

1995 LDRC LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES
AND IDENTIFICATION OF COMMON FACTORS
BY TOM KELLEY

September 20, 1995

PART I

CASE SURVEY

Introductory Note

This is my report of responses to a survey of recent verdicts in libel suits against media defendants. The cases reported in paragraphs A through J are based upon in-depth interviews with defense counsel. In four cases, summarized much more briefly in paragraphs K-1 through K-4, counsel were not in a position to comment because of pending appeals, pending similar claims, or other reasons. The latter summaries are based upon public record information.

I also consulted available jury verdict reports and publicity concerning the cases.

The survey covers the period from October 4, 1993, through September 20, 1995.

A. Jack McWhorter "Mac" Barber v. Gillett Communications of Atlanta, Inc., d/b/a WAGA-TV; Superior Court of DeKalb County, Georgia; Civil Action No. 93-6692-6; October, 1994

1. Date of Broadcast: July 7, 1992

2. Case Summary: Plaintiff, a Georgia Public Service Commissioner, brought suit on the basis of a report by WAGA-TV's Jim Kaiserski. The report was a follow-up on the mistrial of Frank Redding, a black politician who was prosecuted by the U.S. Attorney's office for allegedly accepting money illegally. The mistrial resulted when the jury split along racial lines. The focal point of the report was an allegation by State Representative Billy McKinney that federal prosecutors unfairly target black politicians for prosecution through so-called "sting" operations, while they do not use such operations against white politicians. In support of his position, Rep. McKinney cited a "litany" of black politicians he claims were the subject of federal sting operations. In covering the resulting controversy, Mr. Kaiserski and WAGA-TV aired responses to this allegation from then-U.S. Attorney Joe Whitley, and State Attorney General Mike Bowers. In addition, the broadcast identified, by name and photograph, three white public officials

who had been tried and convicted by state and federal prosecutors. After that, the report showed pictures of two white public officials, one of which was the plaintiff, along with Mr. Kaiserski's statement that they had been forced into quitting or fired when investigators turned up allegations of impropriety. This was followed by statistics from the U.S. Attorney's office showing the number of white versus black politicians prosecuted in the last twelve and twenty-four months. The U.S. Attorney was then shown commenting on those statistics. After that, Rep. McKinney was shown saying, "Not a single white case was the result of a sting operation. Every one of those white people were violating the law and they were caught violating the law." The plaintiff in this case claimed Rep. McKinney's last statement was edited into the broadcast in such a way as to make it appear he was saying the plaintiff was violating the law and caught violating the law. The defense contended the statement was a comment on the U.S. Attorney's case statistics, and did not create the impression plaintiff claimed.

3. Verdict: For defendant
4. Length of Trial: 6 days
Length of Deliberations: 1½ hours
5. Size of Jury: 12
6. Significant Pre-Trial and Mid-Trial Rulings: The trial court denied WAGA-TV's motion for summary judgment without discussion. The court also denied the station's motion for directed verdict at the close of the evidence.
7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): None.
8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None.
9. Pre-Trial Evaluation: Probable defense verdict on liability; no damages. No settlement offer was made by the defense.
10. Defense Juror Preference During Selection: Defense favored younger intelligent jurors who would be unsympathetic to the "good ol' boy" political network and its members.
11. Actual Jury Makeup: 5 black, 6 white, 1 Asian; 7 male, 5 female; average age: 45.42; age range: 23-59:

<u>Age/Sex</u>	<u>Occupation</u>	<u>Spouse's Occupation</u>
59/F	homemaker	retired/civil service
30/M	computer operator	homemaker
54/M	warehouseman	library assistant
39/M	project manager (trnsprtn)	hospital insurance clerk
56/F	community college teacher	[divorced]
20/F	bank processing clerk	N/A
46/M	warehouseman	no response
51/F	executive secretary/AT&T	computer engineer
36/M	firefighter	bookkeeper/YMCA
23/F	day care teacher	N/A
58/F	coord. medical oncology	retired Army
43/M	university bookstore buyer	N/A

12. Issues Tried: The defense presentation to the jury was multi-faceted, but it focused primarily on the two basic arguments:

- a. The report was substantially true, and certainly could not be proved false by clear and convincing evidence, as required by Georgia case law; and
- b. WAGA-TV did not know the broadcast to be false, or act with reckless disregard for whether it was false or true.

13. Plaintiff's Theme(s): The plaintiff called the broadcast a "lynching, rotten to the core." Plaintiff attempted to depict himself as an honest and law-abiding public servant who had been falsely portrayed as a criminal by political adversaries and a careless media.

14. Defendant's Theme(s): Accountability: Who has it; who doesn't. The defense argued WAGA-TV and Jim Kaiserski had it by airing a carefully researched, carefully put-together story about an important public issue -- accountability in government. The plaintiff had accountability, but only up to a point. He decides which rules to follow, and which not to follow -- unacceptable for a public official. He won't face consequences, including publicity, when he breaks rules.

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. Only a few venire members expressed any feeling about the media or the station, and the feelings about the station were equally positive. Surprisingly, few knew plaintiff, despite the fact that he held a state-wide elected office.

b. Sympathy for plaintiff during trial: Plaintiff was not particularly sympathetic, and appeared at times somewhat arrogant, vengeful, and pious, especially at having been investigated by the GBI for bribery. The longer he testified (5 hours), the less sympathetic he appeared.

c. Proof of actual injury: None. Plaintiff claimed no economic loss or medical expense. He did not attempt to prove emotional distress or reputation injury, but relied on the doctrine of presumed damages.

d. Defendant's newsgathering/reporting: The defendant's reporter, Jim Kaiserski, was well prepared and professional. During direct, defense counsel used transcript blow-ups to walk through the broadcast line by line, cut by cut, and had Mr. Kaiserski explain the purpose, intent, and word selection behind each element of the story. This technique put the alleged defamatory statement in context, and emphasized the separation between the statement and the picture of plaintiff. It allowed the reporter to build rapport with the jury and show himself to be competent and thoughtful.

e. Experts: Defendant called the State Attorney General, a Special Assistant Attorney General, and a former head of the Campaign and Financial Disclosure Commission to testify that plaintiff's conduct violated specific laws. These individuals were involved in the prior investigation of plaintiff's conduct, and also offered what amounted to expert testimony concerning the truth of the statement.

f. Other evidence: To prove the truth of the "gist" of what was said, i.e. that plaintiff broke the law, the defense called two experts from the Campaign and Financial Disclosure Commission to detail all the violations of law of which the plaintiff was guilty. This was a calculated risk, but the jury said afterwards that they believed the defense had proven the charges against the plaintiff which caused him to resign rather than contesting them.

g. Trial dynamics:

i. Plaintiff's counsel: Plaintiff's counsel tried to play the old-line, good ol' boy political theme throughout the trial, and at times appeared indignant. In summation, he asked for \$2.5 million.

ii. Defendant's trial demeanor: Defense counsel made a conscious effort to appear serious and professional.

iii. Length of trial: The trial lasted through a full week and into the next. The length of the trial may have helped the defense by highlighting the fact that plaintiff's concern over the broadcast was disproportionate to its actual impact.

iv. Judge: The judge generally took a lenient attitude toward evidentiary matters, but once reacted forcefully when a witness for the plaintiff got out of line. The judge did not rule for the defense on its preliminary motions, which was a bit surprising to counsel.

h. Other factors: Defendant called the Attorney General and the former Chairman of the Ethics Commission to testify that Mr. Barber had broken state laws. Additionally, counsel for defendant used blow-ups of each segment of the broadcast transcript, and had the reporter explain each line -- both how he obtained the information and the message he intended to convey. Defendant used these storyboards, along with an accompanying line-by-line playing of the broadcast video, to place the allegedly defamatory statement in context and emphasize the separation between the statement and plaintiff's appearance. It had the added effect of showing the discipline of the journalistic process and the reporter's care in preparing the report.

In summation, the defense spent most of its time educating the jury on the elements of constitutional malice.

i. Lessons: To avoid undue sympathy for the plaintiff, posture the case as the plaintiff vs. the reporter. When a plaintiff is prone to changing his story or appearing too sanctimonious, keep him on the stand as long as possible to give him the chance to contradict himself or overreact.

16. Results of Jury Interviews: The initial vote of the jury was 10-2 in favor of the station. Significantly, the two jurors that were initially in favor of the plaintiff were both females over 50 years old, both homemakers. Only 4 other jurors were over 50. Apparently, the reason for these two jurors siding with the plaintiff initially was that they both felt Mr. Barber had been defamed "a little." They also stated they felt the station "dug facts up" concerning Mr. Barber. The other jurors felt these ladies were holding their position based on feelings, not on the law. When it became apparent the majority needed help convincing these jurors, they asked the court for the portion of the charge listing the elements of the plaintiff's claim, including the elements of constitutional malice. Once that portion of the charge was received, the first juror gave in to the majority, followed by the other shortly thereafter. Another

juror, a 30-year-old computer operator, after reviewing the charge, began to have some doubts about whether the station's conduct amounted to recklessness. However, the other jurors convinced him that although the story may not have been put together in the best way possible, it was not reckless. The jury came back with a verdict within thirty minutes of getting the portion of the charge they requested. The two alternate jurors, who did not participate in deliberations, were both younger and said they were firmly on the defense side.

Overall, the jurors were very complimentary of the defense presentation of the case. They especially liked the way the defense broke down the production of the story during the reporter's testimony, and said it was very persuasive.

17. Assessment of Jury: The younger people on the jury were firmly in favor of the defense. Given the age of the plaintiff and his witnesses, who were also old and all part of the same good ol' boy political network, this was not altogether surprising.

18. Post-Trial Disposition: Plaintiff has appealed the judgment, the defense has cross-appealed the denial of pre-trial and mid-trial motions, and the case awaits docketing in the Georgia Court of Appeals.

Plaintiff's Attorneys:

Bobby Lee Cook, Esq.
Cook & Palmour
128 S. Commerce St.
P.O. Box 370
Summerville, GA 30747
(706) 857-3421
(706) 857-1520 - FAX

Randolph A. Mayer, Esq.
Mayer & Beal
127 Peachtree St., #600
Atlanta, GA 30303
(404) 688-2700
(404) 688-2988 - FAX

Defendant's Attorneys:

Judson Graves, Esq.
Daniel A. Kent, Esq.
Cynthia L. Counts, Esq.
Alston & Bird
One Atlantic Center
1201 W. Peachtree St.
Atlanta, GA 30309-3424
(404) 881-7000
(404) 881-7777 - FAX

B. Neville Bryce v. Post Newsweek Stations-Florida, Inc.;
Broward Co. Cir. Ct., Florida (Patti Henning, J.); Case No.
89-24990; 4/22/94

1. Date of Publication: October 13, 1988

2. Case Summary: Plaintiff (now deceased) was Jamaican, and owned a bar catering mainly to Jamaicans. His business dramatically declined after the broadcast, and he closed the bar a few months later. Arrested for failing to appear for a hearing on a misdemeanor charge of keeping his bar open too late, plaintiff was mistakenly portrayed by the television station as having been arrested for being a member of the Jamaican Posse, a violent drug dealing gang. Plaintiff was arrested by officers conducting a sweep for Posse members, which caused a cameraman for the station to believe plaintiff was arrested because he was a Posse member. The station made no attempt to verify this, but simply assumed, in the circumstances, that it correctly understood the facts. The station ran a correction when the falsity was discovered. Plaintiff sued for defamation, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress, but did not claim punitive damages.

3. Verdict:

Compensatory: \$300,000

Punitive: Zero

4. Length of Trial: 3 days

Length of Deliberations: 2½ hours

5. Size of Jury: 6 (+ 1 alternate)

6. Significant Pre-Trial Rulings: Summary judgment was granted on the claims for false light privacy and intentional infliction of emotional distress. Pre-trial motions were filed to preclude testimony of loss of business. The court barred evidence of business losses because the plaintiff was unable to produce documentation of revenues and expenses (including tax returns, which he apparently did not file), but allowed plaintiff's testimony of loss of patronage.

The judge declined to embrace the professional liability fault standard embraced by the Restatement (Second) of Torts § 580B cmt. 1.

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

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Jury questionnaire.

9. Pretrial Evaluation: Counsel deem it inadvisable to disclose this while the case remains on appeal.

10. Defense Juror Preference During Selection: "No free lunch" types, i.e. self-employed persons and others that work for their money; persons who know or associate with police officers (since defendant had supportive testimony from the police).

11. Actual Jury Makeup: WM, early 60s, unemployed (foreman); WF, wife, teacher, grown sons, policeman friend; BF, schoolteacher, husband school principal, two grown children, 50s, no relationships with police or lawyers; WF, clerk with phone co., divorced, 50s, three grown children, father retired Chicago policeman; WF, 40s, self-employed with husband in mattress store, grown children, no relationships with police, was a P.I. plaintiff; WF, 60s, retired (worked for distribution co.), divorced, three children, no relationships with police or lawyers; WF, 19, clerk, single, no relationship to cops or lawyers. Only two were college graduates, but the jury was considered intelligent.

12. Issues Tried: Fault (negligence) and damages.

13. Plaintiff's Theme(s): The broadcast was three minutes long. The segment of plaintiff was about five seconds, and showed him being taken out of police car, handcuffed. Plaintiff's theme was:

- a. There was no need to include plaintiff in the broadcast, which could have concluded five seconds earlier, or used more of the several other tapes from which the broadcast was assembled, and
- b. No effort whatsoever was made by anyone to verify the information about plaintiff, which came solely from a cameraman who never even tried to get the name of the person featured at the end of the broadcast.
- c. If this kind of journalistic conduct is acceptable, this is something that could happen to any ordinary "little person".

14. Defendant's Theme(s): Falsity is not fault. The arresting officers did not provide plaintiff's name, and it was impossible, because this was breaking news, to obtain, without the plaintiff's name, the reasons for his arrest before the broadcast. A very high-ranking police official confirmed that

it was impossible to learn anything about an arrestee without his name.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Plaintiff played heavily the theme of the vulnerability of "little people" to this kind of journalistic excess, and came close to violating the "Golden Rule" argument preclusion throughout the trial. Counsel believes this venire, and the jury ultimately selected (which is common in many urban venues), was prone to empathize with these "little people" and "this could happen to you" appeals. Although the plaintiff was a Jamaican national, which tends to evoke prejudice in some segments of the Miami population, counsel does not believe this was a factor here.

b. Sympathy for plaintiff during trial: The broadcast tended to cause a strong visceral reaction. The jury was unimpressed with the station's willingness to call plaintiff a member of such a horrible group without making any attempt to determine plaintiff's true status. (Interestingly, the judge was totally unmoved; she said it was rare for her to so strongly disagree with a jury's verdict.)

