of the diverse neighborhoods of Philadelphia.

Counsel did a presentation to a group of lawyers, paralegals and secretaries from their firm in which Sam Klein and Bob Heim gave opening statements and summations for both sides. Counsel feels that the feedback they received on various themes and categories of evidence was useful.

9. Pretrial Evaluation: On a scale of 1-10, 10 involving the greatest degree of exposure, counsel rated this case as a 3-4. Counsel felt the case looked good on the facts, and if nothing else, on appeal, but considered the significant trial risk to be if they drew the "wrong" jury.

10. Defense juror preference during selection: The plaintiff, in a more youthful period during the early 1980's, had been a militant, flamboyant advocate for the poor African-Americans in Philadelphia of the "We're Not Going To Take It Anymore" school. Plaintiff had become more mainstream and considerably popular, but still was regarded by himself and others as the champion of the underdog. Indeed, at the time of trial, plaintiff was the highly respected President of City Council who had received national publicity and praise for his work with the current Mayor in rescuing Philadelphia from bankruptcy. Counsel preferred older, working class males, without racial preference except that counsel wanted a racially balanced jury, and tried to avoid young, unemployed males of either race, who might identify with Street, particularly in his younger days. This was particularly so given the nature of the article, which criticized Street for being on the Gas Commission, and being considered for chair of that Commission, while $5,000 in debt to the gas company and while earning $35-40,000 per year. Counsel felt people that worked for a living, had to pay their utility bills or face a shutoff, and made less than this would be unlikely to be sympathetic to Street.

11. Actual jury makeup: 1) BM, retired from postal service, 50's, foreperson, believed by defense counsel to be very pro defendant; 2) WM, retired photographer, believed to be defense oriented; 3) BM, upper middle age, government worker, defense counsel not sure of bias at the close of the case; 4) BF, late 30's, worked for social services organization retraining inner-city women, believed to be pro plaintiff; 5) BF, approximately 24 years old, no high school degree, inattentive; 6) BM, older, employed in menial labor, not well educated, lifetime wage earner; 7) and 8) no specific information, believed to be BM's, older, working class. Only two of the jurors considered themselves anything close to regular readers of the newspaper. No juror had a college degree.

12. Issues Tried: As stated in the special interrogatories, whether an average reader would believe that the column accused Street of a crime, and whether the *Inquirer*, when it published the column, knew that readers might understand it as accusing Street of a crime, or acted recklessly with respect to the likelihood of that result.

13. Plaintiff's Theme(s): Byers, a white and admittedly patrician/Republican columnist, was out to destroy the career of an up-and-coming African-American politician.

14. Defendant's Theme(s): The article did not accuse the plaintiff of criminal conduct, but merely a lack of moral leadership based upon the disclosed facts; the plaintiff was unreasonable in so construing it. The defendants emphasized to the jury the subjective element of constitutional malice, telling the jurors they had to "get inside the minds" of the column's author and editor. Except to argue that his position was unreasonable, defendants did not attack the plaintiff (a strategy dictated in part by the judge's exclusionary rulings), but acknowledged that the plaintiff had indeed overcome the problems the column identified, as the column suggested he could.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: counsel did not detect any media bias, particularly since most of the jurors were not regular readers of the newspaper. Counsel were concerned about possible bias in favor of this popular councilman, but did not detect this as a factor with the jury ultimately picked.

b. Sympathy for plaintiff during trial: Defense counsel were aware that the plaintiff was popular, agreed that he was likeable, and hence considered any attack upon the plaintiff to be very risky, particularly if the jury picked was prone to support him. The defense acknowledged to the jury that the plaintiff was essentially honest, but asserted that he was, at least in this case, being unreasonable.

The defendants' approach can be illustrated by an example: throughout pretrial discovery, plaintiff stated that he did not owe the approximately $5,000 gas bill that the utility company claimed. The company had records to back the bill, but the proof was tedious. Counsel stipulated to the judge's suggestion that the issue of whether the money was owed be taken out of the case, and executed a written stipulation that indeed the bill was owed. At trial, Street persisted in his claim that he did not owe this amount, even when confronted with his lawyer's signed stipulation. In closing, counsel referred to this exchange, then asked rhetorically, should the plaintiff be disbelieved, and proposed the answer, "no." Rather, as counsel offered, plaintiff is an honest man and honestly believes he doesn't owe the bill even though everyone else says he does, including his own attorney. Rather than being dishonest, he is unreasonable, and similarly is unreasonable in construing the article as he does here.

The plaintiff did cry at one point during cross-examination, and counsel feels this played well. Plaintiff also was effective when he attacked the column suggesting that plaintiff was a poor role model for the Black poor, asking "who's Russell Byers to tell me how to deal with poor people when I've spent my life doing just that."

c. Proof of actual injury: None, other than the plaintiff's own testimony concerning his reputation, and testimony of supporters concerning reputation damage.

d. Defendants' newsgathering/reporting and trial demeanor: The sentence under the greatest attack was that comparing Street to the judge convicted of taking bribes. The author was trying to convey that both men had broken the "rules."

Another significant problem for the defendant was that columnist Russell Byers' deposition was taken four years before trial. At the time, Byers was a bit indignant about being sued. The deposition resulted in some sloppy answers and language, and some of his answers were open to misinterpretation. For example, Byers created the misimpression that he had destroyed his notes and file concerning the matter after the complaint

was filed, and, when asked if he thought columnists should be fair, responded "no" without adding an explanation.

To add to these potential problems, Byers lived in the relatively exclusive Chestnut Hill neighborhood of Philadelphia and was a classic "preppie" by background. This contributed to the potential of this case to become a race/class struggle. Fortunately, defense counsel spent over 100 hours with Byers preparing him to deal with the tough questions.

e. Experts: The defense called former *Philadelphia Daily News* columnist Chuck Stone, now a journalism professor, as an expert witness. Stone explained to the jury "the difference between fact gathering and opinion writing." Stone explained how a columnist traditionally takes much more liberties than a fact reporter, and explained why opinion is important to the community. In cross-examination, plaintiff obtained several admissions that helped the plaintiff, e.g., that words can hurt feelings, can affect reputations and livelihoods, etc. Then plaintiff asked one question too many: "If a student had turned in this column, isn't true that you would not publish it?" The response was, "No, that is not true, it was a good article." Then counsel asked what grade would the witness give it, and the witness responded, "B+." Shortly thereafter plaintiff's counsel sat down and the court asked about redirect. Defense counsel said, "No, I'll take a B+ anytime." During closing argument, defense counsel read several portions of Stone's testimony. Stone, incidentally, is African-American.

Plaintiff used an expert on criminal law to define the elements of bribery and explain the circumstances behind the conviction of Judge Harris. Plaintiff did not call a journalism expert.

f. Trial dynamics:

i. Plaintiff's counsel - Reasonably confident and aggressive, only occasionally raucous and inflammatory and was controlled reasonably well by the trial judge. Counsel was the former Dean of Temple University Law School and is considered a leader in the African-American legal community. He is also counsel to the Philadelphia Tribune and acted as defense counsel in several defamation actions.

ii. Defendant's counsel - Bob Heim acted as lead counsel during the trial. Bob is generally well-spoken and low key, but engaged in some interesting flourishes. For example, during summation, Heim explicated the point raised by columnist Byers, that Street's conduct was a "dangerous signal" to the community. Heim went to the easel and drew a gas bill, addressed to John Doe Public, and then wrote on the bill "I will pay my gas bill when John Street pays his."

iii. Length of trial - the relative shortness of trial, if anything, favored the defendant.

iv. Judge - Judge Lord is a highly respected jurist. As noted above, he spent three days before the trial in an effort to learn and understand the applicable law, and formulate the jury charge and special interrogatories before the trial began. He also maintained control of the trial and counsel, and when disputes erupted, was careful to reprimand both sides evenly. Defense counsel was slightly chagrined when his attempts to control witnesses under cross-examination by limiting answers to the question asked were rebuffed by the judge, the judge permitting witnesses to explain their answers if they so desired. However, counsel responded by preparing his witness to do the same thing, and this was allowed over objection of the plaintiff.

g. Lessons: Counsel feels that in trial of an opinion case, particularly one of short duration, the importance of an expert witness who can talk to the jury, and perhaps make a closing speech before counsel does, cannot be overestimated. Counsel also feels that the old adage applicable to every case -- preparation, preparation, preparation -- remains vital when dealing with witnesses who won't play well with a big city jury.

16. Results of jury interviews, if any: A Philadelphia Magazine reporter interviewed the jury foreperson, and reported that at the beginning of deliberation, several Black jurors indicated a propensity to find for the plaintiff because he was "one of us." The article reported that the foreman kept the jurors from acting on this basis, and persuaded them to look at the evidence, instructions, etc. Counsel is not sure just how trustworthy this report may be. Counsel were unable to interview the jurors personally.

17. Assessment of Jury: In terms of age and employment, most of the jurors fit counsel's preferred juror profile. The result would indicate this was a good jury.

18. Post-Trial disposition: No post-trial motions filed.

Plaintiff's Attorneys:
Carl E. Singley
230 S. Broad St., 2nd Floor
Philadelphia, PA 19102
(215) 875-0609

Defendant's Attorneys:
Robert C. Heim
Samuel E. Klein
Dechert, Price & Rhoads
1717 Arch Street, Suite 4000
Philadelphia, PA 19103-2793
(215) 994-4000

N. Carla Woodcock v. Journal Publishing Co., Inc. d/b/a Journal-Inquirer, Tolland County Superior Court, Connecticut, Case No. 42904, March 9, 1993.

1. Date of Publication: June 23, 1988, and follow-up articles in 1988, 1989, and 1992.

2. Case Summary: Plaintiff is a 40-year-old member of a local Planning and Zoning Commission, an attractive former model, and mother of one young child. Plaintiff's husband was a state representative for 8 years prior to publication. Defendant newspaper, *The Journal Inquirer*, is an aggressive local daily. Circulation 50,000, (approximately 28,000 editions carried the contested articles).

