1997 LDRC LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES

by Tom Kelley

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PART I
CASE SURVEY

Introductory Note

This is my report of responses to a survey of recent jury verdicts in libel suits against media defendants. Two bench trials are also included. The survey covers the period from September 20, 1995 through September 8, 1997. Two newsgathering cases (Ramos and Sanders) and one libel case (Peeler) from before this period are also included.

Unlike prior surveys, the reports consist almost entirely of written survey responses prepared by defense counsel. The responses have received a light edit, and suffered some additions and clarifications based upon follow-up telephone interviews. However, most of what follows comes from the pens of the lawyers who tried the cases. This change in methodology was made possible by the growing willingness of defense counsel to support this project and take the time needed to write meaningful survey responses. For this, counsel deserve our thanks.

The case reports in paragraphs A through BB are in-depth responses by responding defense counsel. In eight cases, summarized more briefly in sections CC.1. through CC.8., 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.

Table of Trials Reported

Survey Responses

A. **Case Name:** Bandido's, Inc. v. Journal-Gazette Company, Inc.
Indiana District Court, Albion
March 30, 1994

1. **Date of Publication:** October 6, 1988

2. **Case Summary:**

The Journal-Gazette Company, Inc. owns the Journal-Gazette, a newspaper of general circulation that published three editions each day. Bandido's, Inc. operates four Mexican-style restaurants.

On September 13, 1988, the Board of Health conducted an inspection of one of the Bandido's restaurants and found twenty-one separate health violations and ordered that all of them be corrected within thirty days. Seven of the violations were found to be imminently hazardous and, therefore, immediate action was ordered. Among the violations was the finding of "evidence of flies, roaches, and rodents." After the Journal-Gazette prevailed in a FOI action, the inspection report was available to it and the public. However, the FOI judge noted that "there is a possibility that disclosure of the inspection reports might result in improper inferences or interpretations as to the seriousness of the crimes noted."

Shortly after the September 13, 1988 inspection, the Board of Health scheduled a hearing on October 5, 1988 to consider revoking the operating license of Bandido's North. On the day before the hearing, a health inspector visited Bandido's North to determine if any of the violations had been corrected. During that inspection, sixteen violations were discovered. Apparently, the insect and rodent problem had been addressed, as there was no evidence of insects or rodents indicated in the October 4, 1988 inspection report.

On October 5, 1988, the Board of Health held a hearing to determine whether Bandido's North should be closed. As a result of the hearing, the restaurant was ordered closed by the Board and the owner's permit was revoked.

Journal-Gazette staff writer, June Remley, was assigned the news story concerning the closure of the Bandido's restaurant for the October 6, 1988 issue of the Journal-Gazette. In the story which was printed, Remley reported that the Bandido's restaurant in the Northcrest Shopping Center was closed because of health violations, including evidence of insects and rodents. Remley further reported that almost all of the violations had been corrected and specifically pointed out that the closure did not affect the other Bandido's Restaurants in Fort Wayne. The story did not use the word "rats."

The standard procedure at the Journal-Gazette is that a person distinct from the author of a news article edits that article and writes a headline for the article. The copy desk chief then performs a final review, examining the layout and checking to see if the headline accurately summarizes the story. The document then proceeds to the managing editor who reviews the story and headline. Lastly, the page proof editor checks the final pages for typographical errors, story and headline problems, matching jump lines, etc.

After June Remley wrote the news article regarding the closure, copy editor Sheila Pinkley edited (shortened) the article and wrote a headline and subheadline that were attached to the article. Pinkley's work then was reviewed by the Journal-Gazette's copy desk chief, Bill Leonard. The story was then sent to the acting managing editor, Ellen Garner. Finally, "page proofs" of the newspaper were edited by Tom Jones, another editor. The first edition, the Ohio Edition, bore Pinkley's original headline:

Health board
shuts doors
of Bandido's
Inspectors find rats,
roaches at local eatery

The Final Edition bore an altered subheadline to reflect the fact that there was more than one Bandido's location in that locale. In addition, Pinkley changed the word "roaches" to "bugs" to compensate for the inclusion of the longer, more precise, term "north-side":

Health board
shuts doors
of Bandido's
Inspectors find rats,
buts at north-side eatery