The plaintiff himself did not evoke great sympathy. He was not well-spoken, and mumbled. He did not have compelling support witnesses. Plaintiff overreached in several ways. For example, he testified that he developed an ulcer, and that this was diagnosed and treated by his physician; the physician testified that he never diagnosed or treated an ulcer, nor did he receive any complaints by the plaintiff of stomach problems or any other symptoms after the broadcast. Counsel believes that a jury with an open mind would have found this damning impeachment evidence.

c. Proof of actual injury: \$250,000 for hurt feelings, etc. \$50,000 was for emotional distress, including a claim of an ulcer problem, although plaintiff's doctor, in rebuttal, denied treating plaintiff for the ulcer.

d. Defendant's newsgathering/reporting: The station's news director and cameraman were likeable and reasonably credible, but apparently unable to explain to the jury's satisfaction how the broadcast was aired without enough concern for accuracy to check out what the cameraman assumed to be correct. The cameraman gave several "it's not my job to know that" responses which may have conveyed

callousness. The news director, as she had in speaking to the plaintiff's lawyer a few weeks after the broadcast without consulting counsel, in deposition, acknowledged that a "mistake" was made in a way that implied fault as well as falsity. She explained what she meant, but the impact was probably damaging. In hindsight, it appears that the jury placed the burden on the defendant to justify this broadcast.

e. Experts:

Plaintiff's: Marilyn Laschner (not called, apparently because of defendant's contention that there was no issue as to the meaning of the broadcast).

Defendant's: J. Michael Kittross, Boston, MA, professor of journalism. Dr. Kittross was amiable and a good witness for the defense on what journalists have to do and not do for breaking news.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel: Competent -- knew his theme and stuck to it. Used a res ipsa argument in closing, "this has to be somebody's fault."

ii. Defendant's trial demeanor: Relatively low-key, conservative, and respectful in attacking the plaintiff (did not use unfavorable reputation testimony).

iii. Length of trial: 3 days.

iv. Judge: Not a factor.

h. Other factors: Counsel believes this jury held the station to an absolute liability standard, i.e. if you cannot fully verify this charge you cannot use it. Counsel believes that the court should have better instilled the concept that falsity is not fault.

i. Lessons: Even in a case without substantial proof of damages, it is hard to underestimate the impact of a negative report or the high standards the jury will impose upon a broadcaster. Counsel believes this case was lost during plaintiff's opening, when the broadcast was shown. Even without emotional influences, juries have trouble making any distinction between fault and falsity, and where

the latter is clear, a damage strategy is probably best. Juries do not buy the claim that a story harmful to the plaintiff is breaking news and has to be aired that day, particularly if it is "just another crime story."

The defense was able to have the claim for special damages stricken when the plaintiff was unable or unwilling to document them, but plaintiff nevertheless was permitted to show general loss of patronage, effectively giving the impression of business losses.

Counsel's investigation developed some evidence unfavorable to plaintiff as to his prior reputation, but the defense elected not to use it and instead take a "light touch" with the plaintiff. Even with hindsight, it is hard to tell whether offering such evidence would have helped or hurt, but probably the latter.

16. Results of Jury Interviews, if any: None of the jurors was interviewed.

17. Assessment of Jury: The jury gave everything plaintiff's lawyer asked for in closing argument for hurt feelings and reputation. Counsel would like to find a jury less susceptible to emotional impact, and less willing to award a windfall. They would seriously consider assistance from a jury consultant.

18. Post-Trial Disposition: Despite her strong disagreement with the verdict and the amount of the verdict, the judge denied all post-trial motions. The appeal will be orally argued in October.

Plaintiff's Attorneys: Michael Bernstein, Esq.
Michael A. Bernstein, P.A.
1140 Bayview Dr.
Ft. Lauderdale, FL 33304

Defendant's Attorneys: Sanford L. Bohrer, Esq.
Susan H. Aprill, Esq.
Holland & Knight
701 Brickell Ave., 30th floor
P.O. Box 015441
Miami, FL 33101-5441
(305) 374-8500
(305) 789-7799 - FAX

C. Richard P. Crane, Jr. and James D. Henderson v. The Arizona Republic, et al.; United States District Court for the Central District of California; April, 1995

1. Date of Publication: August 1, 1984

2. Case Summary: In the Spring of 1983, the House of Representatives' Select Committee on Narcotics Abuse & Control received allegations of official corruption directed against the Los Angeles Crime Strike Force, its former chief, Richard Crane, and its then current leader, Jim Henderson. The allegations were made by Jerry Vann, an incarcerated felon in the United States Witness Protection Program and former Strike Force witness. Committee Chairman Rep. Charles Rangel hired Sterling Johnson, then the Special Narcotics Prosecutor for the City of New York (and now U.S. District Judge for the Eastern District of New York), to examine Vann's allegations. Johnson prepared a report that summarized his investigation. According to Johnson's report, Vann previously had "cooperate[ed]" with federal and local law enforcement agencies, and "[m]uch of the information he provided was corroborated."

Vann told Johnson during an interview at a federal prison in San Diego that "Crane's clients are organized crime figures" and that when they "have problems with the [Strike Force], they are rarely touched because the current chief (Jim Henderson) is a friend and former subordinate of Crane's." Based on his investigation, Johnson concluded that Vann's allegations "were sufficiently credible that they merited a further in-depth investigation." Chairman Rangel and then-Committee Chief of Staff John Cusack (who now is a law enforcement advisor in the Bahamas) agreed. On November 15, 1993, Rangel wrote a letter to then-Attorney General William Smith, in which he "strongly urge[d]" the Department of Justice to "undertake a vigorous investigation." Two weeks later, Michael Shaheen, head of the Justice Department's Office of Professional Responsibility, wrote Rep. Rangel that the Department of Justice had "initiated an inquiry into Mr. Vann's allegation."

In January 1984, as part of the Committee's "continuing investigation" into Vann's allegations, John Capers (later the chief homicide investigator for the Manhattan District Attorney's Office) and Richard Lowe, then the Committee's chief counsel (and now a New York state trial judge), interviewed Donald Carstensen, an investigator with the Honolulu Organized Crime Strike Force. Capers' report of that interview states that "Carstensen confirmed Jerry Vann's allegation that two large narcotics prosecutions, Operation Fireball and Operation Coco were either dismissed or not brought to trial." Capers' interview memorandum further states that "Carstensen substantiated the allegation of Jerry Vann."

In June 1984, Vann contacted Arizona Republic reporter Jerry Seper. Vann sent to Seper copies of various correspondence between the Select Committee and the Department of Justice and the reports written by Johnson and Capers. Seper authenticated these documents in his interviews with Johnson and Cusack. Confirming the Committee's belief that Vann's charges had merit, Cusack told Seper that "we wouldn't have taken the trouble to write the [Rangel] letter [requesting the Department of Justice investigation] if we didn't think there was a problem. We just don't write letters like that every day."

On June 10, 1984, Seper interviewed Henderson over the telephone. Henderson denied the charges and denied any knowledge of the Committee's investigation. Henderson asked Seper to come to Los Angeles to review documents that he believed would expose Vann's allegations as false. Henderson claimed at trial that Seper told him that he would delay publishing the article until he reviewed these materials. In any event, Seper never reviewed Henderson's documents. Approximately one week after his first interview with Henderson, Seper again called Henderson. At trial, Henderson and Seper had different versions of what was said in this phone conversation. Seper said Henderson again denied any knowledge of the investigation and said he had not spoken to Crane or anyone at the Select Committee or the Department of Justice. Henderson said the call was brief and he did not remember having such a conversation with Seper.

On July 29, 1984, Seper interviewed Crane over the telephone. Crane said he knew about the Select Committee's investigation and had spoken to Henderson about the matter. Crane also said he "wouldn't know Jerry Vann from a bag full of assholes." According to Crane, Seper told him that he had doubts about the veracity of Vann's charges and agreed to review records in Crane's possession before publishing the story. Seper denies he said any such thing. Seper, however, never reviewed Crane's documents.

On August 1, 1984, The Arizona Republic published Seper's article under the headline "U.S. Crime Strike Force in L.A. Accused of Corruption." Eight months later, the Department of Justice issued a report to the House Select Committee stating that "based on our investigation, we have concluded that the allegation raised in [Chairman Rangel's November 1983 letter] are unfounded." The Republic ran a short wire story about the DOJ report inside the paper.

Crane and Henderson filed their complaint in July 1985 seeking \$250 million in damages in Los Angeles County Superior Court. Each plaintiff sought general damages, special damages of \$5 million and punitive damages of \$50 million against the Phoenix Newspapers, Jerry Seper, former publisher Darrow Tully

and former Republic managing editor Alan Moyer (Tully and Moyer were dismissed from the case in 1988).

3. Verdict: For plaintiffs

Compensatory: \$1,000,000 (\$25,000 actual damages and \$475,000 presumed damages for each plaintiff)
Punitive: Directed verdict granted for defendants (no showing of common law malice)

4. Length of Trial: 4 days
Length of Deliberations: 7 hours

5. Size of Jury: 8

6. Significant Pre-Trial and Mid-Trial Rulings: After a Los Angeles County Superior Court judge denied defendants' motion for summary dismissal in January 1988, defendants removed the case to federal court in August 1988 after the dismissal of the "Doe" defendants created diversity. In December 1989, U.S. District Court Judge Edward Rafeedie granted defendants' motion for summary judgment and dismissed plaintiffs' case because the article was a "fair and true" report of a legislative proceeding, and thus absolutely privileged under California Civil Code § 47(4), and also because plaintiffs had failed to show that the Republic acted with actual malice. Crane v. Arizona Republic, 727 F. Supp. 698 (C.D. Cal. 1989).

Judge Rafeedie also held that the following three paragraphs that juxtaposed comments made to Seper by Crane in late July 1984 and by Henderson seven weeks earlier were not actionable in light of the incremental harm doctrine recognized in Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989):

Crane said he and Henderson talked about the allegations, the House request for an investigation and the Justice Department probe of them. He said Henderson told him Vann is a "kook."

Henderson, however, told The Republic he was not aware that specific allegations had been made against him, Crane or the strike force and that he had not talked to Crane about them and that he did not know that the House committee had requested an investigation by the Justice Department.

"This is all news to me," he said.

In dismissing the case in 1989, Judge Rafeedie wrote that "[t]he possible inference that may be drawn by the reader that either Henderson or Crane was lying about his knowledge of the investigation does not impugn either plaintiffs' reputation

beyond the damage already suffered as a result of the privileged report of the House Select Committee proceedings." After Judge Rafeedie's original dismissal of the case, the Supreme Court reversed the Ninth Circuit's holding in Masson and held that the incremental harm doctrine is not compelled by the First Amendment. Masson v. New Yorker Magazine, Inc., 111 S. Ct. 2419 (1991). On remand, the Ninth Circuit held that the incremental harm doctrine is not part of California state law. Masson v. New Yorker Magazine, Inc., 960 F.2d 896 (9th Cir. 1992).

In August 1992, the Ninth Circuit affirmed Judge Rafeedie's grant of summary judgment, except as to the three paragraphs in the article that juxtaposed the plaintiffs' comments. Crane v. The Arizona Republic, 972 F.2d 1511 (9th Cir. 1992). In reversing Judge Rafeedie's grant of summary judgment regarding these three paragraphs, the Ninth Circuit said that "a reasonable jury could conclude that the juxtaposition of the denials was undertaken either knowingly or in reckless disregard of the false impression it would produce concerning Crane's and Henderson's own credibility." 972 F.2d at 1524. The Ninth Circuit also noted that "a reasonable jury could find The Arizona Republic's editing of these denials materially altered the tenor of the story . . ." Id.

In October 1994, Judge Rafeedie held that the three paragraphs were libelous per se. The court also denied defendants' summary judgment motions arguing that (1) plaintiffs had failed to comply with the California correction statute in that their separate demands for correction had either not mentioned the three paragraphs or not mentioned them with the requisite specificity; (2) the three paragraphs were not defamatory of Crane; (3) the punitive damages claim must be dismissed given the absence of common law malice; and (4) plaintiffs' republication and intentional infliction of emotional distress claims should be dismissed.

At trial, a directed verdict granted for defendants on punitive damages, intentional infliction of emotional distress and republication.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): A special verdict form was used.

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Opening statements were delivered to focus groups, and the feedback was used to select themes.

9. Pretrial Evaluation: Unavailable.

10. Defense Juror Preference During Selection: Counsel questioned the traditional preference for well-educated, high income individuals and was willing to consider persons on the lower end of the socioeconomic scale, because the latter would be more likely to feel antipathy towards the relatively well-to-do, well-educated plaintiffs, both of whom were successful lawyers. As it turned out, there was no occasion to choose between the two types, since the approximately 30-member venire was almost entirely college educated and non-minority except for one Vietnamese male. Counsel desired to avoid: persons with backgrounds, friends, or relatives in law enforcement; technical professionals.

11. Actual Jury Makeup: 5 white women; 2 white men; 1 Vietnamese male. All college educated, all newspaper subscribers. 1 claimsman, 1 nurse, 1 public employee, 1 homemaker, the balance salaried employees.

12. Issues Tried: Truth, actual malice, common law malice (California requires both actual malice and common law malice for punitive damages).

13. Plaintiffs' Theme(s): Seper deliberately juxtaposed the statements by the two plaintiffs, made at different times and under different circumstances, to create implication that plaintiffs were liars. Seper did this to bolster the credibility of the allegations made by Jerry Vann and to create a "Page 1" to try to further his career.

14. Defendants' Theme(s): Henderson and Crane were trying to make the story go away. Seper thought Henderson did lie to him in the second interview when he said he had not spoken to Crane, the Select Committee or DOJ. Henderson testified that he spoke to Crane and the DOJ within "a couple of hours or a couple of days" after he spoke to Seper. Defendants argued that Henderson called Crane after his first conversation with Seper and thus was lying in his second conversation. Seper testified that he found it incredible that one week after he first spoke to Henderson, Henderson had not spoken to Crane, the DOJ or the Committee.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiffs, defendants, or issues: Could not detect any, except for the usual tendency to hold the media to high standards and to treat the issue of constitutional malice as one subsumed by the issue of falsity.

b. Sympathy for plaintiffs during trial: Both plaintiffs presented themselves well. Crane's wife was

supportive. Former strike force members testified that Henderson was depressed after the article.

c. Proof of actual injury: Crane said the article prevented him from becoming ("the phone stopped ringing") a successful trial lawyer, "the Edward Bennett Williams of the West Coast." Instead, he became a very successful corporate lawyer and casino owner. Henderson claimed the article prevented him from moving to Phoenix and running for elective office in Arizona. Special damages were not allowed because the plaintiffs declined to share their financial information.

d. Defendants' newsgathering/reporting: There were lapses in the newsgathering and reporting processes, which led to the claimed error. The jury found the reporter likeable and credible at trial.

e. Experts:

Plaintiffs': John Kottler, professor of journalism, U.S.C. (journalistic practices); Professor J. Michael Kittross, Boston (journalistic practices) (not offered); George Lakoff (linguistics) (did not testify); Tim Herrell, former reporter, Orange County Register, now private investigator (journalistic practices, reputed unreliability of source Jerry Vann)

Defendants were successful in drastically limiting the testimony of Kottler and Herrell, and barring others.