The paper ran a story which detailed a developer's allegation that his subdivision proposal was denied by the Planning and Zoning Commission, in part, due to plaintiff member's desire to force him to redesign the subdivision in such a way that the developer would be forced to build a road that would have benefitted a family friend of the plaintiff. The developer is the son-in-law of the newspaper's publisher.

Several follow-up articles were published. The developer was sued for his quotes in the follow-up articles and for a letter to the editor which he wrote and the paper published.

Plaintiff alleged libel against the paper and its reporter; libel by the omission of material facts against the paper and its reporter; libel and slander against the developer.

3. Verdict: $627,369.77, for plaintiff on most of the statements in issue, for defendant newspaper on claims for libel by omission (Strada), and for defendant developer on letter-to-the-editor he had written.

Compensatory: $1,500 special damages against corp. defendants (psychologist's bills); $490,000 general damages against corp. defendants; $10,000 general damages against reporter; $5,000 general damages against developer.

Punitive: $121,369.77 (entitlement determined by jury, amount determined by court, based on evidence of attorney fees).

4. Length of Trial: 30 days, 15 of them for jury selection; jury deliberated 9-1/2 hours

5. Size of Jury: Six (plus two alternates, who eventually were required). 4 men, 2 women deliberated.

6. Significant pre-trial and mid-trial rulings: Defendants' motion for summary judgment on truth and actual malice of each statement denied in a cursory one-page decision. The newspaper was ordered to reveal its confidential sources for the story or have default judgment entered against it. A default judgment was entered against the paper. The newspaper responded by revealing its sources and the case was reopened. The Connecticut Supreme Court denied certiorari on the source issue.

Trial judge refused to entertain motions *in limine* for numerous significant evidentiary issues which defendants knew would arise at trial.

At trial, the judge excluded evidence that the developer appealed the PZC's denial of his application, resulting in a determination (after most of the articles were published) that the denial was arbitrary and contrary to the town's regulations.

7. Trial management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Hearing on amount of punitive damages bifurcated. (Punitive damages in Connecticut are limited to attorney fees and were bifurcated and determined by the judge approximately one month after the jury verdict.)

8. Pre-selection jury work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Attorneys created profiles. Reviewed periodical literature on defamation case jury selection. No outside consultants.

9. Pretrial Evaluation: Likely verdict against defendants; $10-50,000 anticipated.

10. Defense juror preference during selection: Counsel declined to publish this information because of the possibility of remand.

11. Actual jury makeup: 4 men; 2 women. The defense side had an advantage, with sixteen preemptory challenges (one for each named defendant) while the plaintiff had only four.

12. Issues Tried: Actual malice, truth, defamatory meaning, damage to reputation.

13. Plaintiff's Theme(s): Newspaper conspired with state representative's political opponents to ruin his wife and thereby cause him to lose an upcoming election. Newspaper was also biased against officials who were anti-development. Plaintiff claimed that she did not urge, but merely suggested a change in the road location, solely with a view to easing traffic congestion, without any knowledge of any benefit to her husband's associate.

14. Defendant's Theme(s): Article was about the Planning and Zoning Commission member, not her husband. Subject matter was newsworthy, thoroughly investigated, and true.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Sympathetic to plaintiff; skeptical, but not hostile to the media.

b. Sympathy for plaintiff during trial: Plaintiff was only a part-time public official, a family person, and likeable. Jurors did not react visibly to plaintiff's tearful display but apparently were moved by it.

c. Proof of actual injury: Tears on the witness stand. No claim of lost earnings or lost friends. Plaintiff and her husband did not go to a psychologist until seven months after the first article was published -- and several months after he had lost his re-election bid.

d. Defendants' newsgathering/reporting and trial demeanor: Investigation was thorough but since not all possible factual avenues were investigated it may have seemed the paper was somewhat cavalier. Follow-up articles, triggered by subsequent events but which repeated the alleged defamation, probably enhanced the award.

e. Experts: Plaintiff (over objection) had an "expert", Joseph Goulden, testify to journalism standards. Mr. Goulden is an officer of Accuracy in Media (AIM). Defendants responded with an expert, Marcel Dufresne. Mr. Dufresne is a Journalism Professor at the University of Connecticut. It is not thought that either expert had much impact, but it was helpful to neutralize plaintiff's expert with a defense expert.

f. Trial dynamics:

i. Plaintiff's counsel - Reasonable, aggressive, but not flamboyant.

ii. Defendant's trial demeanor - Newspaper presented itself as confident that the investigation and publication of the articles were appropriate, and this could have been perceived as arrogant.

iii. Judge - The judge was unquestionably perceived by the jury as being on plaintiff's team; he overruled virtually all defendants' objections. Because the judge would not rule on evidence before the trial, the defendants' unsuccessful efforts to block evidence smacked of "cover up." Also, the judge made the defendants the scapegoat for length of trial and all delays; and failed to focus the jury upon the issue of constitutional malice.

iv. Other factors -

g. Lessons: If confronted with a sympathetic plaintiff, preserve all appellate issues at the expense of a smooth trial because the law will not necessarily matter to the jury. Counsel found the judge resistent to his efforts to focus the jury on the issue of constitutional malice. The jury clearly did not grasp or apply the charge on this issue.

This case fits a common profile in which the defendants call attention to an appearance of impropriety (i.e., quid pro quo) but the fact of impropriety is unprovable. Where, as here, the plaintiff is otherwise clean, these cases are hard to win to a jury.

16. Results of jury interviews, if any: Reporters interviewed the jurors. Consensus was that the paper had "gone after" the plaintiff. The newspaper created the news rather than reporting it. One juror was told of some

of the defendants' evidence that was excluded and remarked that it might have changed his mind.

17. Assessment of Jury: Diligent, average intelligence, not very emotional. No appreciation or understanding of the law or burden of proof. Inexplicable findings that some statements were libelous and others were not. This verdict of $500,000 on circulation of 28,000, can only be considered excessive.

18. Post-Trial disposition: Appeal pending - multiple issues.

Plaintiff's Attorneys:
Tom Barrett
Sack, Spector & Barrett
West Hartford, Connecticut
(203) 233-8251

Defendant's Attorneys:
Dominic J. Squatrito
James H. Howard
Phelon, Squatrito, FitzGerald,
Dyer & Wood
Manchester, Connecticut
(203) 643-1136

O. ADDITIONAL CASES

1. Leo Alvarado, Jr. v. Express-News Corp. (San Antonio Express-News), Bexar County (San Antonio, Tex.) Judicial District Court, No. 90-CI-13251

Judge: Robert R. Murray

Date of Verdict: March 27, 1992

Length of Trial: 5 days (March 23-27, 1992)

Jury Size: 12

Length of Deliberations: 6-½ hours

Publication Date: March 1990

Case Summary: Plaintiff is San Antonio lawyer with the same name as another San Antonio lawyer who was the subject of felony criminal prosecution and disbarment proceedings. In a newspaper story about the other lawyer with plaintiff's name, defendant newspaper mistakenly ran a photograph of plaintiff in its early edition. The initial press run with the erroneous photo was approximately 40,000, and was distributed only to outlying areas around San Antonio, but not in San Antonio. The error was noticed 12-13 minutes into the press run, and was corrected that same day in later editions, with a prominent retraction published the next day.

Plaintiff claimed defamation and false light invasion of privacy from defendant newspaper's publication of photograph of plaintiff in connection with disbarment proceedings instituted against a convicted felon with the same name.

Experts: For Plaintiff: Thomas W. Eades, M.D., Damaso A. Oliva, M.D., William Gonzaba, M.D., physicians. For Defendant: None.

Verdict: For Plaintiff

$20,000 compensatory damages (past mental anguish)
$10,000 punitive damages (remitted)

Jury found against Plaintiff on false light claim.

Plaintiff's Counsel: Jerry Gibson, Cathy J. Sheehan, Plunkett, Gibson & Allen, Financial Center N.W., 6th Floor, 6243 N.W. Expressway, P.O. Box BH002, San Antonio, TX 78201, (210) 734-7092.

Defense Counsel: Mark J. Cannan, Lang, Ladon, Green, Coghlan & Fisher, 300 Convent St., Suite 1700, San Antonio, TX 78205-3718, (210) 227-3106.

Factors: Plaintiff held to be private figure to whom negligence standard applied, although he ran for state legislature after suit was filed.

Because of clear liability for negligence, defense focused on damages issues. Plaintiff's demand was in "the seven-figure range", while final offer was $45,000. Defense counsel evaluated case as having possibility of damages in "six-figure range" as not surprising.

Plaintiff's themes at trial focused on financial injury, and on trying to prove actual malice. Plaintiff claimed that Defendant's failure to stop the presses immediately constituted actual malice. Plaintiff, a plaintiff's personal injury lawyer, claimed that the publication of his photo as that of a convicted felon caused him to lose potential clients and hindered his law practice in the areas where the edition with the erroneous photo was circulated. Plaintiff presented two witnesses who saw the photograph, both of whom were attorneys who referred cases to plaintiff. Plaintiff also claimed mental suffering and humiliation, and also that his angina was aggravated by the incident, which was supported by medical testimony.

Defense themes were that even though there was negligence, the error was an understandable accident made by a rookie reporter from another city who was unfamiliar with plaintiff, that the presses could not have been stopped as immediately as plaintiff claimed, but that the every effort was made to correct the error as soon as was realistically possible, and that a retraction was printed, so as to negate claim of actual malice. Defendant tried to "humanize" the process of publishing and show what is involved in each day's press run, and how easy it is to make a mistake like what happened, through the editor's testimony. Defendant also tried to show that plaintiff was overreaching in his damage claims, and that any downturn in plaintiff's income was cyclical due to nature of personal injury practice. Defense counsel traced plaintiff's clientele by location and discovered that there was no drop in the number of plaintiff's cases from the areas where the edition with the erroneous photo was circulated. In addition, defense counsel learned that, a month before trial, plaintiff settled a personal injury case for a sizable amount, which had the effect of increasing his yearly income to the highest ever.