Pinkley did not consult with Remley, or anyone else, regarding the wording of the headline. It is clear that Remley was the sole person at the Journal-Gazette who knew the details of the Bandido's North restaurant closure. It is equally undisputed that Remley never saw the headline or subheadline prior to the publication of the story. Pinkley said she realized the article did not mention rats, but that the word "rodents" suggested "rats" to her. Leonard and subsequent editors said they did not notice that the word "rat" was not contained in the article, but Leonard also testified that he saw substantiation for the word "rat" in that the word "rodent" appeared in the body of the article. The subheadline was technically inaccurate in its use of the term "rats" because the inspection report did not specify the type of rodent that made the dropping discovered in the restaurant. Leonard admitted that under Journal-Gazette policy, the word "rats" should not have appeared in the headline, since it did not appear in the body of the article. No individual at the newspaper had any actual awareness that the subheadline contained any inaccuracy until after publication.

On October 6, 1988, the date the article and its attached headline and subheadline ran, the president and owner of Bandido's, James Schindler, and Bandido's attorney, Robert Wright, met with representatives of the newspaper and the Journal-Gazette's attorney, John Walda, to complain about the subheadline. During the meeting, the parties discussed retracting the perceived defect in the subheadline. As a result of the meeting, the newspaper agreed to publish, and indeed did publish, a follow-up article (rather than a typical page two correction). The retraction article was written by June Rumley.

On October 7, 1988, the follow-up article was published. The article contained a statement that no evidence of rats was found at Bandido's North and apologized for the inaccuracy:

> Because of an editing error, a headline -- not the story -- in some editions of Thursday's Journal-Gazette said inspectors had found rats and bugs at the restaurant.
>
> No evidence of rats was found at the restaurant. The Journal-Gazette apologizes for the inaccuracy of the headline.
>
> Thursday's story quoted the health board's inspections reports, which said evidence of flies, roaches, and rodent droppings in a bathroom were found Sept. 13.

In follow-up letters that Bandido's attorney, Mr. Wright, sent to both John Walda and Craig Klugman, the editor of the Journal-Gazette, Wright thanked both Walda and Klugman for the resolution reached in dealing with the October 6th article. Nevertheless, after switching lawyers, Bandido's sent another letter on October 18; 1988, demanding that a second retraction be written. Having already published a retraction eleven days earlier, and having received notice from Bandido's through its attorney expressing satisfaction with the October 7, 1988 retraction, the Journal-Gazette did not print a second retraction. Bandido's then filed suit against the Journal-Gazette.

The paper was able to secure summary judgment in its favor since the trial court found that there was no evidence of actual malice. This was overturned on appeal. The action then proceeded to trial where a jury awarded compensatory damages to the plaintiff in the amount of $985,000. The verdict was overturned on appeal. Bandido's has requested the Indiana Supreme Court to exercise jurisdiction over the appeal and affirm the verdict. This petition to the Supreme Court is still pending.

3. **Verdict:** For plaintiff
   Compensatory: $985,000
   Punitive: Prior to trial, the trial court granted a directed verdict in favor of the paper finding that as a matter of law there was no basis for an award of punitive damages.

4. **Length of Trial:** 2 weeks

5. **Length of Deliberation:** approximately 4½ hours

6. **Size of Jury:** 6

7. **Significant Pre-Trial Rulings:**

Summary judgment was initially granted on all counts in favor of the defendant but later overturned on appeal, 575 N.E.2d 324 (Ind. App. 1991).

8. Significant Mid-Trial Rulings:

The trial court allowed the plaintiff's expert witness to define "reckless disregard" as "extreme carelessness."

The trial court permitted evidence to be admitted regarding the paper's failure to comply with the Indiana retraction statute -- which operates to cut off punitive damages when a newspaper complies with the statute -- as evidence of actual malice.

The trial court permitted evidence of dicta contained in a prior opinion in another case that the paper's use of food inspection reports could be damaging to a restaurant to be considered in determining whether the statements were published with actual malice.

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

Nothing unusual. A general verdict form was used.

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

None, except voir dire.

11. Pretrial Evaluation:

$250,000 to $350,000 exposure.