Defendants': None.

f. Other evidence: Plaintiffs called the former investigator for the congressional select committee, now a federal judge in the Southern District of New York, Sterling Johnson. One juror thought the calling of this witness was window dressing. Others understood he was there to show that Henderson must have known about the investigation.

g. Trial dynamics:

i. Plaintiffs' counsel: Well prepared, effective, slightly off-balance when some of his witnesses were stricken. Asked for \$2.0 million for each plaintiff.

ii. Defendants' trial demeanor: Counsel did not attack plaintiffs as corrupt, but did assert that the false implication in issue was their fault, in that

they were trying to brush Seper off. Seper did well on the witness stand. Henderson was permitted (over vigorous defense objections based on improper character evidence and other grounds) to testify to a conversation with the newspaper's community services director in which the latter said we've had problems with Seper, he has a PI mentality, and he's out to get people. The account was at least partially accurate: The CSD was trying to ameliorate with Henderson. Plaintiffs read a deposition of the former M.E., taken eight years before trial, in which he admitted that nobody looked at the story before it was published, that there was no system of checks in place, and appeared to acknowledge sloppiness. The witness was not capable of rehab for live testimony at trial.

iii. Length of trial: Not a factor.

iv. Judge: Irascible, probably a little tougher on plaintiffs' than defense counsel.

h. Other factors: The judge excluded the defense offer of other articles about the investigation, to show that plaintiffs were not harmed by a suggestion of a fib to Jerry Seper but by the publicity about the investigation.

i. Lessons: When falsity is shown, the element of constitutionality is unlikely to slow the jury significantly.

16. Results of Jury Interviews, if any: The jury said that they spent some time determining the falsity (the implication that one of them lied about knowledge of the investigation) of the publication, then went right to damages without serious consideration of the constitutional malice issue. They felt that the case was well tried, that the lawyers were not a factor, that the witnesses were believable, but that the facts were bad for the defendants. They did not like that an officer of the newspaper said the reporter was sloppy. The insurance claimsman indicated a preference for the defense side, but inability to convince the others.

The jury also expressed regret that their only option was to award money. They would have required some form of retraction or public apology.

17. Assessment of Jury: This was probably not an aberrational jury, and reflects the general tendency of juries to hold the media to high standards and not give the issue of constitutional malice much attention once falsity is found. Counsel feels that if this jury had been instructed on punitive

damages, it probably would have awarded them. The presumed damages award was probably a de facto punitive award.

Pre-trial focus groups felt the plaintiffs were complaining a lot over a "no harm, no foul," and during deliberations the plaintiffs' counsel expressed the belief that the defense had won. Counsel wonder whether a jury not so well-educated and connected to upper income levels would have been better, at least on damage issues.

18. Post-Trial Disposition: JNOV, new trial and remittitur motions denied. Notice of Appeal filed.

Plaintiffs' Attorneys: Brian O'Neill, Esq.
Robert L. Meylan, Esq.
O'Neill, Lysaght & Sun
100 Wilshire Blvd., #700
Santa Monica, CA 90401
(310) 451-5700

Defendants' Attorneys: Daniel C. Barr, Esq.
Anthony L. Marks, Esq.
Christopher J. Raboin, Esq.
Brown & Bain, P.A.
2901 N. Central Ave.
Phoenix, AZ 85012
(602) 351-8000

D. Dorothy Jean Dickerson v. Sally J. Raphael, et al.; Circuit Court, Washtenaw Co., MI (Melinda Morris, J.); Case No. 92-7177 NZ; 12/2/93

1. Date of Broadcast: 1991

2. Case Summary: Plaintiff, a member of Church of Scientology, alleged intrusion, false light invasion of privacy, public disclosure invasion of privacy, and violation of Michigan eavesdropping statute when two of her adult children, in cooperation with Sally Jesse Raphael show, surreptitiously audio and video taped a conversation with the mother in a public park, excerpts of which were broadcast.

3. Verdict: For defense

4. Length of Trial: 6 weeks
Length of Deliberations: Approximately 3 hours

5. Size of Jury: 6 + 2 alternates

6. Significant Pre-Trial Rulings: Court denied summary disposition.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): Nothing unusual. Case was tried by emphasizing public interest in Scientology and its adverse effect on families through separation and exploitation of its adherents.

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None

9. Pretrial Evaluation: Not without risks, but had to be tried and defended vigorously.

10. Defense Juror Preference During Selection: Family-oriented, traditionally religious, educated, common sense people.

11. Actual Jury Makeup: Good cross-section of women, men; young, old; black, white. Well educated, middle class. Included a faculty member and a staff member from U of M, telephone company employee, supervisor of a county construction crew.

12. Issues Tried:

Invasion of privacy -- intrusion, public disclosure, and false light (under a negligence standard)

Violation of Michigan eavesdropping statute

13. Plaintiff's Theme(s): Embarrassment at criticism of her religion on national TV.

14. Defendants' Theme(s): Legitimate public interest, right of family members to speak out about forces that tear families apart, the right of the media to provide a forum for this kind of speech, plaintiff acting as dupe and surrogate of Scientology to "attack the attackers," lack of any injury, Scientology a dangerous cult. The defendants had to overcome possible resentment at its role in sandbagging the plaintiff. They did this by emphasizing the anguish of the family members, and their need for support against the powerful and high-handed Scientology organization.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendants, or issues: Not a factor

b. Sympathy for plaintiff during trial: There was sympathy for the plaintiff, but as the victim of brainwashing by Scientologists, not the defendants.

c. Proof of actual injury: None

d. Defendants' newsgathering/reporting: The defendants presented reasonably well, but were de-emphasized in favor of the plaintiff's family as the protagonists and Scientology as the villain. At one point, the judge asked Ms. Raphael to behave like a program guest and just answer the questions.

e. Experts: Plaintiff's psychiatrist testified to PTSD, a highly exaggerated diagnosis under the DSM IV criteria. Each side called psychiatrists who had examined the plaintiff. The defense psychiatrist testified that the plaintiff was effectively "brainwashed" by Scientology.

f. Other evidence: Both the family and the program had received legal advice that the taping of the conversation was permissible.

g. Trial dynamics:

i. Plaintiff's counsel: Typical plaintiff's PI lawyer.

ii. Defendants' trial demeanor: Prepared and sincere. Greg Curtner effectively handled most of the witnesses. David Freeman, who did opening and summation, speaks with uncommon moral authority.

iii. Length of trial: Not a factor.

iv. Judge: Occasionally came down on both sides, but defendants clearly got the better of it.

h. Other factors: Scientologists crowded the courtroom throughout the trial.

i. Lessons: When the Church of Scientology is involved, make it their case and not the plaintiff's case. Anticipate a long, expensive case.

16. Results of Jury Interviews, if any: Jury liked defense honesty; didn't like plaintiff's exaggerations. The jury was slightly troubled by the eavesdropping claim, but said that even had they found liability on this claim, they would not have awarded damages.

17. Assessment of Jury: High self-esteem, savvy, had no difficulty discerning that Scientology controlled the plaintiff and case. Ann Arbor is a good venue for intelligent juries. They were also capable of emotions; some shed tears during David Freeman's close for the defense.

18. Post-Trial Disposition: On appeal by plaintiff. Defense awarded costs of trial, not fees.

Plaintiff's Attorneys: Robert E. Logeman, Esq.
Leo E. Januszewski, Esq.
Muth and Shapiro, P.C.
301 W. Michigan Ave., #302
Ypsilanti, MI 48197
(313) 481-8800
(313) 481-6752 - FAX

Defendants' Attorneys: Gregory L. Curtner, Esq.
Miller, Canfield, Paddock & Stone,
P.L.C.
150 W. Jefferson, #2500
Detroit, MI 48226-4415
(313) 963-6420
(313) 496-8454 - FAX

David Freeman, Esq.
Wyche, Burgess, Freeman & Parham,
P.C.
44 E. Camperdown Way
P.O. Box 728
Greenville, SC 29602
(803) 242-8202
(803) 235-8900 - FAX

E. Khalid Iqbal Khawar v. Globe International, Inc.; L.A. Co. Superior Ct., Santa Monica (Richard G. Harris, J.); 3/28/94

1. Date of Publication: April, 1989

2. Case Summary: In November, 1988, a small Santa Monica book publisher, Round Table Publishing, Inc., published a book written by assassination conspiracy theorist Robert D. Morrow, The Senator Must Die. The book accused one Ali Ahmad, actually the father of the plaintiff, as being the true killer of the senator. The book was illustrated by a photograph reportedly of Ahmad, but actually of the plaintiff, standing on a podium near Senator Kennedy the night he was shot. The book theorized that the person depicted in the photograph (plaintiff), who was covering the campaign as a free-lance photographer for a Pakistani journal, shot RFK with four bullets from a .22 caliber firearm inside his Nikon F camera. In April, 1989, the defendant Globe published a cover story entitled "Former CIA Agent Claims/Iranian Secret Police Killed Bobby Kennedy," which accurately summarized the allegations contained in the book, and prominently displayed the photograph from the book, which the defendant had cropped and enlarged, and added an arrow pointing to plaintiff. Plaintiff, who claimed he had nothing to do with

the assassination, alleged that he received death threats as a result of the Globe publication (Round Table was also sued but was judgment-proof), that his house and car were repeatedly vandalized, and that his children were harassed at school.

3. Verdict: The trial judge submitted to the jury for special verdict the issues of whether the defendant's publication was an accurate and neutral report (including whether the charges were newsworthy and made by a reliable and prominent person) of the charges made in The Senator Must Die, falsity, negligence, reckless disregard for the truth, malice and oppression, damages to reputation and for emotional distress, and presumed damages. Punitive damages were tried in a bifurcated hearing. The trial court also submitted to the jury for advisory determination the issue of whether the plaintiff was a public figure. The jury found falsity, negligence, constitutional malice, and entitlement to punitive damages, and awarded \$100,000 actual damages to reputation, \$400,000 for emotional distress, \$175,000 in presumed damages, and \$500,000 punitive damages, for a total verdict of \$1.175 million. The jury also found by special verdict (unanimously) that the article was a fair and neutral report, and rendered an advisory verdict that the plaintiff was not a public figure.

At the close of the plaintiff's case, the court dismissed the claims by Ali Ahmad, plaintiff's father, on the grounds that the publication was not of and concerning him.

Following the verdict, the trial court declined to rule whether dismissal was required under the neutral report doctrine in California, but instead disagreed with the jury's finding on that issue, because, even though the plaintiff had never made the contention, the court felt that the photograph in defendant's article was clearer and made the plaintiff more identifiable than the photograph contained in the book. The court declared that it was "convinced, if [this argument] was raised during the trial, that the jury answer to this question [whether the article was a fair, accurate, and neutral report] would have been no." Accordingly, the trial court entered judgment on the verdict of \$1.75 million. (The implication of the trial judge's decision, that a republication privilege is abused by adding truthful information that enhances the identifiability of the plaintiff may defeat the privilege, is disturbing.) See also, Furgason v. Clausen, 109 N.M. 331, 785 P.2d 242, 18 Media L. Rptr. 1369 (N.M. App. 1989).

Also following the verdict, the court found no liability, as a matter of law, on the part of The Senator Must Die author, Robert Morrow, because, in the court's view, the plaintiff's identity was not discernable from the book.

4. Length of Trial: 3 weeks

Length of Deliberations: 2 days on special verdict issues; 1 day on punitive damages

5. Size of Jury: 12

6. Significant Pre-Trial Rulings: The trial court refused to rule on the plaintiff's public figure status in advance of trial, even though the underlying facts were undisputed. Thus, the parties were required to try the case without knowing the applicable standard of liability.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The trial court determined to use the special verdict procedure described above.

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Defendant employed a jury consultant that helped pick the jury.

9. Pretrial Evaluation: The defense felt it had a strong legal and factual defense of neutral reportage and that this should have precluded any finding of negligence and constitutional malice, as a matter of law, or by the fact finder if properly instructed. The defense was well aware that its position as a member of the tabloid press would be difficult with any jury.

10. Defense Juror Preference During Selection: Persons bright enough to perceive the need for fair, accurate, and neutral reports of matters of significant controversy and public interest; readers, who get most of their information from the print media; well educated.

11. Actual Jury Makeup: The foreman was a 45-year-old aircraft manufacturing supervisor who was the foreman and led the jury through most of the deliberations. The balance was largely lower middle class, with a representative number of minorities and females. None was college educated.

12. Issues Tried: See ¶ 3 above.

13. Plaintiff's Theme(s): The defendant negligently and recklessly republished non-newsworthy and implausible allegations contained in a five-month-old book that had sold only 500 copies and had not been republished elsewhere. When a newspaper republishes serious damaging charges from a less than reliable source, it has an affirmative obligation to independently investigate them. Plaintiff presented numerous witnesses as to the true facts of the assassination and as to the implausibility of the defendant's article.

14. Defendant's Theme(s): The article was an accurate and neutral account of a published book that pertained to a continuing public controversy, with appropriate disclaimers and statements distancing the defendant's report from the book; that the article was privileged as a fair and neutral report of charges by a credible source. Moreover, the article was much like a book review, in which the author predicates his comments on a fair summary of the book. Defendant also contended that the plaintiff was an involuntary public figure and thus could not recover damages on a showing of negligence, but must prove reckless disregard for the truth. The defendant did not stipulate to the issue of falsity, but did not present evidence that plaintiff was involved in the assassination.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: This venire, like most, was disposed to react strongly in the negative to the tabloid press, including the Globe.

b. Sympathy for plaintiff during trial: The plaintiff was not a particularly good witness, but his predicament, being accused of assassinating RFK when he was, by his evidence, not in fact involved, with resulting notoriety and harassment of his children at school, evoked a reasonable amount of sympathy.

c. Proof of actual injury: None, other than plaintiff's testimony as to emotional distress, and plaintiff's security expert's testimony on the increased likelihood of the plaintiff becoming a victim of criminal conduct. See experts, below.

d. Defendant's newsgathering/reporting: The defendant's witnesses appeared for trial for testimony in plaintiff's case on dates certain per prior agreement. When that scheduling was not adhered to, the witnesses had to leave due to other commitments. The testimony of the defendant's editorial staff was presented through deposition.

e. Experts:

The testimony by DeBecker had significant impact upon the jury, and was very much a factor in moving this from the small to the moderate range.

None of the defendant's experts had read the Morrow book, and thus were not in a position to evaluate whether the defendant's report was accurate and

neutral, and in a questionable position to argue concerning the journalistic practices involved.

The defense journalism expert, Jonathan Kirsch, made an excellent witness. Unfortunately, he was not permitted by his employer to testify concerning the employer newspaper's policies and practices, which would have added much to the weight of his testimony.

Also for the defense, Professor Hawkins explained the Globe's use of "distancing" language throughout the Globe report, which probably contributed to the jury's neutral report finding.