The jury was presented with a special verdict that set forth 9 elements of compensatory damages, including past and future mental anguish, past and future shame and humiliation, past and future reputation, past and future loss of earnings, and past and future physical pain, in addition to punitive damages. Although the jury found negligence and that the publication was defamatory, it did not find actual malice. The jury awarded compensatory damages for past mental anguish only. Post-trial interviews revealed that most of the jury's deliberations were spent on the issue of damages.

Defense counsel's assessment of reasons for the low jury verdict, despite the fact that liability was clear, was that the jury thought the plaintiff was overreaching in his damages claims, particularly with the claim that his angina was aggravated by the publication, that plaintiff himself rather than his counsel appeared to be directing his case, which had a negative impact, and that the jury did not like plaintiff, who came across as abrasive. On the other hand, the jury liked the defendant's witnesses, the young reporter who pulled the wrong photo from the file and the editor who noticed the error and corrected it. Defense counsel believes the jury was impressed by these witnesses, who came across as sincere and hard to get angry at, and was also impressed by the evidence concerning the

operation of the newspaper and by the quick effort made to correct and retract the error.

Award of $10,000 punitive damages remitted because jury did not find malice. Because the final judgment was less than the last defense offer, defense counsel considered the low verdict a victory. The judgment was paid and not appealed by either side.

2. Glenn A. Brown, D.D.S. v. Philadelphia Tribune Co., Philadelphia (PA) Common Pleas, No. 87-01-01615

Judge: Patrick W. Kittredge

Date of Verdict: March 1992

Length of Trial: N/A

Jury Size: 10

Length of Deliberations: N/A

Publication Date: 1986

Case Summary: Plaintiff, a dentist, claimed that Defendant newspaper reported misleading statements about his being charged with welfare and Medicaid fraud. Defendant contended that story was based on report issued by state Attorney General and that "charged" as used in article meant "accused."

Experts: For Plaintiff: Alan Rubenstein, Esq., criminal justice.

Verdict: For Plaintiff

$750,000 compensatory damages

Plaintiff's Counsel: Mark A. Klugheit, Dechert, Price & Rhoads, 1717 Arch Street, Suite 4000, Philadelphia, PA 19103-2793, (215) 994-4000.

Defense Counsel: Carl E. Singley, 230 S. Broad St., 2d Floor, Philadelphia, PA 19102, (215) 875-0609.

Factors: Post-trial motions are still pending.

3. Joyce Dorman v. Aiken Communications, Inc. (Aiken Standard), Aiken County Circuit Court, South Carolina, No. 90-CP-021260.

Judge: Rodney Peeples, Jr.

Date of Verdict: September 25, 1991

Length of Trial: 3 days

Jury Size: 12

Length of Deliberations: 3 hours

Publication Date: November 20, 1987

Case Summary: This was a public disclosure action against the defendant newspaper that had published a story reporting the name of the plaintiff (a 40-year-old real estate salesperson), a rape victim, in an article that stated she had been "assaulted." The newspaper had received a press release concerning the incident from the police rather than an official incident report. The release named the plaintiff as having been the

victim of a hostage incident and said that her captor had killed himself after the attack. The police release did not mention that the victim had been raped or sexually assaulted, referring to the incident only as an assault. The newspaper's policy was not to release the identities of sexual assault victims. The next day, other newspapers in the area published the details of the crime, including the fact that it was a rape, but did not disclose the plaintiff's name.

Verdict: For defendant. The jury, shortly before rendering the defense verdict, asked the judge to reinstruct it on the issue of actual damages, leaving observers to believe at the time that the jury had found liability and was merely deliberating as to damages.

Plaintiff's Counsel: Barry Johnson, Henderson Johnson, Johnson, Johnson, Whittle, Snelgrove & Weeks, 117 Pendleton St., N.W., Aiken, SC 29802, (803) 649-5338.

Defense Counsel: William L. Pope, Pope & Rodgers, 1330 Lady Street, Suite 615, Columbia, SC 29250, (803) 254-0700; Hendeson & Salley, 111 Park Ave., S.W., Aiken SC 29802, (803) 648-4213; James Grossberg, Ross, Dixon & Mosback, 601 Pennsylvania Ave., N.W., North Building, Washington, DC 20004-2688, (202) 662-2000.

Notes: The South Carolina Supreme Court ordered the dismissal of the claim based upon S.C. Code Ann. § 16-3-730, which imposed criminal penalties for the publication of a sexual assault victim's name "in any newspaper, magazine, or other publication," holding that the statute does not create a private cause of action. 18 Med. Rptr. 1394. Claims for invasion of privacy and infliction of emotional distress were submitted to the jury, as was an instruction allowing punitive damages if the jury found actual malice by clear and convincing evidence. Because of the Supreme Court ruling that the criminal statute did not create a private cause of action, the defense moved for and plaintiff stipulated to order in limine excluding any reference to the criminal statute during the trial.

Factors: The defendant convinced the jury that it did not act knowingly or recklessly as to the fact that the incident on which it was reporting involved sexual assault. Defense counsel believes this was a reasonably good common sense jury (the foreman was a small businessman, and the jury had racial and sexual balance.) One of the female of jurors was a school teacher. This jury, apparently, was willing to accept that the police, too, can make mistakes. The defendants' principal theme was that liability for any injury to the plaintiff belonged to the police department, which used poor judgment in attempting to protect the victim by withholding the nature of the assault rather than the victim's identity.

The defense strategy was not to present any cute themes, but to simply make a clean breast of all the facts, and urged the jury that the newspaper acted in good faith, and that the disclosure that the plaintiff was rape victim was a result of circumstances beyond its control.

4. **James A. Eidson v. Bobby Berry, Decatur Publishing Co., Inc., and Southside Sun Publishing Co., Inc.** (Decatur, GA), Fulton County (GA) Superior Court, No. D-83993

Judge: Wayne Pressley

Date of Verdict: May 7, 1993

Length of Trial: 4 days, May 3-7, 1993

Jury Size: 12

Date of Publication: January 11, 1991

Case Summary: Plaintiff, who was city attorney for East Point, Georgia, turned over to the Atlanta Journal-Constitution a tape recording of a conversation between the mayor and a city councilman which revealed the city councilman using a racial slur in referring to city manager, who was black, while the mayor laughed. Before releasing the tape, Plaintiff had obtained a court ruling advising him to permit access to it under the state Open Records law, and entered into a consent order with the Journal-Constitution for release of the tape. After releasing the tape, Plaintiff was fired as city attorney. In the wake of the controversy over publication of the contents of the tape, the Defendant Southside Sun, which had published the full text of the tape along with an unsigned editorial calling on the mayor and councilman to resign, published letters critical of the mayor and council man, but also carried a letter to the editor written by defendant Berry, a black supporter of the mayor and councilman. Berry's letter stated that:

> "It has been revealed that some tapes exist in which our Mayor and one councilman are guilty of a racial slur. I feel that the city attorney was acting improperly when he delivered the tapes to the newspaper and that the secretary theat recorded a private conversation was also acting illegally. They should both be prosecuted and the city attorney should be barred from practicing law because he knowingly violated Federal law."

The Southside Sun managing editor who reviewed the letter for publication testified that, while he knew the letter contained factually incorrect statements, he published it for the sake of "balance" and "fairness."

Plaintiff sued Defendant newspaper for libel based on letter to editor accusing him of knowingly violating federal law.

Verdict: Mistrial; jury deadlocked 6-6. Interviews with jurors disclosed that 6 for Plaintiff were split from $0 to $500 in amount of award they were contemplating, with one or two willing to award up to $1000.

Plaintiff's Counsel: Taylor W. Jones, Timothy R. Brennan, Jones, Brown, Brennan & Eastwood, 600 W. Peachtree St. N.W., Suite 1900, Atlanta, GA 30308, (404) 872-5300.

Defense Counsel: Stephen F. Dermer, Dermer & Black, 302 Perimeter Center North, Suite 302, Atlanta, GA 30346, (404) 448-6498 (Southside Sun); Scott Walters, Jr. (Berry), 1341 Cleveland Ave., East Point, GA 30344, (404) 766-8393.

Factors: Case was intially dismissed on summary judgment as to defendant Berry because judge held letter to editor was protected expression of opinion, but Georgia Court of Appeals reversed, relying on Milkovich. Eidson v. Berry, 202 Ga. App. 587, 415 S.E.2d 16 (1992). The trial court rejected the defense of neutral reportage on the grounds that this defense is not recognized in Georgia.

Pre-trial demand by plaintiff was $75,000 and offer by defendant was $25,000. Defendant Southside Sun was defunct by time of trial. Defendant Berry was dismissed by plaintiff before trial in order to avoid possible sympathy for individual while plaintiff pursued claim against corporate defendant. Plaintiff's theme was that the defendant published the letter to the editor with knowledge that plaintiff's release of the tape to the media under the Open Records law was not a violation of the wiretap statute or any other federal law. Defendant's theme was that the facts of the controversy were fully reported, and the defendant merely published in good faith citizens' reactions to the controversy in the letters to the editor column.

Case on appeal.