12. Defense Juror Preference During Selection:

Educated persons who could understand and appreciate the burden of proving constitutional malice.

13. Actual Jury Makeup:

Rural, lower class, poorly educated.

14. Issues Tried:

Whether the statements contained in the October 6, 1988 issue of the Journal-Gazette were published with actual malice, and whether and to what extent those statements actually damaged the plaintiff.

15. Plaintiff's Theme(s):

To associate "rats" with a restaurant is to spell its doom. Despite the "warning" from the judge that released the inspection reports, defendant published with reckless disregard for the truth. That three levels of editorial review did not catch that no "rats" were observed but only "rodent droppings" shows that the defendant acted with reckless disregard.

16. Defendant's Theme(s):

Although it is true that "rodent droppings" and not "rats" were found, Rat = Rodent. Even if there was a mistake in the wording of the headline, there was no constitutional malice.

17. Factors Believed Responsible for Verdict:

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

Prone to resent the media because of its perceived power and wealth.

b. Sympathy for plaintiff during trial:

The wife of the restaurant owner cried during her testimony of how the article changed their lives, and the jury seemed to buy it. Defendant showed that plaintiff had poorly managed prior restaurants that had failed, but this appeared to have little effect.

c. Proof of actual injury:

There was testimony that the word "rats" left a derogatory impression in the minds of readers and patrons. The plaintiff's economist testified to lost profits of $1.2 to $2.2 million. The defense expert found no losses, and that plaintiff's downturn was due to management problems and competition.

d. Defendants' newsgathering/reporting:

Defendant's editor essentially admitted an error, but insisted on the accuracy of the reference to "rats," which may have been received as word mincing. The court received evidence of performance reviews critical of copy editor Pinkley.

e. Experts:

Plaintiff: F. Dennis Hale. Hale testified that the word "rats" in connection with a restaurant was extremely sensitive and that its use was understood to be damaging; that it was

"extremely" careless to include the word in the headline; that, "from a journalistic perspective, there is no difference between extreme carelessness and reckless disregard."

Defendant: Ralph Holsinger, professor of journalism, Indiana University (journalistic practices).

f. Other evidence:

The "warning" by the court that granted access to the inspection reports.

g. Trial dynamics:

i. Plaintiff's counsel:

Seasoned trial lawyer, a "pit bull."

ii. Defendant's trial demeanor:

Defendant's witnesses gave performances of mixed quality.

iii. Length of trial:

Not a factor.

iv. Judge:

Unbiased, but glib and unfocused.

h. Other factors:

This jury never got off the position that a mistake = liability.

i. Lessons:

The defendant needed to find a way to better convey the notion that neither a mistake nor negligence in making one meets the knowing or reckless falsity standard. Educate the jury on how mistakes are inevitable and occur every day in newspapers across the country.

18. Results of Jury Interviews, if any:

One juror reported that she and most of the others had concluded right after opening statement that because the defendant made a mistake the plaintiff should win and that the only question that remained was "how much?"

19. Assessment of Jury:

Uneducated jury who failed to comprehend the jury instructions. The foreman asked for help in determining the number of 00's that should be used in writing the number.

20. Post-Trial Disposition:

The verdict was overturned on appeal, 672 N.E.2d 969 (Ind. App. 1996). Bandido's has requested the Indiana Supreme Court to exercise jurisdiction over the appeal and affirm the verdict. This petition to the Supreme Court has been granted and oral argument set for September 9, 1997.

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B. **Case Name:** Melrose Beal v. Bangor Daily News
Superior Court, Washington County, Maine
May 15, 1997

1. Date of Publication: February 21 and 22, 1994

2. Case Summary:

Melrose Beal, a Selectman for the Town of Machias and security guard for the Cutler Navy Station, sued the Bangor Daily News for libel based on two articles which reported that he had been disciplined by his superior for disclosing to other Machias officials confidential information about Navy matters. The information published by the newspaper was based upon a reporter's investigation, including a telephone discussion with the plaintiff's superior at the Navy base, Thomas Shea. At trial, Mr. Shea denied that he had provided the information to the reporter.