Plaintiff's: Gavin DeBecker, Studio City, CA ("Security Expert to the Stars", with obvious bias against the tabloid press) (based upon the so-called science of enhanced risk assessment, this witness testified that the plaintiff was more likely to be a victim of crime as a result of the defendant's article); Bryce Nelson, Los Angeles, CA (journalism professor, University of Southern California) (journalistic practices); John F. McSweeney, Los Angeles, CA (former picture editor for Associated Press) (photojournalism practices); Joan Van Tassel, Malibu, CA (professor of journalism, Pepperdine University) (journalistic practices); L. Fletcher Prouty, Alexandria, VA (historian and political assassination expert); Robert B. Kaiser, Arcadia, CA (historian, expert on RFK assassination); Ulric Shannon, Montreal, Canada (assassination research).

Defendant's: Jonathan Kirsch, Los Angeles, CA (reporter, editor, and free-lance writer, former weekly book reviewer for L.A. Times); John Hawkins, Los Angeles, CA (professor of linguistics, University of Southern California) (concerning neutrality of report).

f. Other evidence: The plaintiff offered extensive evidence disputing the Morrow RFK assassination theory. The defendant elected not to offer any evidence of this kind, and did not, to any significant extent, cross-examine the plaintiff's witnesses on the issue of truth or falsity of the assassination theory.

g. Trial dynamics:

i. Plaintiff's counsel: Hardworking and thorough.

ii. Defendant's trial demeanor: Defendant did not testify in person but only by deposition. Counsel presented themselves as professional and fair, and apparently were well received by the jury.

iii. Length of trial: Not a factor.

iv. Judge: As noted above, the trial court essentially sandbagged the parties with his post-trial announcement of his conclusion, reached during the first two days of trial, which he shared with no one else, that this report was not a fair, accurate, and neutral account of the book because the photograph of the plaintiff made his image more identifiable. However, during the trial, the judge was tempered and judicious and not a significant factor in the jury's determinations. However, the charge given the jury was an olio of diverse statements concerning applicable law which left the jury at liberty to select those statements that fit its view of the case.

h. Other factors: The primary factors were jury antipathy towards the tabloid press, and towards the Globe's conduct in this particular case, and were not significantly offset by plaintiff's counsel. The jury, and principally its foreman, were opposed to the Globe and willing to find for plaintiff notwithstanding its finding that the Globe report was an accurate and neutral account of the Morrow book. Defense counsel wonders if the jury would have made this finding if they had understood that it could mean a judgment for the defendant.

i. Lessons: Defense counsel would consider calling at least one defendant's representative, to try to personalize the defendant's claims of good faith and to deal with statements in deposition about lack of concern for truth or falsity allegations of a book that is the subject of a book review. If more of the jury's feelings of goodwill toward defense counsel could have rubbed off on the client, the jury result may have been even better.

16. Results of Jury Interviews, if any: Because of efforts by the trial court to protect the jury's privacy, full scale interviews with all jurors were not feasible. Representatives of defense counsel were able to interview a few, and learn that the jury was largely controlled by the foreman, supervisor at an aircraft company, who was adverse to the Globe's position. Some jurors indicated that the foreman was arguing for a much higher verdict than ultimately was awarded, but obtained consensus as a result of compromising on the numbers.

17. Assessment of Jury: Typical of what one might expect in the Los Angeles area in terms of education, and bias against the tabloid press. Defense counsel does not think it could have obtained a significantly better jury. The \$1.0 million verdict indicates a relatively restrained jury that must have held a degree of favor for the defense table.

18. Post-Trial Disposition: The appeal of the final judgment, reported in ¶ 3 above, is pending.

Plaintiff's Attorneys: Francis C. Pizzulli, Esq.
Law Offices of Francis C. Pizzulli
718 Wilshire Blvd.
Santa Monica, CA 90401
(310) 451-8020

Craig A. Edmonston, Esq.
Noriega & Alexander
1801 18th St.
Bakersfield, CA 93301
(805) 327-5363

Richard L. Knickerbocker, Esq.
Law Offices of Richard L.
Knickerbocker
4920 Topanga Canyon Blvd.
Woodland Hills, CA 91367
(310) 581-3838

Defendant's Attorneys: Anthony M. Glassman, Esq.
Barbara Tarlow, Esq.
Glassman & Browning
360 N. Bedford Dr., #204
Beverly Hills, CA 90210
(310) 278-5100
(310) 271-6041 - FAX

Paul M. Levy, Esq.
Deutsch, Levy & Engel
255 W. Washington St.
Chicago, IL 60606
(312) 346-1460
(312) 346-1859 - FAX

F. John Lugo v. Inside Edition; Superior Court, L.A. Central
(Richard C. Hubbel, J.); Case No. C750-445; 11/12/93

1. Date of Publication:

2. Case Summary: Before any contact with Inside Edition, plaintiff, a transsexual 30-year-old real estate salesman, had

begun a three-phase cosmetic surgical procedure with a "Dr." John Ronald Brown. Plaintiff thought Brown was a legitimate surgeon. The surgery was a "juri-flap," which is a cosmetic procedure intended to create a straight hairline appearance common to women as compared with a receding "V" look common to men. The first surgery was performed in Tijuana, Mexico. "Dr." Brown was asked by Inside Edition to participate in a TV special regarding his "fine work." The host of the program was David Frost. Plaintiff agreed to have the second phase of the surgery filmed under general anesthetic, provided his identity was kept secret and he had editing rights regarding any film of him. Inside Edition had learned that Dr. Brown had lost his license to practice medicine in California in 1977 because of incompetence and gross negligence. He was recently released from prison for practicing medicine without a license. Stephanie Abrams, the producer-reporter for Inside Edition, released none of this background information to the plaintiff. Without providing any preview rights to the plaintiff, Inside Edition showed plaintiff's surgery on national TV. Plaintiff could be heard moaning and screaming. Although plaintiff's identity was kept secret, the airing made it appear that plaintiff knew of Brown's background and went forward with the surgery. A consultant interviewed on the program described the surgery as life-threatening.

3. Verdict: For the plaintiff. (11-1 on liability, 9-3 on damages. This was the second trial and it was bifurcated. The first trial ended in a hung jury, 8-4 for the defense, but 9 votes were needed for a defense verdict.)

Compensatory: \$91,000

Punitive: Zero. The claim of punitive damages was dismissed in the first trial and the judge refused to consider them in the second trial.

4. Length of Trial: The first trial lasted 2 weeks. The second bifurcated trial included 5 days of testimony (3 days on liability, 2 days on damages).

Length of Deliberations: Deliberations were called off in first trial when the jury appeared to be deadlocked upon juror interviews conducted by the judge. In the second trial, the jury deliberated for 5 days total (3 days on liability phase, 2 days on damages).

5. Size of Jury: 12

6. Significant Pre-Trial Rulings: Partial for summary judgment dismissed claims for defamation, fraud and invasion of privacy. Only the claim of intentional infliction of emotional distress was allowed to go to the jury. A nonsuit at the close of the plaintiff's case in the first trial eliminated the claims for punitive damages.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): There were two separate trials in this case. The first trial ended in a hung jury. In the second trial, the judge, on his own motion, bifurcated liability and damages. The judge's liability theory, which was never the plaintiff's theory, was limited to a breach of contract claim: was there a promise to let the plaintiff view the tape before it was aired, and, if so, was it breached? The answer to this query determined liability for intentional infliction of emotional distress, the only claim left in the case after summary adjudication. So, over defense counsel's objection, the parties basically tried a contract claim with the threat of emotional distress and non-contractual damages. The plaintiff prevailed on liability. Defense counsel believed that without the judge's help, the plaintiff's presentation of its case would have been almost unintelligible. It was a bizarre case but the judge did as judges should - narrowed the case down to the issues he thought ought to be tried.

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Defense counsel worked with a jury consultant on psychological profiles, case theory and opening argument.

9. Pretrial Evaluation: No significant settlement negotiations occurred before or during the first trial. Plaintiff requested \$1 million to settle and settlement was never close. Defense counsel's assessment of the case placed potential exposure at nowhere close to the amount demanded.

After losing liability in the second trial, defense counsel assessed the likely exposure at approximately \$250,000. The plaintiff was demanding \$500,000. The parties entered into a settlement agreement after the liability phase, pursuant to which Inside Edition agreed to pay no less than \$60,000, and the plaintiff agreed to accept no more than \$350,000, regardless of what the jury awarded in damages.

10. Defense Juror Preference During Selection: Ideally, a male ages 35-60, working in traditional industries. Defense counsel was concerned that professionals might have sympathy for the plaintiff.

Defense counsel was looking for jurors willing to take responsibility for their actions as opposed to "I do what my boss tells me to do" kind of people. The defense theme was that Inside Edition did not create this news or participate in the operation; all it did was take pictures of what happened.

The defense counsel wanted to seat people unlikely to identify with the plaintiff, and hoped to generate the reaction from jurors: "This guy has chosen life as a transsexual and

these are the risks. How can somebody willing to do this to themselves complain about being on television, particularly when their identity is not revealed in the news story."

11. Actual Jury Makeup: Although defense counsel wanted as many males as possible, the jury pool was heavily weighted to females. The actual jury was primarily female and primarily Hispanic and African American. Several jurors were employed in the health care industry, which probably worked against the defense because the pictures aired from the operation were very frightening -- bordering on malpractice -- and made the plaintiff a very sympathetic figure.

12. Issues Tried: Intentional infliction of emotional distress by outrageous conduct (willful breach of promise to grant preview rights).

13. Plaintiff's Theme(s): The plaintiff's position was that he was promised the right to preview the broadcast before it aired, and breach of that promise was outrageous conduct which caused him to suffer severe emotional distress. His distress was severe in that he became noncommunicative, angry, and rejected all media. The plaintiff claimed that even if he consented to the taping of the operation, he did not consent to airing his image without his prior review and subsequent consent. The plaintiff tried to depict Inside Edition as a tabloid TV, willing to exploit him under dangerous circumstances, never advising him of what happened, simply to get good copy. Plaintiff had no knowledge of Dr. Brown's background and participated in the prosecution of Dr. Brown that followed the airing of the TV special.

14. Defendant's Theme(s): The defendant's position was that they obtained oral consent to film the operation and honored the plaintiff's desire to remain anonymous. Moreover, Inside Edition did not agree to provide preview rights as to everyone they interviewed, and did not breach any promise or duty towards the plaintiff. Any emotional distress that the plaintiff suffered was caused by his transsexual lifestyle and being deceived by "Dr." Brown. The TV special provided a public service in that it gave the public a dramatic warning about "Dr." Brown's activity which the authorities were unable to prevent.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: Defense counsel underestimated attitudes toward media and sympathy for plaintiff. Inside Edition suffered from the tabloid TV perception. Plaintiff's counsel repeatedly suggested that the type of reporting used in this case was not journalism, but tabloid sensationalism. 60 Minutes had also done a

report on this same doctor, but that evidence was excluded as irrelevant. The idea of exploitative journalism clearly was an undercurrent in the case.

Another possible difficulty was that the Inside Edition reporter who did the story was from the east coast, whereas the plaintiff was from California, like the jurors. Defense counsel believed that testimonial style and local bias may have had an adverse impact.

b. Sympathy for plaintiff during trial: Plaintiff was a very pathetic and sympathetic party. On the whole, the jurors were extremely sympathetic toward the plaintiff. Some of them were dubious. Some were probably experiencing transference - in the sense that they reacted based on how they would feel if one of their own children did this or had this problem.

c. Proof of actual injury: All damages awarded were based on emotional distress. There was no proof of actual medical expenses incurred because of alleged harm suffered by plaintiff. In fact, the jury was specifically instructed that the plaintiff did not consult any psychiatrist or other medical professional for treatment of emotional distress after the broadcast.

d. Defendant's newsgathering/reporting: See ¶ 15.f.

e. Experts: None

f. Other evidence: It was impossible to prevent the jury from learning that the doctor went to jail. The jury knew he was not a legitimate doctor. Part of the plaintiff's argument, which the judge allowed, was that the defense knew this was a bad guy, yet coldly stood by and let him take the knife to this poor victim just to get good copy, and, therefore, somehow, is responsible.

The pictures aired from the operation were so riveting and frightening that the jury simply could not understand why the reporter did not just pick up the phone and tell Lugo what happened during the operation while he was under anesthesia nor disclose that the doctor had lost his license. The real impact of these omissions was in what occurred later. The hairline operation the plaintiff was having had three steps. The first step was done successfully before the Inside Edition report. The second step was what was video taped. Then the plaintiff went back for a third step that turned out to be a disaster. Defense counsel tried to keep the third operation out of evidence, but was unsuccessful. The jurors knew that the doctor was not going to be able to pay Lugo's damages and probably also

realized that Inside Edition had insurance coverage to protect itself against these types of claims.

g. Trial dynamics:

i. Plaintiff's counsel: The plaintiff had different counsel for the first and second trials. The attorney in the first trial was young, fairly intense, and pushed hard the theme of exploitative journalism. The second attorney was older, more low key, and focused on the humanistic side of the story, simply suggesting that we, as human beings, need to help people in these unfortunate circumstances. He simply invited the jury to ask themselves how anyone could do this to this poor person, when it would have been so easy to review the frightening videotape with the plaintiff and get his permission before airing it. Although plaintiff's counsel had not litigated many First Amendment cases, he was good at putting a human side to the trial. Moreover, his trial demeanor counterbalanced the plaintiff's outrageous appearance and made the plaintiff appear more sympathetic. The plaintiff was about 6'1", fairly heavy set, had breast implants and "big hair", and appeared during much of the trial wearing pink spandex.

ii. Defendant's trial demeanor: Good, but not much significance in view of the style of journalism on trial.

iii. Length of trial: See above.

iv. Judge: Not a factor before the jury.

h. Other factors:

i. Lessons:

i. As far as getting consent, you really need to document it on the tape. While it is certainly understandable that media defendants like Inside Edition, who view their work as news, are concerned that securing advance consent begins to make them look like an entertainment rather than a news gathering organization, clients should be counseled about the risks of not getting consent.

Inside Edition's counsel, in this case, indicated he would encourage and counsel news gathering agencies to remember and try to behave with the awareness that anybody who is a subject of the news gathering in a lawsuit is not going to be viewed by a jury as some sort

of abstract piece of news but as a real person. If news organizations can put themselves beforehand into how somebody else might view this happening to a relative, cousin, or friend, they might do some things that do not compromise the news gathering or the constitutional protections, but would show a slightly more human side.

11. Defense counsel thought the settlement agreement which capped damages after a finding of liability worked very effectively. If the defense can evaluate the inside/outside risks, it really avoids any runaway juries. In this case, damages were capped by agreement at \$350,000 regardless of what the jury awarded. In light of the reputation of California juries, defense counsel was understandably concerned that once the jury found liability, if the judge was going to instruct them as expected on damages, the sky was the limit.

With this type of agreement, defense can get a plaintiff to agree to limit the ultimate exposure the defendant can live with the upper limit. The incentive for the plaintiff to make such agreements is they get their day in court. They do not wake up three years later saying 'if only I had gone to court.' In this case, the jury had come back with a huge reward, which the settlement would only give them part of, the plaintiff could still leave with the feeling that he was right. To make such an agreement work, the defense needs to guarantee a minimum award and probably also needs to give up the right to appeal as it did here. In cases where people are really purely economically driven, the upside cap might be so high, an agreement will be difficult, if not possible, to negotiate. There are some plaintiffs who simply refuse to negotiate because they are in it for the "brass ring."