5. Henry G. Fieger, Jr., M.D. v. New Times, Inc. and Michael O'Keefe (Westword), Denver (Colo.) District Court, No. 91-CV-8484-19

Judge: Jeffrey Bayless

Date of Trial: 9/20/93 - 10/4/93

Length of Trial: 2 weeks

Jury Size: 6

Publication Date: November 21, 1990

Case Summary: Plaintiff is neurosurgeon who treated patient for surgical removal of a benign brain lesion. Following successful completion of surgery, patient, who had been hospitalized for psychiatric condition, complained of stomach distress, which was immediately evaluated and treated symptomatically, but determined to be psychosomatic in origin. Patient then demonstrated other symptoms of reactive psychosis, and was discharged with a psychiatric diagnosis. Patient then complained to, and complaints were found partially valid by, health department but not other agencies. Patient then contacted Defendant newspaper, an alternative tabloid, which had been considering a story on health maintenance organizations as providing substandard care. Defendant published story based solely on patient's allegations of malpractice, corroborated in part by the health department findings, but did not try to check patient's records or corroborate allegations of medical malpractice.

Experts: For Plaintiff: Bill Hasakawa (Rocky Mountain News) (journalism standards), Eugene Levine (same), Louis Hodges (same), Marilyn Lashner (linguistics). For Defendants: Al Knight (Denver Post) (journalism standards), Sue O'Brien (U. of Colorado) (same), Steve Everett (U. of Colorado) (same).

Verdict: Jury out

Plaintiff's Counsel: Daniel M. Reilly, McDermott Hansen Anderson & Reilly, 1890 Gaylord St., Denver, CO 80206-1211, (303) 399-6037

Defense Counsel: Bryan Morgan, Haddon, Morgan & Foreman, P.C., 150 E. 10th Ave., Denver, CO 80203, (303) 831-7364

6. E. Eugene Gunter v. Shenandoah Publishing House, Inc. (Northern Virginia Daily), Winchester (Va.) Circuit Court, No. 89-L-198

Judge: Carleton Penn

Date of Verdict: November 22, 1991

Length of Trial: 2 days (November 21-22, 1991)

Jury Size: 7

Publication Date: December 21, 1988 and January 13, 1989

Case Summary: Two separate publications are involved. Plaintiff was criminal defense attorney whose law office was searched by police for stolen goods. Defendant newspaper reported, based on search warrant affidavits, that police were searching for items stolen in a residential burglary. In subsequent prosecution of burglary suspect, Plaintiff was subpoenaed before grand jury to produce a client's file, but Plaintiff did not testify or produce the file. Defendant newspaper reported that "Lawyer escapes having to produce confidential file."

Verdict: For Plaintiff

$10,000 "presumed" damages
$10,000 punitive damages

Plaintiff's Counsel: E. Eugene Gunter (pro se) (Plaintiff hired special counsel for direct examination of himself at trial).

Defense Counsel: David J. Andre, Andre & Fowler, 29 N. Braddock St., Winchester, VA 22601, (703) 667-6400

Factors: Plaintiff appeared pro se at trial; however, after court granted defense motion in limine requring plaintiff to write out his questions and answers on direct examination in advance so as to avoid narrative testimony, plaintiff hired special counsel for direct examination of himself at trial. Plaintiff was held to be private figure, but publication involved matter of public concern so actual malice standard applied. Plaintiff was suspended from practice of law in 1989 by Virginia Supreme Court for surreptitious recording of telephone conversations in unrelated matter and was suspended at time complaint was filed. Plaintiff is only Virginia attorney to be publicly sanctioned four times by disciplinary committees, but court would not allow defense to introduce evidence of disciplinary decisions after plaintiff admitted facts on which discipline was based. Reversed on appeal by Virginia Supreme Court, 427 S.E.2d 370 (1993).

7. Steven Kaplansky v. Rockaway Press and John Baxter, New York Supreme Court, No. 17250/87

Judge: Cosmo DiTucci

Date of Verdict: 1991

Publication Date: 1987

Case Summary: Plaintiff was former executive director of YMHA and YWHA, who claimed that libelous statements in Defendant newspaper caused him to lose his job; Defendant reported that Plaintiff was suspended from job for "gross misconduct" and shady real estate dealings.

Verdict: For Plaintiff. $2,139,500

Plaintiff's Counsel: Jonathan Weinstein, 123-24A 82nd Rd., Kew Gardens, NY 11415.

Defense Counsel: Peter C. Roth, Louis Somma, New York, NY, (212) 586-2774.

Factors: Motion to set aside damages granted in part; judgment reduced to $1,850,000 compensatory damages. Appeal pending.

8. Pauline Kiernan v. Globe International, Inc.

Court: Los Angeles Superior Court

Judge: Diane Wayne

Date of Verdict: October 8, 1992

Length of Trial: 2-½ weeks exclusive of jury deliberations.

Jury Size: 12

Length of Deliberations: 5-½ days

Publication Date: July 1991

Case Summary: *Globe* published a tabloid story in or about May, 1988, regarding Glenn Ford's desire to marry Pauline Kiernan and for her to have his child. Suit ensued and was settled and a retraction published prior to answer for reasons other than the merits. Subsequently, in July, 1991, an affiliated publication referred to as a "Special" published a photo driven article depicting Ford's home and relationships with young women, including Plaintiff. Kiernan sued alleging that the article suggested a romantic relationship with Ford as opposed to what she argued was purely a professional nurse-patient relationship.

Experts: Each side had linguistic/semantics experts. The plaintiff had a psycologist testify; the defendant had a psychiatrist. The plaintiff also had a social scientist who conducted a survey and testified as to the import and meaning of the article to the average reader.

Verdict: For defendant.

Plaintiff's Counsel: Henry D. Gradstein, Michael R. Blaha, Gradsteen, Luskin & Van Dalsem, Los Angeles, CA

Defense Counsel: Anthony Michael Glassman, Stephen J. Rawsen, Barbara Tarlow, Glassman & Browning, Inc., Beverly Hills, CA; Paul M. Levy, Deutsch, Levy & Engel, Ltd., Chicago, IL

Notes: The court ruled that the plaintiff was public figure. The court also ruled that release of a prior cause of action did not preclude admission into evidence facts and settlement negotiations. The judge also determined not to use jury questionnaires. The defendant employed a jury consultant (psychologist), and determined that preferred jurors were middle class, older working females. The jury selected was 7 female, 5 male.

Factors: The defendant contended that a romantic relationship in fact existed between the plaintiff and Ford, but that the article did not suggest a special relationship, and was not susceptible of a defamatory meaning. Secondarily, defendant contended that the *Globe* did not act with a knowing or reckless state of mind as to any indication of a romantic relationship. As charged by the court the issue of whether the article is defamatory, whether *Globe* intended the second publication to imply a romantic relationship and whether a romantic relationship in fact existed.

The plaintiff waived appeal rights in exchange for a waiver of costs.

The defendant interviewed the jury. The consensus was that the defendant was culpable because of repeated (second) publication of facts similar to those initially sued upon; that a romantic relationship did exist; that the plaintiff was not credible nor injured.

The defense believes this was a fair-minded, hard-working jury that was willing to set aside initial preconceptions.

9. Kenneth R. Lewis v. News-Press & Gazette Co. et al. (St. Joseph News Press/Gazette), United States District Court, Western District of Missouri, No. 91-6037-CV-SJ-8

Judge: Joseph E. Stevens, Jr.

Date of Verdict: September 3, 1992

Length of Trial: 7 days.

Jury Size: 8

Length of Deliberations: 2 days

Publication Date: December 9, 1990

Case Summary: Plaintiff is a state trial judge who, during the year preceding the article in issue, had been embroiled in a dispute with the defendant newspaper over the judge's refusal to honor the newspaper's request for the identity of grand jurors. Defendant published articles critical of plaintiff's refusal to release names. The last publication was an article, written after the Attorney General had issued an opinion backing the judge, that declared the newspaper would "use all means available" to encourage judges to release grand jurors' names. Unrelated to this matter, the judge got into a dispute with some local elected officials over construction of barriers around the a road on his farm near Chillicothe, which the judge claimed was private property. When defendant published an article about local resentment over plaintiff's construction of barriers around the road, plaintiff claimed that the article was defamatory in that it implied he violated a criminal statute prohibiting obstructing a roadway. Other defendants were county commissioners, township board members, and citizens who petitioned to open the road. In addition to defamation, plaintiff brought claims for conspiracy and civil rights violations under 42 U.S.C. §§ 1983 & 1985. The judge bifurcated punitive damages.

Verdict: For plaintiff against defendant reporter Michael McCann and two other Defendants (Gerald DeWitt and Bud Howsman) on conspiracy claim, $52,500; $35,000 against DeWitt and Howsman on defamation claim. After the corporate defendant prevailed, plaintiff did not seek punitive damages against the individual defendants.

For Defendants News Press/Gazette and its editor David R. Bradley, Jr., three county commissioner defendants and two township board member defendants.

Plaintiff's Counsel: Timothy W. Monsees, Myerson, Monsees & Morrow, P.C., 1310 Carondelet Drive, Suite 400, Kansas City, MO 64114-4845, (816) 941-4300

Defense Counsel: Wendell E. Koerner, Jr. (News Press/Gazette), Brown, Douglas & Brown, 510 Francis, Suite 202, St. Joseph, MO 64501, (816) 232-7748

Notes: District Court held before trial that plaintiff had stated claim for defamation under §§ 1983 and 1985 despite Paul v. Davis, insofar as plaintiff had alleged deprivation of other rights as result of alleged defamation and conspiracy to defame. However, the court dismissed these claims at the close of the plaintiff's case. The jury found that McCann's article itself was not defamatory, but that McCann had engaged in conspiracy to defame (under state law) with defendants DeWitt and Howsman, after they went to the newspaper and McCann began reporting on plaintiff's road. Actual malice was an element of all claims submitted. Plaintiff did not request and the court did not give an instruction on the newspaper's vicarious liability for McCann's conduct.

Factors: The biggest factor was the credibility of the defendant reporter, McCann, who was self-righteous over being haled into court and was lackadaisical in answering questions. In his deposition, McCann made admissions which were very difficult to deal with at trial. For example, after describing the destruction of his notes following completion of the article, he was asked if this was something he did to "cover your ass," to which he responded "yeah, I guess so." Defense counsel would not change his advice that reporters dispose of notes on a routine basis after an article is completed but would take more care to prepare the reporter for this kind of question. The reporter's demeanor improved at trial but the deposition statements hurt him and he was not effective in explaining his reporting conduct. The reporting appeared sloppy, particularly since the reporter drove to Chillicothe, spoke to the locals, but did not

interview the plaintiff until forced to by his superiors after the plaintiff contacted them.