3. Verdict: For plaintiff
Compensatory: $125,000
Punitive:

4. Length of Trial: 4 days

5. Length of Deliberation: 1 hour, 50 minutes

6. Size of Jury: 8

7. Significant Pre-Trial Rulings:

None

8. Significant Mid-Trial Rulings:

The court ruled that Melrose Beal was a public official and that plaintiff would have to prove actual malice.

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

The court bifurcated the jury deliberations on compensatory and punitive damages. The jury answered with a special verdict form. They answered yes to question 1, which read as follows:

1. Has Melrose Beal proven by clear and convincing evidence that Bangor Publishing Co. and Paul Sylvain published a false and defamatory statement of fact which they knew to be false or which they published while entertaining serious doubts as to their truth or falsity?

After the jury returned its compensatory damages award, the court granted defendant's motion for a directed verdict as to punitive damages for failure to prove the state law predicates.

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

No formal analysis.

11. Pretrial Evaluation:

Defense counsel believed that plaintiff was a public official and that plaintiff would be unable to establish actual malice.

12. Defense Juror Preference During Selection:

The defense preferred intelligent, younger male, higher educated, skilled, non-union, non-law enforcement jurors, who were not from the town of Machias.

13. Actual Jury Makeup:

Single male, 53, high school education, fishpacker; single male, 22, college student; married male, 55, wife = math tutor, high school education, electrician; married female, 37, high school education, husband = equipment operator; female (other information not available); single female, 55, associate degree, study hall monitor; married female, 47, husband = urchin diver, one year college, unemployed kennel attendant; married female, 52, high school education, unemployed, husband = master mechanic; married male, 58, wife = real estate broker, education unknown, real estate broker; married female, 27, husband = plant foreman, education unknown, director day care center.

14. Issues Tried:

Libel, actual malice, damages, loss of consortium.

15. Plaintiff's Theme(s):

Plaintiff suggested that the newspaper reporter was a close friend of the police department, with whom plaintiff had engaged in a long-running feud. Plaintiff also claimed

that the reporter had fabricated information despite the fact that he had retained his notes and they were reasonably comprehensive and consistent with the article.

16. Defendant's Theme(s):

Defendant stressed the lack of actual malice, the accuracy of the challenged statements, and the number of separate sources that confirmed and corroborated those statements.

17. Factors Believed Responsible for Verdict:

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

General dislike of the newspaper.

b. Sympathy for plaintiff during trial:

Yes, based on post-trial interviews with jurors.

c. Proof of actual injury:

Plaintiff retired a year early from his Navy job, although no loss of income was claimed, only reputational damage.

d. Defendants' newsgathering/reporting:

The jurors were critical of a follow-up article published by the paper and an editor's explanation of the editorial process was viewed skeptically.

e. Experts:

None.

f. Other evidence:

N/A.

g. Trial dynamics:

i. Plaintiff's counsel:

Low-key and competent, slick closing argument.

ii. **Defendant's trial demeanor:**

N/A.

iii. **Length of trial:**

4 days.

iv. **Judge:**

Margaret Kravchuk -- did a good job.

h. **Other factors:**

N/A.

i. **Lessons:**

As always, actual malice is a difficult concept for jurors to understand. Also, attitude toward media always a problem.

18. **Results of Jury Interviews, if any:**

One of the two who voted for the defense told counsel that those who voted in favor of the verdict simply did not understand actual malice and could not be persuaded. One of those who voted for the verdict said he understood this issue, and that this was the reason they decided not to find loss of consortium, i.e., because the article did not even mention the spouse, so there could be no actual malice.

19. **Assessment of Jury:**

Wanted to deliberate quickly and go home; did not understand actual malice.

20. **Post-Trial Disposition:**

Appeal pending.

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C. **Case Name:** Jacqueline Ferreira da Silva v. Time Incorporated, a/k/a Time Warner Inc., Saba Press Photos, Inc., and Viviane Moos
S.D.N.Y.
Case No. 93 Civ. 8602
Judge John E. Sprizzo
January 17, 1997

1. **Date of Publication:** June 21, 1993

2. **Case Summary:**

This was a libel and invasion of privacy case arising from the publication of plaintiff's picture (working as a prostitute) in TIME Magazine's 1993 cover story ("Sex for Sale") about the international sex trade. The caption to the picture said plaintiff was "looking for customers."