16. Results of Jury Interviews, if any: Several of the jury members were pro-defense but agreed to vote for liability in the bifurcated trial and fix it later on damages. Interviews revealed that several jurors were pushing for very high damages but they basically negotiated down to a number they thought Inside Edition would pay and not appeal. The jurors also admitted that the amount of damages was arrived at randomly.

An interview of the first jury revealed that the defense was far ahead and that the jury was 8-3 with one holdout who initially favored the plaintiff but was ultimately leaning to the defense when the judge called off deliberations. The judge also dismissed one of the primary jurors just prior to deliberations because he called in with car trouble one morning and was going

to be an hour late. It turned out this juror was clearly on the side of the defense.

17. Assessment of Jury: See ¶ 16.

18. Post-Trial Disposition: None. Defendant waived right to challenge jury verdict by prior agreement capping the potential award.

Plaintiff's Attorneys: Barnard F. Klein, Esq.
Ellen Larkin, Esq.
31852 Apuesto Way
Coto de Caza, CA 92679
(714) 858-4331

Defendant's Attorneys: Vincent H. Chieffo, Esq.
P. Kevin Morris, Esq.
Gipson, Hoffman & Pancione
1901 Avenue of the Stars, #1100
Los Angeles, CA 90067-6002
(310) 556-4660
(310) 556-8945 - FAX

G. Jeffrey Masson v. Janet Malcolm; U.S.D.C., N.D. CA (Eugene F. Lynch, J.); 11/2/94

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 and published by 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 type from handwritten notes (not available at the time of trial) 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.

This was the second trial of the case against Malcolm. The first trial resulted in a defense verdict for The New Yorker and a hung jury on damages as to the claims against Malcolm.

3. Verdict: In a special verdict form, the jury found that three of the five quotations were not falsely attributed to Masson, those being "intellectual gigolo," "sex, women, fun," and "greatest analyst who ever lived," all of which could be found on defendant Malcolm's typewritten notes. The jury found that the other two quotations were false, but that the quotation "I don't know why I put it in" was not defamatory. The jury then found that the quotation regarding "the wrong man" was not published by Malcolm with constitutional malice. The jury did not reach the issue of whether Malcolm published with awareness that any quotes were defamatory, because that special interrogatory was placed in order after the constitutional malice interrogatory and the case was over before it reached the awareness question. Thus, the potential appellate issue of whether awareness of defamatory meaning became moot.

4. Length of Trial: 4 weeks
Length of Deliberations: 3½ days

5. Size of Jury: 8

6. Significant Pre-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" that "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 defendant's 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; other 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.

In addition, a significant pre-trial ruling was that an entirely new trial would take place as to defendant Malcolm, in spite of the fact that the earlier jury had reached a verdict finding falsity, defamatory meaning, awareness, and constitutional malice as to two of the quotes and had hung on damages with at least two of the jurors holding out to give Masson no damages whatsoever.

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 defendant could argue or put on evidence outside that limited parameter (but see ¶ 15.g.iv. below). The charge was formulated before the trial began and counsel were permitted to refer to it in both opening and summation.

The jury was instructed by way of the special interrogatory to consider, as to each of the five quotations, the elements of defamatory meaning, falsity, knowledge or recklessness as to falsity, and knowledge of defamatory meaning, in that order, reversing the order of the last two elements from the order that was presented to the jury in the 1993 trial. After plaintiff's lawyer, in opening, urged that Malcolm was under a "duty" make certain inquiries regarding inconsistent information, the court decided to charge the jury that there was no duty as such.

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 being appealed, this information is not available.

10. Defense Juror Preference During Selection: Educated individuals; people not involved with psychoanalysis; women who appeared to be less likely to sympathize with Masson.

11. Actual Jury Makeup: 1 male, 7 females.

1) BF, 43, 2 children, office assistant, East Palo Alto;

2) HM, 44, 2 children, systems analyst, Pleasanton;

3) WF, 41, counsellor/social worker, San Francisco;

4) WF, 55, 4 children, computer programmer/analyst, San Francisco;

5) HF, 59, 4 children, accounting assistant, Foster City;

6) WF, 37, 3 children, postal clerk, Santa Rosa;

7) Foreperson: WF, 46, 2 children, French literature major, housewife, San Francisco;

8) WF, 25, research assistant, San Francisco.

12. Issues Tried: Whether quotes were false and defamatory, whether Malcolm published with knowledge or recklessness as to their falsity, whether plaintiff was injured., and whether Malcolm knew the quotes were defamatory.

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.

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.

In the second trial, there was considerably more emphasis than during the 1993 trial on the fact that Masson's reputation and prospects were very, very low when Malcolm first encountered him.

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: In contrast to the 1993 jury, Masson did not generate significant sympathy with this jury. The jury foreperson, an intelligent and extremely well-educated person with a background in literature and language, was the person most sympathetic to Masson. Generally, however, very little sympathy for Masson and his extraordinary way of life was generated.

c. Proof of actual injury: Plaintiff limited testimony to that of plaintiff and persons who had met him only after the publication took place. No one except his former girlfriend testified to his reputation before the article. The evidence concerned emotional distress and general damage to reputation. Defendant raised a significant question about whether any of the five quotations in issue had any impact on the plaintiff's reputation compared to the balance of the article and many other articles and events in Masson's life at the time which caused his lowered reputation and dim prospects.

d. Defendant's newsgathering/reporting: 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."

e. Experts:

Plaintiff's: Masson called William Burrows of NYU to testify concerning acceptable journalistic practices with respect to compression.

Defendant's: Malcolm called Dean Mills, Dean of the Missouri School of Journalism, to testify as to acceptable editing techniques and to the editing of the "wrong man" quote.

f. Other evidence: N/A.

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: Much has been made in the press of training of the defendant to testify at this trial, including changes in dress, language, and demeanor. In fact, the changes were wrought more by the effort of defendant herself with the help of an experienced drama coach who, on a regular basis, was able to provide feedback as to how defendant was presenting herself. The constant and repetitive nature of the feedback, designed and engineered in close coordination with Malcolm's counsel on the West Coast, had the effect of raising defendant's consciousness about the audience that she was reaching and the manner of her expression.

iii. Length of trial: Not a factor.

iv. 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 was allowed to introduce more portions of Malcolm's tape-recorded interviews with Masson than in the first trial, which

depicted his sometimes obnoxiously bombastic character, dirty talk, male cynicism towards sex, and willingness to discuss his prolific sex life, all of which tended to demonstrate that Malcolm's depiction of Masson in the two-part series was correct. Furthermore, Masson was led on cross-examination to admit that he did not intend to be chaste once he moved into the Freud house, that he intended to have parties, and that he intended to open up the gender-restrictive attitudes of the gatekeepers of the Freud materials to allow more women. Thus, the quote about "sex, women, fun" was shown to be substantially accurate. Furthermore, considerable effort was made to provide evidence of the fact that Masson was broke, without prospects, and without any real hopes when Malcolm first encountered him.

h. Other factors: The second trial was more personal.

i. Lessons: At the beginning of closing argument, Gary Bostwick spent approximately 20 to 25 minutes explaining, in common-sense terms, what the core instructions on constitutional malice meant. With almost no reference to facts in the first one-third of the closing argument, the presentation focused on "subjective awareness of a high degree of probable falsity."

16. Results of Jury Interviews, if any: Counsel were permitted to interview the jurors. One juror indicated that she decided that Masson was not going to get a penny once she saw a drawing used in final argument showing Masson with his pockets turned inside-out, depicting his poverty-stricken state at the time. The jurors all agreed that Masson had "shot himself in the foot" with the statements he admitted he made in parts of the articles not in issue. However, they were troubled by the fact that three of the quotes that were on the typewritten notes had come from handwritten notes that were no longer available. The jurors expressed their belief that the case would have been much easier if the handwritten notes had been there. There was very little juror sentiment against the technique of combining quotations from different times and places into one single monologue. As in the first case, the jury had more trouble with the one quotation that was in front of them that existed on tape. Its editing troubled them significantly. They believed that the meaning of the edited quotation did not conform to the defendant's innocent interpretation and had in fact been false and defamatory. However, they were convinced that defendant's explanation was a sincere explanation, i.e., that she had no reckless disregard for the truth when she did it.

17. Assessment of Jury: Appeared to be better educated and, more importantly, enjoyed being with one another and trying the case more than the first jury.

18. Post-Trial Disposition: Defendant dismissed and awarded close to \$80,000 in costs; Masson has appealed to the Ninth Circuit.

The most interesting postscript: On August 11, 1995, the missing notes were found by Malcolm's two-year-old granddaughter rummaging through a bookcase.

Plaintiff's Attorneys: Charles O. Morgan, Esq.
450 Sansome St., #1310
San Francisco, CA 94111

Defendant's Attorneys: Gary L. Bostwick, Esq. (Malcolm)
100 Wilshire Blvd., #1000
Santa Monica, CA 90401
(310) 395-5372
(310) 395-2132 - FAX

H. N.C. Garden City, Inc., d/b/a Garden City A-1 Transmissions v. The Detroit News; Wayne County Cir. Ct. (John A. Murphy, J.); Case No. 92-224679-CZ; 2/24/94

1. Date of Publication: October, 1991

2. Case Summary: In 1986, the Attorney General of Michigan had pursued an elaborate "sting" of independently owned transmission shops to uncover numerous consumer frauds. This sting which was known as "Operation Shifty" attracted considerable attention at the time. In 1991, The Detroit News learned that General Motors -- a direct competitor of these independent transmission shops -- had secretly assisted the Attorney General.

In October, 1991, The Detroit News published a two-part series discussing the secret relationship between the Attorney General and General Motors in the 1986 sting. As part of the series, The News reported in a sidebar on the experiences of one John Folino, who owned a number of American Transmission Shops (including one in Garden City, Michigan). Folino and several of his American Transmission Shops had been charged by the Attorney General after the 1986 sting operation, and Folino had responded with public protestations of his innocence combined with charges of malfeasance and a lawsuit against the Attorney General.

The sidebar was illustrated with a posed photograph of Mr. Folino and the caption of the photograph identified him as being "in his Garden City A-1 Transmission Shop." This was incorrect.

The caption should have stated that Folino was in his Garden City American Transmission Shop. The Garden City A-1 shop was not owned by Folino, and none of the A-1 franchises including Garden City had been implicated in the 1986 sting.

On the day of this publication, the owner of the Garden City A-1 Transmission shop placed an outraged telephone call to the reader representative of The Detroit News who immediately dictated a correction. Unfortunately, by the time the correction had gone through the copy desk and the composing room, it repeated and emphasized the error by reporting that there had been an error in the coverage and in fact "it was the Garden City A-1 Transmission Shop that was targeted by the Attorney General in his 1986 sting operation." This incorrect correction prompted more outraged calls to the newspaper from the A-1 owner. A correct correction was run in all editions the subsequent day and two weeks from the day of the original mistake in all editions of The Detroit News. Several days before the statute of limitations expired, the Garden City A-1 Transmission Shop filed this libel action alleging business loss.

3. Verdict:

Compensatory: \$4,000. The Michigan Revised Libel Statute provides that a libel plaintiff who recovers economic damages may also recover "reasonable attorney fees." Following post-trial arguments on this issue, the trial court awarded \$15,000 in attorney fees to the plaintiff.
Punitive: There are no punitive damages in Michigan.

4. Length of Trial: 6 days
Length of Deliberations: ½ day

5. Size of Jury: 8

6. Significant Pre-Trial Rulings: The plaintiff owned a number of A-1 Transmission Shops and related entities throughout the metropolitan Detroit area under various corporate names. These other businesses had been in financial distress and there were a large number of judgments against them. Plaintiff brought a motion in limine to exclude these judgments. The court refused to exclude most of those related judgments which gave defense the opportunity to suggest that the plaintiff was not a good businessman and that the A-1 name in metropolitan Detroit had a questionable business reputation.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): There were no mid-trial jury instructions and the judge did not formulate instructions before trial. A special verdict form

(somewhat revised) as dictated by the Michigan Standard Jury Instructions was used.

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires):
None

9. Pretrial Evaluation: This case was tried under a negligence standard in Michigan. The defense assumed that there would probably be a finding of negligence. The defense also believed that plaintiff's damage claim of approximately \$300,000 was too high.

10. Defense Juror Preference During Selection: Preferable jurors -- intelligent, well-educated people (to understand the net profits analysis by defendant's accounting expert); anyone who had their car repaired at a transmission shop on the theory/hope that they probably did not like the experience. Neither race nor gender was considered significant in selecting the jury.

11. Actual Jury Makeup: 4 white females, 1 black female, 2 white males, 1 black male.

12. Issues Tried: Negligence and, secondarily, the existence and extent of plaintiff's damages.

13. Plaintiff's Theme(s): Plaintiff attempted to convince the jury that he had always been an ethical businessman, that he was not implicated in any way in the 1986 Attorney General sting, that the mistake in the caption coupled with the newspaper's inability to get a proper correction on the first try highlighted its negligence, and that his business had been significantly damaged by this reporting.

14. Defendant's Theme(s): Defendant primarily emphasized the extreme good faith of The Detroit News in "doing the right thing" by publishing a correction with a photograph. Counsel and witnesses described in detail for the jury the complexities of putting out a daily newspaper to demonstrate that mistakes of this type are inevitable. They emphasized other business factors, besides The Detroit News report, that affected plaintiff's business.

15. Factors Believed Responsible for Verdict: (Defense considered this verdict to be so low as to be a victory for the newspaper.)

a. Pre-existing attitudes of the venire towards the plaintiff, defendant, or issues: As is probably true of many courts in large metropolitan areas, jurors in the Wayne County Circuit Court tend to have more than the usual bias

against large organizations and the media. That did not appear to be a particular factor with this jury. During voir dire, there were a few statements by prospective jurors as to generally negative views of transmission shops. One prospective juror, while being questioned about having taken his car to a transmission shop, said that he could not remember the name "because they all sound alike." This response fit nicely in the defense theme that anyone could make the same mistake (A-1 vs. American) that the photographer had made.

b. Sympathy for plaintiff during trial: The plaintiff never appeared to succeed in generating any sympathy for himself or his business during the trial.

c. Proof of actual injury: Plaintiff's business records showed a definite and rather prolonged drop off in business following the article. He also had anecdotal proofs of business loss by his store manager that were credible. The A-1 Transmission Shops in metropolitan Detroit, including this one, had become franchisees of Cottman Transmission Systems which is a large national transmission repair franchisor. The Cottman records, including Cottman evaluations and visits to this particular location proved to be very helpful to our argument that there were numerous factors affecting the performance of this business and that The Detroit News article was the least of them.

d. Defendant's newsgathering/reporting: The defense witnesses presented themselves well.

e. Experts:

Plaintiff: Plaintiff retained no experts and attempted to rely on his own staff for the damage and net profit analysis.