From juror interviews after the verdict, defendant learned that a male truck driver and a male coffee warehouse worker were for plaintiff; a male electrical engineer and a female college-educated secretary held out for the defendants' First Amendment rights and regretted the verdict against McCann. The jury as a whole did not find the judge very sympathetic, as reflected in the low award.

10. Quang Nguyen v. An Duc Nguyen, M.D. and Duc Khoi d/b/a Viet Nam Tu Do (Westminster, CA), Los Angeles Superior Court, No. C-752 083

Judge: Newell Barrett

Jury Size: 12

Date of Verdict: September 6, 1991

Length of Trial: 9 days (August 26 - September 6, 1991)

Length of Deliberations: 1 1/2 days

Publication Date: August 1989

Case Summary: Plaintiff was a 50-year-old Vietnamese nephrologist from Anaheim who sued weekly Vietnamese-language newspaper based on report that he was unqualified and incompetent and that he had falsely advertised his medical practice. Newspaper also published fictional articles whose main character plaintiff claimed was based on him, and which plaintiff claimed portrayed him as committing unethical acts, and which insinuated that plaintiff was taking advantage of non-English speaking Vietnamese.

Experts: For Plaintiff: Cyril Barton, M.D. (Irvine, CA), on Plaintiff's training in nephrology; Nguyen Dinh Hoa (San Jose, CA), Vietnamese language expert. For Defendants: Khuang Nguyen (San Diego, CA), Vietnamese language expert

Verdict: $16 million

General damages: $3.5 million
Special damages: $580,000 (lost income)
Punitive damages: $12 million

Plaintiff's Counsel: Barry B. Langberg, Joseph M. Gabriel, Langberg, Leslie, Mann & Gabriel, 2049 Century Park East, Suite 3030, Los Angeles, CA 90067, (213) 286-7700.

Defense Counsel: Tien V. Doan, Francisco Suarez, Law Officers of Tien V. Doan, 15751 Brookhurst St., Westminster, CA 92683, (714) 775-5701.

Factors: Judge ruled that Plaintiff was private figure. No offer and no firm demand before trial.

11. Nellie Mitchell v. Globe International Publishing, Inc. (The Sun), United States District Court, Western District of Arkansas, No. 91-3001

Judge: H. Franklin Waters

Date of Verdict: December 4, 1991

Length of Trial: 3 days (December 2-4, 1991)

Jury Size: 8

Publication Date: October 2, 1990

Case Summary: Defendant is supermarket tabloid *The Sun*, which publishes the usual Elvis and UFO stories. In October 1990, defendant published a story about a 101-year-old newspaper carrier in Australia who allegedly became pregnant by one of her customers. Accompanying the article was a photo of Plaintiff, a 96-year-old former newspaper carrier in Mountain Home, Arkansas. Plaintiff, who was subject of a 1980 story in *The Examiner*, also published by defendant, sued for libel, false light invasion of privacy, and outrageous conduct.

Verdict: For Plaintiff on false light invasion of privacy and outrageous conduct claims:

$650,000 compensatory damages (remitted to $150,000)
$850,000 punitive damages

For Defendant on defamation claim

Plaintiff's Counsel: Phillip H. McMath, Sandy McMath, McMath Law Firm, 711 W. 3rd St., P.O. Box 1401, Little Rock, AR 72203-1401, (501) 376-3021; Roy E. Danuser, 520 S. Baker, Mountain Home, AR 72653-3895, (501) 425-5121.

Defense Counsel: Phillip S. Anderson, John E. Tull III, Williams & Anderson, 111 Center St., 22nd Floor, Little Rock, AR 72201, (501) 372-0800; Paul M. Levy, Michael B. Kahane, Deutsch, Levy & Engel, 225 W. Washington St., Suite 1700, Chicago, IL 60606, (312) 944-2159.

Factors: Plaintiff was private figure to whom Gertz standard applied; under Arkansas law, ordinary negligence is standard for private figures. Defendant admitted that story was entirely fictional; author was given the headline and the photo and told to make up a story; editor assumed subject of photo was dead. Defendant relied on Pring v. Penthouse defense, arguing that no one could have believed that story was true. Reported decisions: 773 F. Supp. 1235 (1991); 786 F. Supp. 791 (1992). The Eighth Circuit affirmed as to liability and punitive damages but remanded for remittitur of compensatory damages, finding that jury's award was "shocking and exaggerated." 978 F.2d 1065 (8th Cir. 1992). On remand, District Court remitted compensatory damages to $150,000. 817 F. Supp. 72 (1993). On certiorari before United States Supreme Court.

12. Shameem Noel Rassam v. Arab Times and Osama Fawzi Yousef, United States District Court, Eastern District of Virginia, No. 92-1527-A

Judge: T.S. Ellis III

Date of Verdict: June 9, 1993

Length of Trial: 3 days (June 7-9, 1993)

Jury Size: 6

Length of Deliberations: 3 hours

Publication Dates: August 1992, October 1992, January 1993

Case Summary: Plaintiff was former radio and TV announcer in Baghdad who decided to stay in United States when Iraq invaded Kuwait in 1990. Plaintiff remained a radio commentator on an Arabic-language radio program in Washington, DC. In June 1992, Plaintiff helped organized a charity gala to benefit Iraqi children orphaned by the Persian Gulf War, for which she was master of ceremonies.

Defendant newspaper is an Arabic-language newspaper with a small circulation. Defendant editor received an anonymous letter to the editor

accusing plaintiff of fraud in connection with the gala. Written in Arabic, the letter used an Arabic word meaning "thieves" to refer to plaintiff and another organizer by name, and suggested that plaintiff may have diverted the funds to herself. In the next edition of the paper, defendant editor asked the author of the anonymous letter to identify himself. He then received an anonymous telephone call from a man with an Iraqi accent, who provided more information about the alleged misappropriation of funds. Without investigating the accusations further, Defendant published the anonymous letter on the letters to the editor page with a disclaimer. At the time of publication, defendant could not prove all of the facts to support the accusations of misappropriation of funds by plaintiff. Plaintiff tried to contact defendant for a retraction but was unsuccessful, and she then filed suit.

After the lawsuit was filed, defendant published a second article, an editorial which took issue with plaintiff's suing him over the first publication of the anonymous letter. Alluding to the free press guarantee of the First Amendment, defendant tried to justify publishing the letter by asserting that people who attended the gala and gave donations were entitled to an accounting for the funds. Defendant did not seek advice of counsel before publishing the editorial.

In January 1993, defendant published another editorial accusing plaintiff of being an Iraqi agent and a member of an organized arm of the Iraqi government in the United States, and alleging that the Iraqi government was financing the lawsuit. Plaintiff amended her complaint to include these two subsequent publications as well.

Experts: None. Defense considered using an expert on Arabic language to testify concerning meaning of certain Arabic terms, but decided not to use expert testimony on this issue.

Verdict: For Plaintiff

$9,000 compensatory damages ($3,000 per publication)
$150,000 punitive damages ($50,000 per publication)

Plaintiff's Counsel: Joseph P. Drennan, 1101 14th St. N.W., Washington, DC 20005, (202) 371-1717.

Defense Counsel: William B. Cummings, 112 S. Pitt St., Alexandria, VA 22314, (703) 836-7997

Factors: No significant pre-trial rulings. Plaintiff was an acknowledged public figure.

Plaintiff's pre-trial demand was $600,000. No offer of settlement was made by Defendant, who was uninsured. Because defendant did not have enough money to pay either plaintiff's demand or a judgment, defendant proceeded to trial without evaluating potential exposure. Defense counsel, however, did not believe plaintiff could prove substantial actual damages from the publications, which was confirmed by jury verdict for $3,000 compensatory damages per article.

The issues tried were truth, the defamatory meaning of certain Arabic words, reckless disregard, and damages. It was learned during discovery that no proceeds from the gala ever went to Iraqi orphans because its operating costs consumed all the donations. However, defendant was unable to show that plaintiff had diverted any of these funds to herself; instead, all funds were spent on the gala.

The jury was described as a well-balanced, intelligent, suburban Washington, DC jury. Defense counsel was looking for open-minded jurors, but was prevented from any extensive voir dire due to federal practice limiting voir dire to judge. Nonetheless, defense counsel was satisfied with the jury panel selected. No jury interviews were allowed in federal court.

Plaintiff's themes were that she was singled out for vilification because of her former status within Iraq, and that defendant published the anonymous letter after only a de minimis investigation into its charges. She characterized the second publication as a taunting retort to her lawsuit, and the third publication as revenge for the lawsuit, and an attempt to get plaintiff harmed or deported by linking her to the Iraqi government. Defendant's theme was that the publications were legitimate attempts to call for an investigation into what happened to the money from the fundraiser, and for an accounting to the donees. Defendant insisted he was trying to call attention to matters of interest in the Arabic community, both as to the fundraiser and to the possibility that plaintiff was an Iraqi agent.

Plaintiff did not make out a case for substantial compensatory damages. For damages, plaintiff, a professional performer, testified to her emotional distress and humiliation, and cried on the witness stand. Plaintiff also testified that she received angry telephone calls at work, that she was shunned by acquaintances, and that her daughter was harassed at school. However, plaintiff was unable to prove any specific monetary losses. Although plaintiff claimed that she would be harmed by anti-Iraqi groups or deported by the United States government if people thought she was an Iraqi agent, she did not prove that either misfortune occurred.