Plaintiff claimed she was not a prostitute when the picture was taken, when she was 19 -- although she admitted being a prostitute between the ages of 12 and 18. Alternatively, plaintiff claimed she stopped being a prostitute and turned her life around (including a marriage and pregnancy) between the time the picture was taken and the time it was published (a seven-month period).

3. **Verdict:** For defendant, with a finding of no falsity.

4. **Length of Trial:** 8 days.

5. **Length of Deliberation:** 7 hours.

6. **Size of Jury:** 8 -- with one dismissed during deliberations, at her request.

7. **Significant Pre-Trial Rulings:**

TIME's motion for summary judgment based on substantial truth was denied, as was a motion for reconsideration. da Silva v. Time, Inc., 908 F. Supp. 184 (S.D.N.Y. 1995).

8. **Significant Mid-Trial Rulings:**

None; the judge never decided basic issues such as the public/private figure status of the plaintiff or the inappropriateness of the privacy (misappropriation) claim under New York law §§ 50-51.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

The case was bifurcated with only liability tried. The judge prepared sequential questions and the jury deliberated solely on the first question of truth/falsity.

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

None.

11. **Pretrial Evaluation:**

There was some concern that the plaintiff, an allegedly rehabilitated prostitute, would make a sympathetic witness.

12. **Defense Juror Preference During Selection:**

No teachers or social workers or psychologists.

13. **Actual Jury Makeup:**

1. Male appraiser, nurse wife, two kids, middle aged
2. Male guard at state park, single, young
3. Female CUNY accountant, truck driver husband, kids, middle aged
4. Female nursing student, also worked at Metropolitan Opera, single, young

5. Male title examiner, single, young
6. Female, Rockland County School District employee, married with family, middle aged
7. Black male, court reporter, two daughters in college, middle aged

14. Issues Tried:

Substantial truth, lack of actual malice/gross irresponsibility.

15. Plaintiff's Theme(s):

1) Plaintiff was not a prostitute when the picture was taken, and 2) she was no longer a prostitute when her picture was published (seven months after it was taken); TIME should have gone back to Recife, Brazil to check on her status.

16. Defendant's Theme(s):

The picture and caption were true at the time the picture was taken. Pictures by their definition capture a past event. TIME's story concerned the tragedy of global prostitution and plaintiff's picture was used to illustrate an ongoing social issue. The story was months in the making and TIME could not have done such a story -- or others like it -- if it had to go back and check on the status of everyone pictured.

17. Factors Believed Responsible for Verdict:

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

Not substantial.

b. Sympathy for plaintiff during trial:

Plaintiff, who spoke through an interpreter, came across as sympathetic but not truthful. Among other lies, it came out that during the entire first day of her deposition, she denied ever having been a prostitute, before admitting it the next day.

c. Proof of actual injury:

None.

d. Defendants' newsgathering/reporting:

The freelance photographer who took the picture in Recife, Brazil and who personally knew the plaintiff to be a prostitute was a very compelling witness.

e. Experts:

None.

f. Other evidence:

TIME put on the photo editor responsible for the story and he testified about the care used in publishing the photograph. TIME also called as a witness the photographer's driver/guide in Recife, Brazil, who confirmed the photographer's testimony about plaintiff working as a prostitute.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff was represented by a solo practitioner who wore cowboy boots and often submitted handwritten legal documents.

ii. Defendant's trial demeanor:

The freelance photographer (Viviane Moos) and president of the photo agency (Marcel Saba) both sat at counsel table. Both were excellent witnesses.

iii. Length of trial:

Some impact, since the jurors seemed eager to finish the case and go home.

iv. Judge:

Significant adverse impact. The judge asked many hostile questions of defendants' witnesses and was at times openly hostile to defense counsel, at one point requiring co-counsel to take the stand and testify about where a document had come from.

h. Other factors:

None.

i. Lessons:

It is important to personify the media institution with a compelling and sympathetic individual -- in this case the freelance photographer -- who can counteract any sympathy toward the plaintiff. Also, a jury can sometimes be trusted to overcome a judge's hostility.