Defendant: Defendant's experts were James Wieghart, currently Professor of Journalism at Central Michigan University and past Editor of the New York Daily News. Professor Wieghart testified that mistakes of this sort simply cannot be viewed as a departure from the proper standard of care. He illustrated his testimony with examples from the New York Times of similar mistakes. Richard McEndarffer from Plants & Moran was retained by the defense to testify to business valuation and lost profits. The Cottman records of visits and inspections of this location as well as plaintiff's own tax returns proved to be some of the defendant's more compelling evidence.

f. Other evidence: The defense also had one of the senior editors at The Detroit News testify as to the entire process of producing a daily newspaper. They used a photograph that had been published in a recent edition and started from the photo assignment sheet to a photographer through the composition, editing, and production processes of that photograph and cutline. Defendant tried to use this evidence to show the jury the complexities involved in the production of a daily newspaper and to blunt plaintiff's theme that this caption mistake was inexcusable and actually negligent. This testimony dovetailed well with that of Professor Wieghart.

g. Trial dynamics:

i. Plaintiff's counsel: A competent and workmanlike attorney with an extensive background of representing the A-1 Transmission franchises in metropolitan Detroit.

ii. Defendant's counsel: An experienced defense counsel team.

iii. Length of trial: Not a factor.

iv. Judge: A deserved reputation for fairness. In control of courtroom.

h. Other factors: N/A.

i. Lessons: In a business loss case, the emphasis by the defense on other factors affecting the plaintiff's business is time very well spent. In the end, the defense was able to convince the jury that this was a business with a variety of problems having no relationship to The Detroit News.

16. Results of Jury Interviews, if any: The juror interviews were a short discussion in the hallway after the verdict was returned. If this jury was any indication (and probably no jury is any indication of what another one will do), it would seem that in a situation like this, it is difficult to convince a jury that there was no negligence as defined in the instructions. Once the jurors learned that a mistake had been made, they were looking for a number that they thought adequately compensated the plaintiff. The defense success came from its critical analysis of plaintiff's operations.

17. Assessment of Jury: In light of the result, one would have to conclude that this was a good jury from the defense standpoint.

18. Post-Trial Disposition: The revised Michigan libel statute provides that a private figure plaintiff need prove only negligence but is limited to recovery of economic damages plus a reasonable attorney fee. Plaintiff filed a motion for his fees in the amount of \$25,000. Defense argued that in light of plaintiff's demand during final argument for upwards of \$300,000 that the \$4,000 jury verdict reflected that plaintiff had effectively lost the case and should not receive any attorney fees. The trial court reduced the attorney fee award to plaintiff to \$15,000. Defendant subsequently negotiated to reduce that amount even further and paid this reduced amount.

Plaintiff's Attorneys: Dennis J. Harris, Esq.
25121 Ford Rd.
Dearborn Heights, MI 48127

Defendant's Attorneys: James E. Stewart, Esq.
J. Michael Huget, Esq.
Butzel Long, P.C.
150 W. Jefferson, #900
Detroit, MI 48226
(313) 225-7000
(313) 225-7080 - FAX

Barbara Wartell Wall, Esq.
Vice President/Senior Legal Counsel
Gannett Co., Inc.
1100 Wilson Blvd., 24th floor
Arlington, VA 22234

I. Sentinel Insurance Agency and Ronald E. Higgerson v. Kelly Broadcasting Co. (KCRA-TV, Sacramento); Superior Court, County of Sacramento, State of California (James T. Ford, J.); No. 519011; 8/3/93

1. Date of Publication: June 5, 1990

2. Case Summary: Plaintiffs Sentinel Insurance Agency and Ronald E. Higgerson, the 49-year-old president and sole shareholder of the agency, sued over the defendant station's report prepared by consumer affairs reporter Mike Luery. In the segment, included in the regular evening newscast, the defendant reported that more than a dozen of the plaintiffs' customers had requested assistance from "Call 3", a volunteer consumer assistance service operated by the station. The broadcast included a statement that a "consumer warning" had been issued regarding the plaintiff agency, which had been accused of a scheme of taking money for insurance policies that it did not deliver. The story included brief statements by three of the plaintiffs' customers who had requested help from Call 3. The former customers described problems of being placed with

unacceptable insurance companies, paying for policies which they did not receive, and difficulty in obtaining refunds. Plaintiffs alleged falsity on the basis that policies were eventually issued and/or refunds eventually provided all of the complaining consumers featured on the broadcast, and that the story falsely implied that a "consumer warning" had been issued by a governmental agency. Plaintiffs also contended that the broadcast falsely implied that the plaintiffs' business practices were unfair, deceptive, or fraudulent.

3. Verdict: For the defendant (10-2)

4. Length of Trial: 3½ weeks
Length of Deliberations: 5 hours

5. Size of Jury: 12

6. Significant Pre-Trial Rulings: The key ruling was the judge's refusal to permit liability on the basis of falsity of any discrete statements in the broadcast, but instead instructing the jury that if the substance, gist, or sting of the statements contained in the broadcast were true, the defendant could not recover and:

The substance, gist, or sting of the statement are those important material aspects of the statement which, if false, would have a different effect upon the viewer's mind than produced by the truth.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): There was no unusual trial management. A special verdict form was used.

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): Questionnaires were useful in getting honest responses to questions designed to elicit negative experience with insurance agents, appreciation for "Call 3", and experiences giving rise to anti-media bias.

9. Pretrial Evaluation: Plaintiffs' pre-trial demand was \$1.0 million. Defendant offered nothing.

10. Defense Juror Preference During Selection: Negative insurance experience, no negative media experience; favorable attitude towards consumer advocates; TV-watchers. Tried to avoid self-employed persons who have to deal with regulators.

11. Actual Jury Makeup: The jury consisted of 7 men, 5 women, all white except for the foreman. The foreman was a college-educated black male, who was a mid-level executive with the California Department of Emergency Preparedness. The balance

of the jury included a WM with an M.A. in literature who was a university professor, WM retired military, WM retired school janitor, WM carpenter in mid-30s, 3-4 from blue collar backgrounds. The foreman, whose career background was not one that normally would be considered favorable, was strongly on the side of the defense. The two jurors who held out were both women, whose husbands were self-employed in small businesses.

12. Issues Tried: Negligence, truth, damages, punitive damages.

13. Plaintiffs' Theme(s): Defendant reporter was negligent in failing to learn and report that insurance policies were eventually issued in the case of two clients, that refunds were eventually provided the other; that the transactions in all three cases were appropriately concluded; and the defendant's business practices were not unfair, deceptive, or fraudulent. The defendant also deliberately falsified and sensationalized by implying that the "consumer warning" had been issued by a government agency rather than Call 3.

14. Defendant's Theme(s): The defendant was in the enviable but delicate position of having more evidence to support the general "sting" of pervasive unfair, deceptive, and fraudulent conduct than it did to support the factual detail contained in the broadcast. Defendant urged that it did everything reasonable in investigating such a piece; that Higginson was given every reasonable opportunity to refute or deny the charges, but declined to be interviewed on advice of his attorney; that Luery interviewed the three complainers who appeared in the broadcast and reviewed the documents they provided; that the story was reviewed and approved by the station's news director and general counsel; and that the complaints of the consumers in question were reflective of a course of conduct involving: improper procurement fees charged to high-risk insureds; pocketing of unauthorized deductions from policy refunds due insureds; taking and keeping money for policies not delivered; selling policies issued by non-admitted companies without disclosure of the risks. All of the foregoing was demonstrated by a four-year investigation conducted by the California Department of Insurance. Although Luery did not have the resources for such an investigation, the results of the one he did conduct were essentially on the money. Even if the defendant did not get it exactly right and should have done a better job of investigating, what he would have found was much worse than what was reported.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiffs, defendant, or issues: The Call 3 consumer assistance program, which was staffed by volunteers from the

community and performed consumer services much broader than those actually utilized in the defendant's broadcasting operation, was well regarded in the community. One or two of the venire expressed a strong anti-media bias, but this was not considered unusual.

b. Sympathy for plaintiffs during trial: The plaintiff was a very successful businessman and not one who would come across as a "little guy." A napoleonic type, he was usually unpleasantly aggressive, and occasionally surly. He overreached on emotional distress (as to which he claimed the broadcast caused him to be dysfunctional with his family), particularly when he claimed that there were no other stressors at the time; the defense offered evidence that his children had made allegations that Higginson physically and psychologically abused them. All but one of the jurors found that this evidence swayed them toward the defense; one juror who had been falsely accused of wrongdoing by a child was moved toward the plaintiffs. Plaintiff's demeanor was a significant factor in the case. This, as well as the evidence of his unscrupulous business practices, caused most jurors to dislike him.

c. Proof of actual injury: Sentinel claimed net profit loss of approximately \$1.3 million, and loss from personnel turnover of approximately \$1.6 million. Higginson claimed emotional distress, including nausea, depression, and sleep disturbance. (The defense financial experts offered persuasive evidence that there was no pattern of loss in the defendant's nineteen offices.)

d. Defendant's newsgathering/reporting: Defendant's investigation was arguably sloppy, and the report contained several factual errors.

e. Experts:

Plaintiffs': M. Kevin McRae, C.P.A., Sacramento, CA; Edwin Bayley (journalism), Dean, U. of Ca., Berkeley School of Journalism, Carmel, CA. (Defendant blocked the testimony of linguist (Prof. of Linguistics, Berkeley) George Lakoff.

Professor Bayley testified effectively that responsible journalism required much more of an investigation that was conducted by defendant's reporter. On cross, he agreed that if the reporter were able to learn and report what the Department of Insurance's two-year investigation revealed, the report would have been much more damaging.

Defendant's: Ronald G. Pomares, C.P.A. (testified that his analysis of plaintiffs' financial records revealed no loss of income as a result of the broadcast), Sacramento, CA; Bertram Harnett (retired judge, insurance practices), Boca Raton, FL.

f. Other evidence: Defendant called Gary Matsumoto, eleven-year veteran investigator for the Department of Insurance, to testify to his two years' work investigating the plaintiffs, and conclusions of calculated and pervasive fraudulent conduct that enabled Higginson and Sentinel to cheat customers out of millions of dollars. This was the most crucial evidence in the case.

g. Trial dynamics:

i. Plaintiffs' counsel: Aggressive, snarly, sometimes rude, often arrived late, received admonitions from the judge in front of the jury.

ii. Defendant's trial demeanor: Defense counsel attempted to present as professionally aggressive. The TV witnesses were okay, community volunteers for Call 3 were excellent.

iii. Length of trial: Not a factor.

iv. Judge: Able and fair, but no libel trial experience. The jury grew very fond of him.

h. Other factors: Defense counsel hammered (avoiding as much as possible the difficult job of defending the reporter's work) the "gist" or "sting" theme throughout the trial. In closing, he presented two boxes. In the first, he presented the statements shown not to be literally true. Citing the portion of the charge quoted above, counsel presented in the second box the "gist" or "sting" of these statements, being generous to plaintiffs. He then reviewed the true and full information about the plaintiffs, which fully supported the "gist" of the statements and would have been much more harmful if fully reported.

i. Lessons: Be prepared to prove the true gist of your publication.

16. Results of Jury Interviews, if any: Most of the jurors said they were offended by the plaintiffs' business practices and that was the overriding factor in the verdict. The reporter could have done a better job, but his report was just the tip of the iceberg, and the whole truth was much worse. The two who voted for plaintiffs would not talk.

17. Assessment of Jury: Counsel feels this was an intelligent and common-sense jury. Ten out of twelve of these jurors were obviously good for the defense. However, it is somewhat disturbing, given the strength of the defense evidence of pervasive wrongdoing by the plaintiffs, that two jurors held out for them.

18. Post-Trial Disposition: Plaintiffs moved for new trial on several grounds, including juror misconduct based upon pre-deliberation discussions among jurors. The trial court denied that motion, and the case eventually settled for dismissal by payment by plaintiffs to defendant of \$15,000, representing one-half of the allowable costs at the trial court level.

Plaintiffs' Attorneys: David M. Ramirez, Esq.
4993 Golden Foothill Pkwy.
El Dorado Hills, CA 95762

Defendant's Attorneys: L. Thomas Wagner, Esq.
Hardy Erick Brown & Wilson
1000 G St.
Sacramento, CA 95814
(916) 449-3800
(916) 449-3888 - FAX

J. Smiley's Too, Inc., d/b/a Smiley's Coin Laundry and Dry Cleaners, and Colfax Avenue Irrevocable Trust, d/b/a Smiley's Laundromat and Cleaners v. Denver Post Corporation, et al.; Denver Co. Dist. Ct. (John Coughlin, J.); Case No. 93CV2866; 10/24/94

1. Date of Publication: June 1, 1992

2. Case Summary: As a sidebar to a business section feature on trends in the dry cleaning industry, the defendant newspaper ran an article concerning consumer complaints about the plaintiff dry cleaners' failure to settle claims for lost clothing. The article quoted a Denver District Attorney's Office consumer fraud specialist assigned to the plaintiffs' file concerning the high volume of complaints against the dry cleaner, and its lack of responsiveness to both consumers' and the DA's office's attempts to resolve them. Specifically, the DA's representative was quoted as saying that the plaintiff "stonewalks" its customers and "blows off" the DA's office when it attempts to resolve them. The article also detailed a number of the complaints on file, and the dry cleaners' purported comments in response. The plaintiffs claimed that the reporter fabricated quotations by the District Attorney's Office representative, and also fabricated a statement attributed to a plaintiffs' representative by the name of "Bill Rogers" to the effect that the problems of lost clothing were the fault of the

customers. The article was published a very short time after the District Attorney had awarded the plaintiff dry cleaner a public service citation. When the DA's representative realized (after the article was published) how she had embarrassed her boss, she denied recall of a number of the statements attributed to her. Plaintiffs also claimed it had no employee by the name of "Bill Rogers," and that the reporter fabricated that interview. Plaintiffs sued for libel, commercial disparagement, and interference with business relations.

3. Verdict: For defendants. In special findings, the jury found that the plaintiffs had not proven, by clear and convincing evidence, falsity as defined in the instructions, and constitutional malice. The jury also found that the article was protected by the fair reports privilege.

4. Length of Trial: 8½ days
Length of Deliberations: 10 hours

5. Size of Jury: 6 (+ 2 alternates)

6. Significant Pre-Trial and Mid-Trial Rulings: Defense motions for summary judgment on the basis of the absence of falsity, constitutional malice, and the fair reports privilege were denied. However, the court ruled that the defendants' article involved matter of public or general concern so that the plaintiffs were required to establish constitutional malice as required by Diversified Management, Inc. v. The Denver Post, Inc., 653 P.2d 1103 (Colo. 1982).

The court ordered the defendant reporter to undergo a Rule 35 psychological examination for evaluation of memory and judgment impairment due to chronic alcohol abuse. The defendants sought a writ of prohibition from the Colorado Supreme Court barring this exam, but the petition was denied.