Factors which defense counsel believes were responsible for the verdict are the defendant's lack of sensitivity to the strong words used in the anonymous letter, his failure to conduct any further investigation, and his decision to publish the letter without checking any facts or reviewing it with counsel. Defense counsel believes that while the jury did not think the defendant was wrong, the jury thought his conduct was wrong in publishing the accusations without attempting to confirm them or gather more facts. Basically, the defense had bad facts to work with, including the false statements about plaintiff having misappropriated charity funds. The defendant editor, although described by defense counsel as "low-key", insisted that he had not done anything wrong.

The two subsequent publications also bore on the jury verdict, as it appeared that defendant was getting into a row with plaintiff for having filed the lawsuit, and because he did not have a good explanation for his actions and repeated the initial accusations without any further investigation or advice from counsel.

Although the jury did not find the plaintiff and particularly sympathetic, she was an attractive, mature woman a performer by profession, who was articulate in English for an Iraqi native. According to defense counsel, the trial judge appeared sympathetic to the plaintiff. Plaintiff's counsel was not particularly effective in stirring the jury's emotions enough to award greater compensatory damages. Defense counsel believes that the award of punitive damages was intended to "send a message" to defendant that he should investigate before publishing.

13. **Owen Rogal, D.D.S. v. ABC, Inc. and John Stossel** (ABC News 20/20)

Court: United States District Court for the Eastern District of Pennsylvania, Civil Action No. 89-5235

Judge: Joseph L. McGlynn, Jr.

Date of Verdict: December 18, 1992

Length of Trial: 10 days

Length of Deliberation: 5-½ hours

Jury Size: 8

Date of Publication: March 24, 1989

Case Summary: Plaintiff, a dentist, claimed that he was libeled and portrayed in a false light by a 20/20 segment called "The Biting Pain" on temporomandibular joint disorder (TMJ), which he claimed portrayed him as a purveyor of quack cures for TMJ. Defendant reporter (Stossel) allowed himself to be examined by plaintiff, who diagnosed TMJ. Three other dentists who examined defendant reporter did not diagnose TMJ. The broadcast detailed the expensive corrective devices and procedures recommended by plaintiff to treat TMJ. Plaintiff claimed that this libeled him by depicting him as a money-grubbing fraud.

Plaintiff's Counsel: M. Mark Mendel, 1620 Locust St., Philadelphia, PA 19103; Robert A. Holstein, Holstein, Mack & Klein, 250 S. Wacker Drive, Chicago, IL 60606.

Defense Counsel: Jerome J. Shestack, Burt M. Rublin, Wolf, Block, Schorr & Solis-Cohen, 12th Floor, Packard Bldg., S.E. Corner 15th & Chestnut Sts., Philadelphia, PA 19102-2678, (215) 977-2000.

Experts: Plaintiff called Edward Planer, former V.P. of NBC Network News, now a professor at Northwestern (U. Medill School of Journalism) and Tony Lame, former investigative reporter for NBC affiliate in Philadelphia, now a private investigator. The defendants were prepared to but did not call William J. Small, Dean, Fordham Graduate School of Business, former President of NBC News, and Mark Levy, Professor of Journalism, U. of Md.

Verdict: For Defendant

Notes: Defendants argued that plaintiff was "limited purpose public figure" due to his conducting national seminars on TMJ, TV and radio appearances, prior lawsuit against American Dental Association, his TV commercials, and the fact he was subject of extensive controversy in the dental field. Plaintiff was held to be private figure who needed only to prove negligence under Gertz.

Factors: Plaintiff used outtakes from the interview to try to show that portions omitted would have told a different story. Other outtakes showed that defendant also omitted material more damaging than what was included and were used for impeachment on cross-examination of the plaintiff. On balance, the outtakes favored the defense. Rogal also claimed that Stossel misled both Rogal and the audience by not disclosing that Stossel had been injured on the side of his head during an interview with a pro wrestler several years earlier. The defense presented no witnesses, but relied on cross-examination of plaintiff's witnesses and Stossel. Defendant successfully demonstrated that the plaintiff lied on the witness stand and his practice was money-oriented and devoted to servicing plaintiffs' lawyers handling personal injury lawsuits, much more so than stated in the broadcast. The ferocity and success of the attack on the plaintiff diverted attention from what otherwise might have been difficult reporting and editing facts.

The presence of Court TV under the experimental procedure in effect in this federal district probably resulted in more judicial control of the trial.

Jurors were engineer (m); road worker (m); nurse (f); research clerk (f); salesman (m); mechanic (m); bank teller (f); tool and die maker (m).

Jury foreman (engineer) was strongly biased against news media - other jurors persuaded foreman to agree to defense verdict after 5-½ hours of deliberation and initial report to judge that they were deadlocked.

14. **Leonard M. Ross v. Santa Barbara News Press (New York Times Company)**, Los Angeles County Superior Court

Judge: Harvey A. Schneider

Date of Verdict: 10/4/93

Length of Trial: 3 weeks

Jury Size: 12

Publication Date: November, 1988, follow-up story February, 1989

Case Summary: This is yet another libel case that involves the activities of Los Angeles Organized Crime Strike Force director Richard Crane. The series of articles in issue were a profile of Ross' success in real estate syndications, which eventually led to his becoming a controlling shareholder in Santa Barbara Savings and Loan. The articles detail the real estate investment activities of Ross and his former partner, Barry Marlin, and the investigation of those activities by the Strike Force and other federal agencies. Ross and Marlin had a falling out, in which each accused the other of fraud, and in which Ross allegedly used threats of physical force to pressure Marlin to buy him out. Marlin continued in the business of real estate syndication, and became the subject of a federal investigation for fraudulent activities in that connection. Although federal authorities admittedly investigated Ross' alleged use of organized crime contacts to pressure Ross to buy him out, the crux of the suit is Ross' claim that federal investigators were not investigating him in connection with fraud upon investors in real estate syndications. The newspaper contended the article was substantially true, because of the defrauded investors had claimed that Ross' financial demands on Marlin played a role in the loss of their funds.

The suit also focused upon statements in the article about a civil suit by a former litigation opponent of Ross that claimed that Ross arranged unsuccessfully, to have him killed in an auto accident. The claimed false statement on this matter is a quote by the victim's associate that the parking valet who was responsible for the accident disappeared afterward, when in fact he remained available and was questioned. Ross claimed this lent credence to the attempted murder claim.

As an interesting twist, Ross recovered millions of dollars from his insurance carriers for their bad faith refusal to defend investor suits against him.

Verdict: $7.5 million ($5.0 million - reputation injury; $2.5 million - emotional injury). No punitive damages awarded because jury found no constitutional malice.

Plaintiff's Counsel: Anthony M. Hassman, Beverly Hills, California

Defense Counsel: Rex Hienke, Kelli Sager, Gibson Dunn & Crutcher, Los Angeles, CA

Notes: In closing, the plaintiff asked the jury to award $1.5 million. Plaintiff's attorney called the defendant's reporting a "hatchet job. They were trying to bury Leonard Ross." "They didn't want the truth to interfere in any way," he said. Defense counsel said the "articles told the truth about a tough man who sues anyone who disagrees with him." They "were unflattering because he had been involved in things that were unflattering." He asked jurors to consider whether readers would have had different opinions of Ross had the articles appeared without the disputed statements.

1993 LDRC LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES
AND IDENTIFICATION OF COMMON FACTORS
BY TOM B. KELLEY

October 4, 1993

PART II

SUMMARY AND ANALYSIS OF COMMON FACTORS PRESENT IN RECENT PLAINTIFFS' VERDICTS IN LIBEL TRIALS.

I did a second survey of the most recent jury trials in libel cases against media defendants, the methodology and results of which are discussed in PART I. This PART II discusses the trends and common factors observed in the results.

A. INTRODUCTION AND COMPARISON TO 1991 LDRC STUDY

In the LDRC bulletin entitled "LDRC RECAP AND UPDATE: Trial Results, Damage Awards and Appeals", July 31, 1992, LDRC reported its survey of all libel trial results for two time periods: (1) the 1980's and (2) 1990 and 1991. In summary, LDRC reported that during the 1980's juries found for media defendants only 26.3% of the time, and that when the defendant lost, the awards averaged $1.5 million, with a median of $200,000. During 1990 and 1991, the media continued to prevail before juries at roughly the same unfavorable rate (27.6%), but the average award skyrocketed to $9,066,310, and the median to $1.5 million. The 1990-91 results were based upon 29 jury determinations.

For the 21-month period covered by this survey, 16 jury verdicts were discovered. The results are as follows:

CASE	VERDICT (Times 000)
Alvarado v. Express News Corp., San Antonio, TX, 4/92	$30
Bauer v. Northwest Publications, Inc., Duluth, MN, 5/93	Defense verdict
Brown v. Philadelphia Tribune Co., Philadelphia, PA, 3/92	$750
Eidson v. Decatur Publishing, Inc., Atlanta, GA, 593	Hung jury (not in computations)

Fieger v. New Time Publishing, Inc., Denver, CO, 10/93	Jury Out (Not in computations)
Frey v. Multimedia, Inc., Cincinnati, OH, 3/93	Defense verdict
Harrison v. Hartford Courant, et al., Torrington, CT, 8/93	Defense verdict
Holtzscheiter v. Thomson Newspaper, Inc., Florence, SC, 2/93	$2,000
Kiernan v. Globe International, Inc. Los Angeles, CA, 10/92	*Defense verdict*
Lewis v. News Press & Gazette Co., St. Joseph, MO, 9/92	$87.5
Masson v. The New Yorker, San Francisco, CA, 6/93	Defense verdict
Pesta v. CBS, Detroit, MI, 8/92	Defense verdict
Rassam v. Arab Times, Alexandria, VA, 6/93	$159
Robinson v. Capital Cities-ABC, Inc. (KTRK-TV), Ft. Worth, TX, 11/92	*Defense verdict*
Rogal v. ABC (20/20), Philadelphia, PA, 12/92	Defense verdict
Ross v. Santa Barbara News Press, Los Angeles, CA, 10/93	$7,500
Street v. Philadelphia Inquirer, Philadelphia, PA, 6/93	Defense verdict
Woodcock v. Hartford Journal Advocate, Hartford, CT 3/93	$628 (including $121 in court-imposed punitive damages)

(The above numbers are carried without adjustment for post-trial relief.)