18. Results of Jury Interviews, if any:

One juror, an older woman (juror #6), was an initial holdout against TIME. The others all agreed relatively quickly that the photograph and the caption were substantially true.

19. Assessment of Jury:

Reasonably attentive, but eager to get the case over with; demanding of amenities.

20. Post-Trial Disposition:

No appeal.

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D. **Case Name:** David R. Dumond and Dennis P. Beaulieu v. Diversified Communications
Penobscot County Superior Court; Bangor, Maine
Civil Action, Docket No. CV-94-328
March 21, 1997

1. **Date of Publication:** Date of broadcast: May 19, 1993

2. **Case Summary:**

Plaintiffs, local building contractors, brought suit over a consumer affairs report broadcast on WABI-TV. The report had focused upon the experiences of one homeowner, Jacques St. Onge, who was dissatisfied with a number of conditions in his new home. The report passed along advice from the Maine Real Estate Commission to persons considering building a new home about what they could do to research their contractors and protect their expectations. Plaintiffs allege that the report contained defamatory accusations about them -- namely that they were incompetent, uncaring, had a poor reputation in the community, and had left uncorrected a number of defects within the home.

At trial, the plaintiffs conceded that the facts in the report were accurate, but claimed that it was misleading because it suggested that they were responsible for all problems. They claimed that they had never been contacted directly by WABI-TV prior to the broadcast and that it was, overall, defamatory and false. WABI defended its report as accurate, balanced, and broadcast only after numerous unsuccessful efforts to interview the contractors. The report did state that, according to the wife of one of the contractors who had been reached just prior to the broadcast, the contractors claimed they had done everything the could to make the homeowners happy. It also reported that the realtor who sold the property to the homeowners on behalf of the plaintiffs had refused to comment because he had "been hassled by a lawyer" and did not want to talk about it.

3. **Verdict:** For defendant

4. **Length of Trial:** 10 days

5. **Length of Deliberation:** 2 hours

6. **Size of Jury:** Five women, three men

7. **Significant Pre-Trial Rulings:**

The trial court denied defendant's motion for summary judgment which had been based upon the grounds that there was no evidence to support any claim of negligent investigation of the report by WABI-TV, or actual knowledge or reckless disregard of any

false statement of fact. Defendants argued for but the court rejected a negligence test based on industry standards, requiring expert testimony.

8. Significant Mid-Trial Rulings:

The defendant argued for a conditional privilege, to trigger a higher-than-negligence fault standard for liability for compensatory damages. The trial judge refused to recognize a conditional privilege, reasoning that the broadcast did not involve a significant enough public interest value. The case was submitted on both negligence and actual malice standards of fault.

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

The case was consolidated, over defendant's objection, with a related breach of contract dispute between the homeowners and the contractors. Evidence relating to that dispute was tried first, and following a jury verdict in favor of the homeowner on some of their allegations of defects, the jury reconvened to hear evidence pertaining to the defamation claim.

The trial court submitted detailed special verdict interrogatories; the jury only reached issue #1, whether the statements in issue were "false defamatory statements of fact.'

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

Defense favored educated homeowners with a leaning toward conservative women.

11. Pretrial Evaluation:

Probable defense verdict on liability; minimal damages. No settlement offer was made by the defense.

12. Defense Juror Preference During Selection:

Defense favored educated homeowners with a leaning toward conservative women.

13. Actual Jury Makeup:

Five women, three men, ages ranging from 43 to 68. Occupations included law firm manager, secretary, bus driver, teacher, hotel food director, administrative assistant, deli clerk, and retired school teacher.

14. Issues Tried:

The defense presentation to the jury focused primarily on the two basic arguments:

a) The report was substantially, if not entirely, true. The only inaccuracy in the report based upon the evidence was the fact that discovery revealed the house actually had six code violations (one of which could have led to a gas explosion) when the broadcast had actually indicated that, despite the homeowners' complaints, there were no code violations; and

b) even if untrue, the defendant made repeated, good faith efforts to get the contractors' side of the story and did not publish any falsity with either actual knowledge or reckless disregard of whether it was false or true.

15. Plaintiff's Theme(s):

Plaintiffs contended that the broadcast was a misleading smear of their reputations, casting them in an unfair light. They contended that it was an abuse of the defendant's role as a broadcaster to publish such a report without their knowledge or input.