The court issued in limine rulings (1) barring evidence of alcohol related traffic offenses and incidents of alcohol abuse by the defendant reporter prior to six weeks before the article in question, and subsequent to two weeks after publication of the article; (2) barring evidence concerning articles and editorial policies not directly related to the article; (3) excluding evidence or argument as to balance or fairness. The court also denied plaintiffs' motion in limine seeking to exclude evidence of consumer complaints against the dry cleaner other than the few specifically discussed in the article.

At the close of the plaintiffs' case, the trial court granted the plaintiffs' motion for directed verdict as to several of the specific statements in the article that were in issue, and also dismissed the claim for punitive damages.

7. Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation): The trial court submitted all three claims to the jury. The jury was charged that in order to recover under any of the claims, the plaintiffs would have to prove both falsity and constitutional malice. The jury was also charged that the fair reports privilege, if found applicable, would bar all three claims. On the issue of falsity, the jury was instructed that the plaintiffs must find, as to one or more of these particular statements in issue, by clear and convincing evidence that:

The substance or gist of the statement was false at the time the article was published, and the falsity was such that the article as a whole would produce a materially more damaging effect upon the reader than the truth of the matter.

In the special verdict form, the jury was required to answer the following special interrogatory:

1. Was the substance or gist of one or more of the published statements, and the article as whole, by clear and convincing evidence, false? (Yes or No.)

8. Pre-Selection Jury Work (psychological profiles, attitudes surveys, mock trial, pre-selection questionnaires): None.

9. Pretrial Evaluation: Probable defense verdict, but the trial court's unwillingness to exclude evidence of the reporter's drinking, the several errors in the reporter's work, and the claims of a fabricated interview, made the case risky.

10. Defense Juror Preference During Selection: Business career types, wage earners; avoid government workers, counselling and psychological professionals, educators, persons with experience with alcohol abuse.

11. Actual Jury Makeup: (Ages are approximations):

- a. 35-year-old WF, 12th grade ed., title insurance agency employee (foreperson), married, two children;
- b. 30-year-old WM, B.A., computer programmer;
- c. 50-year-old WF, two years college, housewife, part-time employee of suburban county library district, B.A. (music), grown children;

d. 70-year-old WF, one year college, retired employee of State Department of Motor Vehicles, grown children, widow;

e. 45-year-old WM, high school, car wash employee, divorced, one child, admitted drinking problem;

f. 50-year-old WF, two years college, homemaker, grown children, husband works in health insurance.

12. Issues Tried: Falsity, constitutional malice, fair reports privilege, damages.

13. Plaintiffs' Theme(s): The defendants distorted the significance of the public record of complaints against the plaintiffs, and knowingly fabricated derogatory quotations by the District Attorney's Office consumer fraud specialist and the so-called "Bill Rogers." The defendant reporter, who was drinking the afternoon he wrote the story, was required by the newspaper to obtain comment from the plaintiffs, and, under pressure to complete the story in time to leave for a vacation, simply fabricated a quotation and attributed it to a non-existent person.

14. Defendants' Theme(s): The case is really about the dozens of the plaintiffs' customers whose clothes the plaintiffs lost, and whose claims for reimbursement the plaintiffs responded to with evasion and delay. The defendants, even though their article was not flawless, told the basic truth about the plaintiffs, which consumers who might deal with Smiley's have the need and right to know.

15. Factors Believed Responsible for Verdict:

a. Pre-existing attitudes of the venire towards the plaintiffs, defendants, or issues: Nothing out of the ordinary.

b. Sympathy for plaintiffs during trial: Several jurors said they admired the plaintiffs' C.E.O. for his contributions to the community and courage in maintaining a needed business in a bad part of town.

c. Proof of actual injury: Plaintiffs' economist testified to economic loss of approximately \$1 million.

d. Defendants' newsgathering/reporting: After several days of preparation with the aid of video, the defendant's reporter did reasonably well. Gil Spencer, now retired but editor of The Post at the time of the publication, has a 10th grade education, and worked his way through the ranks from copy boy. The jury loved him.

e. Experts:

Plaintiffs': Patricia Pacey, Ph.D. (economist), Boulder, CO, re loss of profits and loss of value of business; Chad Emrick, Ph.D. (psychologist), Denver, CO, concerning memory and judgment impairment of reporter due to chronic alcohol abuse.

Defendants': Meyer Saltzman, C.P.A., Denver, CO, re absence of business losses (consultation only, not endorsed as a witness); Kathryn Matthews, M.D., Denver, CO, re mental condition of reporter (did not testify).

Plaintiffs' alcohol abuse expert testified that based upon results of memory function testing, the reporter's memory function was impaired and below normal. Defendants' consulting psychiatrist discovered that the testing had been incorrectly scored, and that when correctly graded the reporter's performance fell within the normal range. She also provided accepted literature which declared that the psychologist's selection of limited tests was "indefensible." Without prior warning, the plaintiffs' psychologist was forced to admit this on cross-examination, which effectively nullified his testimony.

f. Other evidence: The defendants located and presented the testimony of a witness (a former employee of the plaintiffs), not anticipated by the plaintiffs, who testified that the name "Bill Rogers," which plaintiffs claimed was a name invented by the reporter when fabricating the quotation attributed to him, was a fictitious name used by one of the plaintiffs' representatives when dealing with complaining customers.

g. Trial dynamics:

i. Plaintiffs' counsel: Aggressive, bombastic.

ii. Defendants' trial demeanor: Defense counsel sought to maintain the appearance of the judge's blessing (by following the rules, asking permission for witness approaches, etc.), and to curry favor with the jury by providing ample visual aids (blow-ups, overhead projections). However, counsel was aggressive in presenting the case against plaintiffs and presented some degree of righteous indignation.

iii. Length of trial: Shorter would have been better, but the trial was not long enough for that to be a factor.

iv. Judge: Fair, even-handed, the jury grew very fond of him.

h. Other factors: The defense focused on substantial truth throughout the trial. In summation, the pertinent portions of the charge and special verdict were displayed on the overhead projector. The substantial truth theme was emphasized in two ways. The jury was asked to strike anything which it believed was shown to be not literally true from the article, and consider whether the overall effect would be any different. Second, the jury was asked to consider the trial evidence of plaintiffs' business practices, and consider whether the real truth was not much worse than what was printed.

i. Lessons: Avoid government employees as jurors (these were the two holdouts for plaintiffs), and do not underestimate the high standards to which some jurors hold the media.

16. Results of Jury Interviews, if any: Three of the six jurors gave in-depth interviews. From this, we learned that three of the jurors were strongly in favor of the defense, two favored the plaintiffs. The sixth (the one with the drinking problem) was essentially a placebo who favored the defense but did not participate in deliberations. The two who favored the plaintiffs (the two government employees on the jury) saw the plaintiffs' principal as something of a hero, maintaining his business in the heart of the inner city and taking on one of the city's daily newspapers. While they agreed that the plaintiffs had not proven the falsity of anything significant in the article, they argued that the defendants had not proven truth either, and it was not fair that the defendants should win if they could not do so. They also judged the defendants harshly for not conducting a more elaborate investigation that went beyond review of the District Attorney's file and a couple of interviews. These jurors were also prone to make an award based upon the relatively inconsequential falsities in the article.

The three-person majority persuaded the others by going through the article paragraph by paragraph, and showing that all damaging statements were substantially true. The key factor in persuading the two holdouts was a review of the written instructions given to the jury, which made it clear that the plaintiffs had the burden of proving falsity, and that this burden was not met unless the gist of the article as a whole was false. The majority felt that the defendant reporter was sloppy in preparing the article, but got most of it right, and for that

reason did not find reckless disregard for the truth. Largely because of the failure of the plaintiffs' psychologist's testimony, the jury considered alcohol use by the reporter as a non-factor, and did not discuss it significantly in their deliberations. Even the two holdouts for the plaintiffs sympathized with the reporter, and seemed to hold the defendant newspaper to high standards because of its power, wealth, and influence.

The jurors greatly appreciated defendants' use of an overhead projector for exhibits and portions of the charge during summation.

17. Assessment of Jury: Three good, two bad, one neutral.

18. Post-Trial Disposition: Motions for new trial denied, appeal pending.

Plaintiffs' Attorneys: Richard B. Podoll, Esq.
John J. Eberle, Esq.
Podoll & Podoll, P.C.
1700 Lincoln St., #3700
Denver, CO 80203-4537
(303) 861-4000
(303) 861-4004 - FAX

Defendants' Attorneys: Thomas B. Kelley, Esq.
Faegre & Benson, P.L.L.P.
370 17th St., #2500
Denver, CO 80202-4004
(303) 592-9000
(303) 820-0600 - FAX

K. SUMMARY REVIEWS

1. Ruth Gaba v. Los Angeles Hebrew Media, Inc., Orly Hadida, et al.; Superior Court, Van Nuys, CA (B. Phelps, J.); Case No. NWC 048 322; 3/30/93

a. Date of Publication:

b. Case Summary: The plaintiff, a garment worker in her 30s, claimed that she rejected attempts at friendship of a free-lance columnist, defendant Orly Hadida. Allegedly in retaliation, Hadida wrote a "gossip" column about the plaintiff that was published in the L.A. Hebrew Media, Inc. Plaintiff claimed defamation and invasion of privacy. Defendants urged that the article was not malicious and all the facts recited were true.

c. Experts:

Plaintiff's: John McSweeney, Los Angeles, CA.

Defendants': None

d. Verdict: \$175,000 (\$150,000 for emotional distress, \$6,000 medical costs, \$4,000 loss of earnings, \$15,000 punitive damages).

e. Length of Trial: 1 week
Length of Deliberations: 3 hours

f. Size of Jury: 12

g. Notes: According to Verdictum Juris Press, the plaintiff's demand was \$75,000; the defense offered \$7,500.

h. Factors: Unknown

Plaintiff's Attorneys: Steven T. Lowe, Esq.
12424 Wilshire Blvd., #900
Los Angeles, CA 90025
(310) 447-1727
(310) 447-6485 - FAX

Donald Barnett, Esq.
1801 Century Park East
Los Angeles, CA 90067
(310) 553-1226

Defendants' Attorneys: Greg Abrams, Esq.
Tarzana, CA
(818) 609-9268

Tamla C. Jensen, Esq.
10324 Balboa Blvd.
Granada Hills, CA 91344
(818) 363-6733

2. Lundell Mfg. Co., Inc. v. American Broadcasting Companies, Inc., et al., Case No. 92-4060, U.S.D.C., N.D. IA

a. Date of Broadcast: July 2, 1992

b. Case Summary: The case was about a brief news story aired at the conclusion of ABC's program, World News Tonight with Peter Jennings, on July 2, 1992, as part of a series called "Anger in America," which focused on citizen disillusionment with elected officials. The story dealt with a rural Georgia county's effort to solve its garbage crisis caused by lack of available landfill space. One of the county commissioners had apparently

touted a particular garbage recycling machine manufactured by the plaintiff as a solution to the county's problem, claiming that the machine could pay for itself and operate self-sufficiently through the sale of fuel pellets, compost, and other recycled products. The story did not mention the plaintiff by name or attribute the machine to the plaintiff, although the plaintiff's logo was depicted in three shots.

The story reported that the county obtained a bond issue to purchase the machine which, as it turned out, failed to generate enough revenue to cover operating costs and to retire the revenue bonds, as was intended. Despite raising the "tipping" fees, the machine never did operate economically and was ultimately closed down by the Georgia Environmental Protection Dept. The citizens of the county were understandably angry that they incurred an increase in property taxes to retire the bonds used to finance the recycling machine.

The plaintiff argued that the statement that the machine "does not work" implied that its machines were mechanically defective and inoperable. What the reporter meant, however, and what was described in the context of the entire story, was that the garbage recycling machine did not work as promised in a financially self-sufficient manner. Indeed, the story contained several references indicating that the machine was mechanically operable and not defective. By the time the case reached the jury, the sole issue was whether the statement that the machine "does not work" was actionable.

c. Experts: There were no experts on liability issues; each side retained economists.

d. Verdict: For the plaintiff.

Compensatory: \$1,058,000 (\$158,000 for past lost profits, \$900,000 for damage to reputation)
Punitive: Zero.

e. Length of Trial: 2 weeks

Length of Deliberations: Slightly longer than 1 day

f. Size of Jury: 8

g. Notes: As originally pleaded, there were three allegedly libelous statements at issue. The court awarded partial summary judgment as to one of the statements, which statement referred to the fact that county residents were now forced to pay to have their trash hauled to another county's landfill, but allowed the remaining two statements to go to trial. At trial, the court directed entry of judgment for ABC on one of the two remaining statements at issue in the case, which statement suggested that no buyers had been found for the fuel

pellets produced by the machine, leaving only the statement that the plaintiff's recycling machine "does not work" for consideration by the jury.

Post-trial motions by the defendant are pending.

Plaintiff's Attorneys: Paul D. Lundberg, Esq.
Shull, Cosgrove, Hellige, Du Bray &
Lundberg
P.O. Box 1828
Sioux City, IA 51102
(712) 255-4444
(712) 255-4465 - FAX

Defendants' Attorneys: Michael A. Giudicessi, Esq.
Kasey W. Kincaid, Esq.
Faegre & Benson, P.L.L.P.
400 Locust Street, #400
Des Moines, IA 50309
(515) 248-9000
(515) 248-9010 - FAX

3. Prozeralik v. Capital Cities/ABC, Inc.; Niagara County, NY;
Case No. 48424

a. Date of Publication: May 7, 1982

b. Case Summary: Plaintiff sued on two broadcasts -- one that misidentified plaintiff as the victim of an abduction and beating and said the FBI was "investigating the possibility" that the victim owed money to organized crime figures, and a second that defendant believed was a correction of the story. Defendant's reporter/anchorperson for the midday news broadcast sought to follow up a story from the night before concerning a kidnapping, and contacted the FBI to confirm the identity of the victim, who had been described earlier as a Niagara Falls restaurant owner. According to the reporter/anchorperson, the FBI agent confirmed the plaintiff's name, indicating that if he did not call back that morning the station could consider the victim's identity confirmed as that of the plaintiff. The FBI agent admitted having the conversation, admitted being asked to confirm the identity of the victim, but denied confirming the identity, promising to call back if the identity was not confirmed or ever doing such a thing. He did admit to some commitment to call back, but denied that the failure to call was to be deemed a confirmation. When the misidentification became known, the station carried a correction on its evening broadcasts which stated that, "The FBI earlier today said and confirmed the victim was Prozeralik, but our independent investigation is revealing he is not involved."

c. Experts: Plaintiff called experts in linguistics and journalistic practices, and the defendant called one in journalistic practices. Both sides used experts on damage issue. All experts were local to Buffalo.

d. Verdict: \$11,500,000 (\$11,000,000 compensatory, \$500,000 punitive).

e. Length of Trial: 7 weeks
Length of Deliberations: 6 hours

f. Size of Jury: 6

g. Notes: This is a retrial of a case originally tried in June and July of 1991. The first trial was reviewed in detail in the Jury Verdict Survey prepared by the undersigned for the 1991 Symposium. That trial resulted in a verdict of \$8.5 million compensatory damages (\$4.0 million for reputation injury and emotional distress, \$4.4 million for pecuniary loss) and \$10 million in punitive damages. The case was appealed through the New York state system and resulted in a reversal by the New York Court of Appeals, finding error in the trial court's charge that in effect directed a verdict of falsity as to the correction and as to punitive damages. The case was thus remanded for new trial on all issues. Prozeralik v. Capital Cities Communications, Inc., 82 N.Y.2d 446, 626 N.E.2d 34, 605 N.Y.S.2d 662 (1993). The Court of Appeals also found the evidence insufficient to establish common law malice as required, in addition to constitutional malice, for an award of punitive damages, but nonetheless ordered this issue to also be retried.