These results indicate that the defendants prevailed 56.25% of time. In cases lost, the average verdict was $1,593,500, the was $628,000.

I hesitate to attribute much significance to the drop in average and median verdicts from the 1990-1991 results. The six cases that resulted in those plaintiff's verdicts in the 21 months studied involved less sympathetic plaintiffs, smaller audiences, venues in which jurors are more prone to be more conservative about the value of money, and less difficult facts than the adverse results reported in the LDRC study and my 1991 survey. In my opinion, these verdicts are not inconsistent with the prior LDRC reports or my conclusion in the summary presented at the last symposium that "the market value of the garden variety libel case has gone up." The results in the *Brown*, *Holtzscheiter*, *Rassam* and *Woodcock* cases, are significantly above what would have been expected during the 1980's.

So, too, upon qualitative analysis, the significant rise in percentage of defense verdicts does not appear to be reflective of a trend. Simply stated, the facts in most of the cases tried after the period subsequent to 1991 (if handled deftly by defense counsel) lent those cases to defense victory. That was not true of most of the cases tried in 1990 and 1991.

In the balance of this report, I will try to identify the common factors reported by counsel in the defendant verdict cases and what differentiates those cases from the plaintiff verdicts that were studied in this survey and the 1991 survey. As in the last study, I found it difficult to come up with anything not already perfectly obvious to experienced defense counsel.

B. PRECONCEIVED BIASES AND PREJUDICES OF JURORS

Responding attorneys generally agreed that, in each venue, 15% (more or less) of persons likely to be summoned for jury services have significant anti-media biases. In small to medium sized towns, such biases are usually more prevalent and focused upon the local media outlet. Greater than average anti-media biases also exist in some ethnic or poor neighborhoods in large cities (who are generally biased against establishment institutions and large organizations); in smaller towns in which class struggle or conflict is present, and in politically conservative groups. It appears that some form of preexisting bias was a factor in some of the plaintiffs' verdicts (*Furgason*, *Holtzscheiter*) and affected deliberations in cases that resulted in defense verdicts (Rogal, Pesta).

As was true of the last survey, most responding defense counsel believed that intelligent, better educated people who read newspapers make better jurors on liability issues, but are likely to award more money if liability is found. In several cases, however, well educated jurors proved to be temporary hold-outs for the plaintiff (*Pesta*, *Rogal*; but see *Lewis* where such persons claimed they held out for the defendant) or instrumental in bringing about a plaintiff's verdict (*Furgason*). As always,

counsel's preferences as to juror types were hopelessly diverse, but for what it is worth there was some consensus on the following: prefer intelligent white collar types over those who earn commissions in any form of "blue sky" compensation, politically moderate to liberal and open-minded over politically conservative and dogmatic. Avoid well educated people who are artistic, emotional, creative, or in "touchy-feely" professions (social work, counselling, etc.) or who are obsessive, compulsive, anal-retentive, or in highly structured or technical professions, in favor of common sense blue collar wage earners.

Responding counsel agree that the opportunity to personally interrogate the venire increases the chances (but does not guarantee) that anti-media and other anti-defense biases will be disclosed. (Of course, interrogation by counsel also permits counsel to establish rapport, introduce themes, and defuse factors with high emotional impact.) In several state court cases, counsel were able to get more than the usual time for voir dire (*Short; Southern Air*). In addition, some federal courts are permitting voir dire to be conducted by counsel under the supervision of a magistrate judge (*Pesta*).

Most counsel continue to be skeptical of jury surveys or mock trials as a means of profiling good jurors, because it is rare that counsel has the opportunity to "choose" anyone that fits the profile, and because counsel prefer to rely on their in-person impressions rather than an abstract composite. Some counsel found jury studies useful in determining which broad demographic groups are most likely to accept the defendants' case position or to be offended by what the plaintiff or the defendant did. More commonly, counsel found mock trials and similar techniques useful in identifying themes most likely to play well with lay persons. Defense lawyers with extensive jury experience tend to shun these devices altogether.

C. LIKEABLE OR SYMPATHETIC PLAINTIFFS

In the last survey, all of the high verdicts involved male plaintiffs. All were professionals, most of them were lawyers, prosecutors or judges, and a few of them were doctors. In the cases surveyed for 1992-93, the plaintiffs are a more diverse lot (w=winner; l=loser): Female free-lance writer (Bauer-l); two male dentists (Brown-w) and (Rogal-l); a male city attorney, (Eidson (hung jury)); two male physicians, (Fieger-? and Pesta-l); female Native American recipients of public fund grants (Harrison-l); a welfare mother (Holtzscheiter-w); three businessmen (Frey-l); (Robinson-l); and (Ross-w), two city councilpersons, one male (Woodcock-w), one female (Street-l); one male judge (Lewis-w); one male Freudian analyst (Masson-w vs. Magazine, hung jury vs. author); and a female Iraqi radio announcer in residence in the United States during the Gulf War (Rassam-w), one female nurse (Kiernan-l).

As in the last survey, it does not appear that the results were affected in any significant way by whether the standard was negligence or actual malice. There were significant exceptions, e.g., *Masson, Ross, Street*.

The more pervasive the plaintiff's reputation, the larger the likely damage range.

D. NEUTRALIZING SYMPATHY

In the cases in which defendants prevailed, the defendants were able to at least neutralize sympathy. This was done in several ways:

1. Attack the Plaintiff as a Person Undeserving of Recovery. In some cases, the defense launched a broad and sometimes aggressive attack upon the plaintiff. Such an attacks were permitted by the court and lacked significant risk because they pertained to what was charged in the publication or at least the same subject matter. See *Meyer, Rogal, Southern*. This strategy carried significantly more risk when the attack pertained not directly to the publication in issue but was offered on reputation, emotional distress, or other damage issue. See *Furgason, Holtzscheiter, Masson*. In *Holtzscheiter*, while the attack at least in part went to the gist of the defamation (that the mother did not support her murdered daughter's education), the jury apparently was willing to take any attack upon this sympathetic plaintiff as unwarranted. In *Masson*, the jury was not offended by the attack on the plaintiff, but rejected it as irrelevant.

2. Attacking the Plaintiff by Justifying the Particular Charge in Issue. This is the traditional truth defense, in which the defendant aggressively defends and focuses its trial themes on its publication and attacks the plaintiff only indirectly insofar as the evidence going to truth and nondoubting state of mind "slops over" onto the plaintiff. This will usually be enough to carry the day when the defendant has done nothing to seriously offend the jury with its newsgathering and reporting conduct, and the plaintiff is not especially sympathetic. See *Pesta, Harrison, Robinson, Frey*. Successful counsel in these cases were careful with evidence tending to attack the plaintiff on collateral matters, and when such evidence was offered it was done without emphasis in summation.

3. Disclaiming Any Attack on the Plaintiff. In other cases there was evidence that impeached the credibility of the plaintiff or his/her claims, but counsel disclaimed any attack on plaintiff and even "stroked" the plaintiff. In *Street*, counsel effectively impeached the plaintiff's credibility and then argued that it did not tend to show a bad motive or character on his part,

but merely that he was being unreasonable in this case. Success with this approach depends very much on how it plays. In *Covey*, counsel's well-intentioned efforts to use a light touch in cross-examining the plaintiffs were claimed by plaintiffs' counsel and perceived by jurors as attacks and this contributed to the adverse result. See also *Holtzscheiter*. Another approach is to acknowledge that the plaintiff is not a bad person but urge (in so many words) that he has gotten bogged down in blaming his troubles on others, in this case, the defendant; that plaintiff needs to learn to accept responsibility and deal with his/her problems directly; and that a damage award in this case would teach him just the opposite (and wrong) lesson. *Frey, Robinson, and Street* are examples of variations of this approach.

Attacking the plaintiff always has significant risks. It frequently backfires when counsel is unwilling to take ownership of such an attack in opening, but nonetheless slips it into the evidence. Sometimes this will occur despite efforts of counsel to avoid it. See *Holtzscheiter, Covey*. Experienced plaintiffs' lawyers will charge the defense with subtle but calculated, unfair, and irrelevant character assignation.

E. THE "NO INCREMENTAL HARM" DEFENSE

In several cases, defense counsel urged a trial theme that resembles the incremental harm doctrine. Adapted to the court's charge, this theme took one of two basic forms: 1) the publication is substantially true, or would have produced the same effect upon the reader had it not included the disputed charge; or 2) the plaintiff's injuries were caused, not by the charges in issue, but by other publicity, notorious acts of plaintiff, or other factors not within the defendants' control, or by the portions of the publication not in dispute. The first was attempted successfully in *Short*, in which the defendant demonstrated that the plaintiff was essentially a bad sheriff, even though the particular charge in issue was not completely nailed down, and in Meyer, in which the defendant proved that the plaintiff was a drug user, a bad person, and a liar, to overcome a charge that was not nailed down at all. See also *Ross*. The second was attempted unsuccessfully in *Masson*.

The conclusion to be drawn from these anecdotal results, as well as from my first survey, is that the distinctions inherent in these themes are frequently lost on the jury. It appears that incarnations of the incremental harm doctrine succeed as trial themes only when coupled with compelling proof that the plaintiff is as bad or worse than depicted by the defendant, which means they do not add much.