16. Defendant's Theme(s):

Defendant contended that all statements of fact in the report were verifiable and objectively true based upon videotape, the broadcast, and testimony by independent witnesses. Further, defendant contended that it had made every good faith and reasonable effort to broadcast the contractor's side of the story, but the contractors had refused to cooperate. Defendant contended that the report was a consumer affairs story in the public interest.

17. Factors Believed Responsible for Verdict:

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

Post-trial juror interviews suggested that, notwithstanding that WABI has nearly one-half of the local television market news audience, most jurors carried an anti-media bias.

b. Sympathy for plaintiff during trial:

Plaintiffs made sympathetic appearances and came across as generally credible.

c. Proof of actual injury:

Plaintiffs alleged that their work opportunities dried up after the broadcast, and that their partnership split up within a few months thereafter. No hard numbers were presented.

d. Defendants' newsgathering/reporting:

The defense witnesses from WABI all made good appearances at trial. Post-trial juror interviews reflected that WABI witnesses were all regarded as credible and "straight shooters."

e. Experts:

Plaintiff called no journalism experts.

Defendant called Professor John T. Weispfenning of Otterbein College as an expert witness on journalism standards. Dr. Weispfenning's testimony was helpful. Defendant also relied upon opinion testimony by a local building contractor and a city official with respect to defects in the work done by the plaintiffs on the property.

f. Other evidence:

Nothing significant.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiffs' counsel made a very effective presentation and appealed to the jury's sympathies concerning the disparate positions of the parties.

ii. Defendant's trial demeanor:

Defendant's witnesses presented themselves as serious and professional, while establishing the good faith and objective basis for the report.

iii. Length of trial:

Ten days due to consolidation with the related contract dispute between the contractors and the homeowners. Post-trial interviews with the jurors showed that they felt it was too long.

iv. Judge:

The judge did an effective job with trial management, but refused to allow the conditional privileges sought by defendant during trial and jury instruction.

h. Other factors:

Not applicable.

i. Lessons:

There was a significant anti-media bias, notwithstanding the generally favorable local opinions of WABI-TV which has approximately one-half of the local television news market. While the jury seemed to unanimously feel that all of the WABI witnesses were credible, four jurors expressed a clear anti-media bias and felt that the media as a whole does not treat individuals fairly.

18. Results of Jury Interviews, if any:

As indicated above, there was a significant and unexpected anti-media bias for this local news operation. When the jury retired for deliberation, it was deadlocked 4/4. Ultimate, after extensive consideration of whether statements at issue were both "false and defamatory statements of fact," two jurors sided with the defense and rendered a 6/2 verdict in favor of the defense.

19. Assessment of Jury:

Two women on the jury had a firm ant-media bias. Juror interviews reflect that they were very sympathetic toward plaintiffs, and felt that the plaintiffs had been cast in a false light by this broadcast, regardless of the literal truth of the statements of fact in the report.

20. Post-Trial Disposition:

No appeal. Costs awarded to defendant.

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E. **Case Name:** Clint Eastwood v. National Enquirer
C.D. Cal.
Hon. John Davies
October 1995

1. **Date of Publication:** December 13, 1993.

2. **Case Summary:**

Clint Eastwood alleged that the Enquirer ran a phony "exclusive interview" which he never gave. The Enquirer claimed that it bought the interview from a freelancer and published it in good faith.

3. **Verdict:**
Compensatory: $150,000
Punitive: None

4. **Length of Trial:** 2 weeks

5. **Length of Deliberation:** 4 days

6. **Size of Jury:** 10

7. **Significant Pre-Trial Rulings:**

Enquirer's motion for summary judgment denied. Eastwood's motion in limine to prevent Enquirer from citing advice of counsel denied.

8. Significant Mid-Trial Rulings:

Court ruled that both the commercial appropriation and Lanham Act claims must meet actual malice standard per Cher v. Forum Int'l, 692 F.2d 634 (9th Cir.), cert. denied, 462 U.S. 1120 (1983).

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

Court agreed to bifurcate between liability verdict (which included a special verdict on common law malice) and punitive damages phase.