The case is on appeal.

Plaintiff's Attorneys:

Richard T. Sullivan, Esq.
Sullivan, Benatovich, Oliverio &
Trimboli
600 Main Place Tower
Buffalo, NY 14202

Frank R. Bayger, Esq.
Gross, Shuman, Brizdle & Gilfillan
465 Main St., #600
Buffalo, NY 14203
(716) 854-4300
(716) 854-2787

Defendant's Attorneys:

Floyd Abrams, Esq.
Paul W. Butler, Esq.
Marvin S. Putnam, Esq.
Cahill, Gordon & Reindel
80 Pine St.
New York, NY 10005

Ralph Halpern, Esq.
Jaekle Fleischman and Muguel
Fleet Bank Building
Twelve Fountain Plaza
Buffalo, NY 14202

Madeleine Schachter, Esq.
Litigation Counsel
Capital Cities/ABC, Inc.
77 W. 66th St.
New York, NY 10023

4. Larry Stecco v. Michael Moore, et al.; Genesee Co. Cir. Ct.,
MI (Judith A. Fullerton, J.); Case No. 90-5047-NZ; 7/1/93

a. Date of Publication: Motion picture released 1989.

b. Case Summary: This suit was against Michael Moore and Warner Brothers, arising out of the movie Roger and Me, which was produced by Moore. One of the movie scenes was a Flint, Michigan Junior League "Great Gatsby" Party, which plaintiff attended. Moore interviewed plaintiff on camera, and in the interview plaintiff said that Flint was "a good place to live." The Junior League had hired black and white professional models to pose as live statues, but the movie showed only black models. The plaintiff alleged that the film depicted him as a rich, uncaring racist who attended a lavish party while the rest of the city suffered, and subjected him to mockery. Plaintiff claimed that defendants placed him in a false light, misappropriated his likeness, slandered him, and induced the interview by fraud.

c. Experts: None

d. Verdict: For defendants on the fraud claim. For plaintiff on the false light claim. \$6,250 compensatory damages (\$3,125 against Moore, \$2,125 against Warner Bros.). Punitive damages are unavailable in Michigan.

e. Length of Trial: 3 days (11 hr. trial days)
Length of Deliberations: 2 hours

f. Size of Jury: 6

g. Notes: The trial court granted summary judgment on the misappropriation claim, and dismissed the slander claim during trial.

A panel of mediators evaluated the case at \$200,000.

The jury consisted of 2 men, 4 women, all of working class backgrounds, 1 retiree. There were no professionals, government employees, or educators.

The plaintiff claimed that the defendants "sandbagged" him into giving an interview and depicted him in a false light. The defendants' theme was that the plaintiff did in fact attend the party and consented to the interview; the scenes of the statues were not used for purposes for charging racism, and no such charge could be reasonably implied. In closing argument, defense counsel told the jury that if they found liability, the most they should award is \$6,250, the amount paid each of the unemployed auto workers that the film depicted being evicted from their homes. This was the amount of the jury's verdict.

Plaintiff's Attorneys: Glen N. Lenhoff, Esq.
328 S. Saginaw St., 8th floor
Flint, MI 48502

Defendants' Attorneys: Steven F. Spender, Esq.
Spender & Robb
2353 S. Linden Rd.
Flint, MI 48532
(810) 230-1415
(810) 732-0144 - FAX

DLL09E4E.WP5

1995 LDRC LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES
AND IDENTIFICATION OF COMMON FACTORS
BY TOM KELLEY

September 20, 1995

PART II

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

This is the third biennial survey of 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. SUMMARY OF RESULTS AND COMPARISON TO PRIOR STUDIES

This survey covers verdicts returned from October 4, 1993 until September 15, 1995. During the nearly two-year period covered by this survey, 14 jury verdicts were discovered. The results were as follows:

	CASE	VERDICT
1.	<u>Barber v. Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV, Decatur, GA, 10/94</u>	Defense verdict
2.	<u>Bryce v. Post Newsweek Stations-Florida, Inc., Ft. Lauderdale, FL, 4/94</u>	\$300,000
3.	<u>Crane and Henderson v. The Arizona Republic, et al., Los Angeles, CA, 4/95</u>	\$1,000,000
4.	<u>Dickerson v. Sally J. Raphael, et al., Ann Arbor, MI, 12/93</u>	Defense verdict
5.	<u>Gaba v. Los Angeles Hebrew Media, Inc., et al., Van Nuys, CA, 3/93</u>	\$175,000
6.	<u>Khawar v. Globe International, Inc., et al., Santa Monica, CA, 3/94</u>	\$1,175,000
7.	<u>Lugo v. Inside Edition, Los Angeles, CA, 11/93</u>	\$91,000
8.	<u>Lundell Mfg. Co., Inc. v. American Broadcasting Companies, Inc., Sioux City, IA 5/94</u>	\$1,058,000

9.	<u>Masson v. The New Yorker Magazine, Inc., et al., San Francisco, CA, 11/94</u>	Defense verdict
10.	<u>N.C. Garden City, Inc. v. The Detroit News, Detroit, MI, 2/94</u>	\$4,000
11.	<u>Prozeralik v. Capital Cities/ABC, Inc., et al., Lockport, NY,</u>	\$11,500,000
12.	<u>Sentinel Insurance Agency and Higginson v. Kelly Broadcasting Co. (KCRA-TV, Sacramento), Sacramento, CA, 8/93</u>	Defense verdict
13.	<u>Smiley's Too, Inc., et al. v. The Denver Post, et al., Denver, CO, 10/94</u>	Defense verdict
14.	<u>Stecco v. Moore, et al., Flint, MI, 7/93</u>	\$6,250

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

The defendants prevailed 36% of the time, the average plaintiff's verdict was \$1,701,028 and the median \$300,000. These calculations are arguably skewed by the high verdicts in Khawar (against the tabloid press) and Gaba (against a small culturally-oriented publication). Leaving these results out, the defendants prevailed 42% of the time, the average plaintiff's verdict was \$1,994,179, the median \$300,000. The win/loss rate is probably also skewed by the N.C. Garden City, Inc. and Stecco cases, in which the de minimus verdicts were wins in effect.

Although charting trends is not the writer's expertise, the following data is pertinent to an assessment of where we have been and where we may be going:

Time Period and Source	Defendant's Success Rate	Average Plaintiff's Verdict	Median Plaintiff's Verdict
<u>1980s</u> LDRC Recap and Update: "Trial Results, Damage Awards, and Appeals", 7/31/92	26.3%	\$1,500,000	\$200,000
<u>1990 & 1991</u> (Id.)	27.6%	\$9,066,310	\$1,500,000

1/1/92 - 10/4/93 Thomas B. Kelley, "Survey of Recent Libel Cases", 10/4/93 (16 verdicts)	56.25%	\$1,441,313	\$376,000
1/1/92 - 12/31/93 LDRC bulletin: "Trial results, damage awards and appeals", 1/31/94 (24 verdicts)	45.5%	\$1,061,136	\$159,000
10/4/93 - 9/15/95 Thomas B. Kelley, "Survey of Recent Libel Cases", 9/20/93 (14 verdicts)	35.7%	\$1,701,028	\$300,000

In the foregoing, there is a discernable trend in the last four years in which (1) the success rate of media defendants before juries has increased dramatically to roughly 45%, from the relatively dismal rate of only 27% during the 1980s and the beginning of the 90's; and (2) the gargantuan bulge in the average and median size of plaintiffs' verdicts has been reduced to the relatively moderate levels of the 1980s.

To what this apparent trend might be attributed is not clear. The more recent favorable results do not mirror any general trends in the jury/tort reparation system. To the contrary, in jurisdictions familiar to the undersigned, the "tort reform" jury mentality peaked during 1990 and '91, the very time when libel trials produced the worst numbers for media defendants.

A qualitative comparison of the cases I surveyed this year and in 1993, with those surveyed from earlier years, show that post-1991, a much smaller number of difficult, potentially inflammatory cases went to trial. This is probably due to a combination of factors, including more summary judgment successes, a greater incidence of settlements in difficult cases, budgetary constraints that lead to less aggressive reporting, and the possible "chill" of the high verdict spate of 1990 and 1991.

Notwithstanding the favorable trend identified during the mid-'90s, it appears that the combination of a difficult case and a problem venue can still be lethal. In Prozeralik, first tried in 1991, the award of \$18.5 million (\$8.5 million actual, \$10 million punitive) was one of the significant mega-verdicts of that era. Tried again in 1994 with different liability and punitive damage instructions as mandated by the New York Court of Appeals, Prozeralik v. Capital Cities Communications, Inc., 82

N.Y.2d 446, 626 N.E.2d 34, 605 N.Y.S.2d 662 (1993), the result of \$11.0 million actual, \$0.5 million punitive is enigmatic.

B. ANALYSIS

1. OVERVIEW

The statistics from the past two years, like those of the two years that preceded them, were relatively favorable. In terms of the strategies that produced wins and losses, most of what I learned from responding counsel this year is identical to what I reported in the 1993 analysis, and I will not repeat those observations here. Anyone who does not have a copy of the 1993 survey and analysis should feel free to ask me for it.

I report my few additional observations below.

a. JURORS

Several cases had strong evidence supporting the issue of substantial truth of the publication, but also had mild to severe problems with reporting conduct. Examples are: Barber, Sentinel Insurance Agency, and Smiley's Too, Inc., In all of these cases, at least two jurors held out, at least briefly, in favor of the plaintiffs.

In Barber, the two brief holdouts for the plaintiff were both female. One was a homemaker, who indicated no strong biases, although she had written a letter to the station complaining of too much "OJ coverage" because it was cutting into her soap operas. She was white, middle class, 50s, and, from the post-trial interview, thought to be skeptical of the media. Counsel does not recall the background of the other female juror who briefly held out for the plaintiff. As happened in several cases, however, the holdouts were convinced when the jury asked for and received the charge in written form, and the majority was able to use it to persuade them.

In Sentinel Insurance Agency, the two who voted for plaintiff were spouses of self-employed persons, and for that reason may have sympathized with the plaintiff.

In Smiley's Too, Inc., the two holdouts for the plaintiff were a WF, mid-50s, married, children, employed at the county library, and a WF, retired department of motor vehicles employee, early-70s, widowed.

As best reporting counsel could tell from interviews with the pro-plaintiff jurors, most of them seemed to harbor distrust for the media because of its perceived power, influence, wealth, etc. In Smiley's Too, Inc., for example, the clear preponderance

of the evidence favored a finding of substantial truth, but the case had warts in the form of bad reporting conduct on the part of the reporter, including allegations involving effects of chronic alcohol abuse and drinking on the job. This evidence was highly controverted, and most jurors did not consider it a factor. The holdout jurors believed it was a factor, but did not blame the reporter. Indeed, they felt sorry for him, and blamed his employer for his problems as well as the plaintiffs.

It is reasonably clear that if jurors of the same sort as the above holdouts were in the majority, these cases could have been lost. Our best guess is that this type of juror predominated in the Bryce and Crane cases, although both of these cases were admittedly difficult on liability.

It is hard to identify what sets these bad jurors apart. I discussed this question at some length in the 1993 survey. From the current responses, it appears that persons employed as government bureaucrats are especially prone to be problem jurors. On the other hand, the jurors who held out for plaintiff in Sentinel Insurance Agency apparently identified with the hard-working self-employed plaintiff, to whom the press and government alike are villains.

From my experience in trying these cases and doing this survey, I believe that generalizations about race, gender, occupations, etc. are not as useful as our informed instincts during voir dire. If there is a bottom line characteristic that we should be looking for, I believe it is high self-esteem, i.e. individuals who are secure, happy with their lives, harbor no deep resentments, and are therefore not prone to use their power as jurors to move money around.

In some cases, we should question our tendency to prefer well-educated jurors. In Crane, for example, liability was problematic, and counsel hoped to keep damages low if the case was lost on liability. A low-income jury might have been preferable on damages, and perhaps so even on liability, because of lack of affinity with the wealthy lawyer plaintiffs. However, defendant did not have that option, because, remarkably, the defendant drew an almost entirely college-educated, upper middle class venire in the Central District of California.

b. WHERE THE BURDEN OF PROOF REALLY IS

During their trials, most defense lawyers felt good about how their cases were going. Observers such as court personnel, normally considered reliable courtroom thermometers due to their experience, frequently told defense counsel that the evidence was favoring their clients. Most counsel were startled when they heard from the jury. This was true not only in cases that resulted in plaintiff's verdicts such as Bryce and Crane, but

also in cases with defense verdicts where jurors reported that some of their members held out in favor of the plaintiff. The lesson is what we already know, that a media defendant enters one of these cases with a significant disadvantage, much the same as that encountered by insurance companies in bad faith cases. It is all too easy to underestimate this handicap.

Regardless of whether the problem jurors described above sit on your jury, it is clear that most juries expect you to be able to establish the truth of your client's article. If your defense is that falsity does not equal knowing or reckless falsity, or that falsity is not equal to fault, you have a very difficult case.

For example, in Smiley's Too, Inc., the defendants' sources on critical defamatory statements tended to support the defense, but also had things to say that were useful to the plaintiff. The plaintiff elected not to call some of these people, figuring that the defense could do better with them because of their ability to ask leading questions on cross. The defense elected not to call them at all, relying on the plaintiffs' burden of proof. The jury nearly deadlocked for lack of evidence as to truth of these points, until the jurors favoring the defense reviewed the instruction on burden of proof and liability, and used them to sway the holdout jurors toward the defense.

In Barber, the defendant's reporter put on a line-by-line exposition of the broadcast, showing the basis for each statement in it, and the reasons for choosing the language used. In post-trial interviews following the defense verdict, the jury indicated that this was an important factor, and suggested they indeed expected this kind of proof from the defendant.

In Bryce, the defendants elected not to call a key member of the reporting team, to keep the case as free as possible from any appearance of bumbling. Apparently, the jury expected more. The people whom the defendants did call could not answer to everything for which the jury expected the defendant to account.

c. CAN YOU WIN ON A SUBSTANTIALLY FALSE PUBLICATION?

This has happened, but rarely. The example provided by this survey is the second trial of the Masson case, in which Gary Bostwick spent the first 25 minutes of his summation giving the jury a lecture on the meaning of constitutional malice. I think even Gary would counsel that this result is very hard to achieve after falsity is found, as shown by the first trial. Malcolm had other things going for her to offset the jury's willingness to find falsity, including the many foolish statements the author attributed to Masson which he admitted making.