F. DEFENDING NEWSGATHERING AND REPORTING

Based upon the results reported in the 1991 survey, I identified the following to be symptomatic of a case likely to result in a high plaintiff's verdict:

1. failure to consult obvious available sources or documents that could confirm the published facts or provide contrary information;

2. interviewing with leading questions and pushing sources towards desired responses;

3. failure to confront the plaintiff with the charges;

4. surreptitious recording of conversations and similar "sneaky" newsgathering techniques;

5. reliance on sources who are disgruntled, bear a grudge against plaintiff, or are not credible for "obvious reasons";

6. reporter emotionally involved in the story;

7. use of language that carries a greater sting than the facts as known to the publisher (alteration of quotes is in this category);

8. failure to report known, significant countervailing facts;

9. defendant denies awareness of a defamatory implication which appears obvious to the jury;

10. defendant destroys or "loses" notes, tapes or any other significant evidence, particularly during the post-complaint stage;

11. the most common problem is the reporting of charges concerning a public person when their truth has not been conclusively determined, and later events show that the charges were unfounded. The defendant usually takes the position that it was doing its job in reporting serious charges, presenting countervailing information, and permitting the public to resolve the controversy. This trial theme is very hard to sell when an otherwise clean plaintiff claims to be injured by a charge that is not sustainable.

In most of the defense verdict cases, none of the foregoing was present. In cases in which some or even most of the foregoing factors were present, counsel managed to neutralize them. The most extreme case was *Meyer v. Advertising Age*, included factors 1, 3,

5, 7, 8 and 9. The jury in that case was obviously disturbed by the defendant's newsgathering and reporting tactics, but this was overcome by the defense showing that the plaintiff was indeed a drug user and a liar to boot. More commonly, less egregious lapses on the media's part are overcome by showing that the defendant basically got it right on a matter of legitimate public concern.

In general, the defendant is more likely to win despite minor warts when the publication involves "core value" discourse as defined by the values of jury. For example, a jury is likely to give more leeway to a publisher that suggests favoritism in connection with a councilman's brother's receipt of public funds that were wasted (*Robinson*) than one making a similar suggestion in connection with a councilwoman's actions on a development plan that were adverse to a developer who happened to be a competitor of her husband (*Woodcock*). Unquestionably, the relative likability of the respective plaintiffs also played a significant role in the opposite results of these two cases which were similar as to liability proof.

The defense most likely to be successful is one in which the newspaper or broadcaster can focus the jury on what the defendant did and take pride in it. See *Short, Pesta*. Even where the media conduct in issue does not warrant much pride, the defendant can more humbly show the human side of the journalistic process. This can be done in the newspaper business by comparing that business to other manufacturing businesses, and emphasizing the feat by which a newspaper creates and distributes an entire inventory and starts on a new one each day. This was successful in *Dorman*, partially successful in *Alvarado, and* unsuccessful in *Furgason*. It can be done in either media by showing how the process of recreating reality and words is inherently imperfect (*Robinson*). Even where the defendant is better advised not to focus much attention on its own conduct, he can prevail by focusing on the plaintiff as described in paragraph II.D. above.

Several cases involved claims of implied defamation resulting from omission of countervailing facts or arguably ambiguous language. These presented little problem when the defendant was able to show that the plaintiff was guilty of the worst that could be implied from the statements in issue, as in *Meyer, Rogal* and *Pesta*. If the defendant does not have this kind of firepower, the implied meaning cases can be dangerous if the jury perceives the defendants' position on the meaning conveyed by the publication to be not well taken, not forthright, or incredible (see cases discussed in the 1991 survey), or the plaintiff is especially sympathetic (see *Holtzscheiter*). In *Bauer, Harrison* (liability bifurcated from causation and damages), and *Street*, the defendants' case position on meaning was reasonable and the sympathy factor was kept in check.

A subspecies of a implied meaning case involves a charge of the appearance of impropriety when there is little or no evidence of actual impropriety. These are defensible so long as the sympathy factor is kept in check, *Harrison, Robinson, Street*. They are losers when it is not, e.g., *Woodcock*.

G. **EXPERTS**

Most defense counsel would prefer not to use journalistic practice experts because they permit plaintiff's counsel to take shots at the defendant's case, and inject abstract theories and argument by asking hypothetical questions which may or may not be grounded in the facts. Most agree that where the plaintiff designates a journalistic practices expert, the defendant should retain one, if nothing else to keep the plaintiff's expert honest, and to call as a witness if plaintiff's expert is permitted to testify and scores points, and cross-examination is not effective in neutralizing him/her. In addition, some counsel commend offensive use of a well-credentialed expert when the defendant has engaged in a journalistic practice that the average juror would have difficulty accepting such as alteration of quotes, reliance on confidential sources, or undisclosed taping of interviews, or reliance upon a single source.

H. **DEFENDANT'S TRIAL DEMEANOR**

In many of the defense wins, defendants were in a position to display with pride their journalistic process and work product. More importantly, in all cases the defendants were in a position to be forthright with the jury, and not forced to take positions that the jury could find to be disingenuous, as usually happens in cases involving factors 7, 9, and 10, subsection II.F., above.

The winning defendants attribute their success to well prepared witnesses. Good trial demeanor does not come naturally to most reporters and editors, and is achieved through a lengthy conditioning process. Only when the witness has thoroughly assimilated the facts and the process can h/h concentrate of things like eye contact, self-effacement, and similar means of augmenting credibility. In several cases (*Masson, Meyer, Street*) counsel spent over 100 hours in preparing the key witness, and in one case (*Short*) made the witness part of the defense team, attending depositions, hearings, etc.

Commonly, the largest hurdle in preparing witnesses for trial was overcoming an early bad deposition, usually of the reporter or writer. Preparation for the early deposition has to be thorough (virtually every question should be anticipated) and witness and counsel must overcome the newsperson's 1) resentment and self-righteousness over being sued; 2) natural gabbiness, and disinclination to profess lack of knowledge; 3) occasional tendency to be casual and flip. The latter two elements require that you get

across to the reporter the notion, "don't get mad, get even" and that this requires self-discipline and preparation. Counsel need to be attentive to the more diffident reporter, who may be mortified at being sued, frightened by the process, or otherwise need "pumping up." Counsel also found it necessary to spend considerable time before the deposition listening to the client's ideas on how to defend (usually some form of *in terrorem* discovery or a countersuit) and forging an agreement on the elements, sequence and timing of the defense plan; and most importantly, to separate these considerations from the goal of the deposition, which is to give only answer questions asked. Almost all responding defense counsel wish they had spent more time on getting their witness "eye on the ball" before their depositions.

I. UNIMPORTANCE OF PROOF OF ACTUAL INJURY

As with the last survey, juries that find liability encounter no difficulty awarding sizeable, (*Covey, Holtzscheiter, Mitchell, Rassam, Woodcock*) and even gargantuan sums (*Furgason*) without significant proof of actual injury.

J. TRIAL DYNAMICS

The judge continues to be a factor in most of the high plaintiffs' verdicts by omitting to make pretrial rulings to shape the trial, playing into the hands of aggressive plaintiff's counsel who benefits from the resulting lack of focus; failing to limit plaintiff's counsel to probative evidence that is not unduly prejudicial, admonish regarding proper argument, and give appropriate elements definitions and limiting instructions before, during, and at the end of trial. This phenomenon is discussed in detail in the 1991 survey and will not repeated here. In the defense verdict cases in which a weak judge presided, counsel filled the control vacuum him/herself not only by being well prepared but also by being aggressive and exuding a deep personal conviction in h/h clients' cause. In cases where the judge was in control, some successful defense counsel did their best to get to know the judge and limit objections to those that were essential or likely to be granted in an effort to create the appearance that the judge and defense counsel were of the same mind. In all of the defense victories, the judge, defense counsel, or some combination of the two, managed to avoid setting the juggernaut rolling in the plaintiff's favor.

K. JURY UNDERSTANDING OF ISSUES

As was likewise true with the last survey, it appears that jurors rarely understood or correctly applied the "actual malice" standard. In the few cases where the jury appeared to have at least a partial understanding of the standard of knowing reckless falsity (*Masson, Street*), that understanding was fostered by aid from the court in the form of mid-trial and end-of-trial jury

instructions and special verdict forms that forced the jury to apply the standard and facts which lent themselves to emphasis on that particular issue. *Frey; Masson; Street; Pesta*; see also *Southern Air*, in which the jury found for defendant on falsity apparently because it found the proof inclusive and that the plaintiff had failed to meet its burden.

Jurors have trouble simulating information that supports the defense side through auditory learning processes. Most winning defense counsel recommend utilizing visual learning processes through as much demonstrative evidence as possible. Visual aids such as overhead projections or blowups of documents, and jury instructions, diagrams and charts of the journalistic process, aid comprehension and avoid confusion.

Counsel found it easier to keep the issues in focus when the court formulated the charge before the trial began, so that counsel could refer to it beginning with opening. *Masson; Street*. Even when the charge was not determined before trial, counsel benefitted from having the charge given in writing before closing, so that it could be used in blow ups and referred to in summation. See *Frey, Short*.

CONCLUSION

In sum, when counsel for a media defendant in a libel case faces a jury trial, he/she should do what we always have done:

Identify themes by which the defendant can take pride in its work product, or at least show that the process that led to it, although imperfect and inevitably human, is worth preserving. Readily admit mistakes but still be in a position to justify the general tenor of the publication and/or the effort behind it. If none of these themes appear very durable, a well calculated focus on the plaintiff and what he did, although risky, may nonetheless carry the day. The more unsympathetic and undeserving of recovery the plaintiff, the more error, unfairness, and even deviousness will be tolerated from the defendant. The more compelling the subject matter, the more will be tolerated from the defendant in raising questions about the plaintiff's ethics or propriety, notwithstanding that the defendant does not "have the goods" on the plaintiff.

Attempt to enlist the aid of the court in shaping the trial well before it begins, with *in limine* rulings, pretrial and mid-trial jury charges, special verdicts, and in securing adequate opportunity to learn the biases of potential jurors.

If there is no theme within the winning profile that fits your case, settle or pursue an appellate strategy.