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

Mock trial work confirmed that, while Eastwood was an enormously attractive figure, the jury would ultimately agree that he was not seriously damaged.

11. Pretrial Evaluation:

Defendant offered Eastwood $300,000 before trial; Eastwood sought significantly more.

12. Defense Juror Preference During Selection:

Eastwood's politics complicated our jury selection -- his Republican roots attract many typical "defense" jurors. We looked for relatively older jurors who ran businesses and appreciated the low impact the article had on Eastwood's career.

13. Actual Jury Makeup:

Half male/half female; 8 white, 1 black, 1 Asian. Middle-class, with almost all between 30 and 50.

14. Issues Tried:

1. Did the Enquirer misappropriate Eastwood's name and likeness by publishing the "exclusive interview with actual malice?

2. Did the Enquirer create a false implied endorsement by Eastwood by publishing with actual malice?

3. (Damages.)

15. Plaintiff's Theme(s):

The Enquirer stole Eastwood's good name and injured him by suggesting that he would tell intimate family secrets to a tabloid. The Enquirer's failure to call Eastwood (the most logical call to make) shows they did not want to know the truth.

16. Defendant's Theme(s):

1. Eastwood knows the article didn't injure him; he brought the lawsuit to intimidate the Enquirer from covering him in the future;

2. The reporter who submitted the interview "checked out;" the Enquirer acted in good faith, and wouldn't risk a lawsuit over a relatively boring story;

3. Eastwood is a fine actor and attractive man, but his lawsuit is another story.

17. Factors Believed Responsible for Verdict:

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

The jurors clearly loved Eastwood (lining up for autographs immediately after the verdict) and had mixed feelings about the Enquirer.

b. Sympathy for plaintiff during trial:

Eastwood was a good witness, but low key. He did not inflame the jury (they were out four days).

c. Proof of actual injury:

This was a huge hole in Eastwood's case, and helped hold the verdict down.

d. Defendants' newsgathering/reporting:

The jurors joined in the usual second guessing, but by and large seemed to agree that the Enquirer tried to do a decent job.

e. Experts:

Plaintiff: George G. Strong, C.P.A., Los Angeles, CA. This witness attacked the defendant's proof regarding expenses to be deducted from revenue for purposes of calculating

profit. Len Hirshan, William Morris Agency, testified that the defendant's use had a multi-million dollar "endorsement value." This expert was disregarded by the jury.

Defendant: Mark F. Weinstein, Los Angeles, CA, economist.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Ray Fisher did a nice job of letting Eastwood be the star.

ii. Defendant's trial demeanor:

Witnesses acquitted themselves well.

iii. Length of trial:

The length of the trial helped us -- it put distance between the predispositions and the verdict. The jurors seemed surprised to learn how many people tried to get the story right.

iv. Judge:

Judge Davies is hardly a media defendant's judge, but he ran a fair trial.

h. Other factors:

Although the jury liked Eastwood, they seemed also to like the defendant's successful attack on the plaintiff's damage experts.

i. Lessons:

1. A tabloid can survive a trial against an attractive celebrity, if the underlying article is essentially benign.

2. If the article is false, do not expect a defense verdict. The actual malice argument is best made to the court of appeals.

18. Results of Jury Interviews, if any:

The jury was sharply divided on actual malice. After three days, the defense hold-outs agreed to a liability verdict based on a compromised damages award.

19. Assessment of Jury:

The jury ultimately would not enforce the actual malice standard, but otherwise tried to be fair.

20. Post-Trial Disposition:

The case is now on appeal to the Ninth Circuit based on the absence of actual malice.

Plaintiff's Attorneys:

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Defendant's Attorneys:

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Henry Shields
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F. Case Name: Wayne Elder v. Gaffney Ledger
Court of Common Pleas, Cherokee County, SC
May 30, 1997

1. Date of Publication: May 17, 1995

2. Case Summary:

The Ledger of Gaffney, South Carolina publishes a voice mail letter to the editor column on its editorial page entitled "What is Your Beef?" On May 17, 1995, it published the following anonymous item:

> Are the drug dealers paying?

I'd like to know what the people think about this.

The Chief of the Blacksburg Police Department knows that these people are selling drugs and they have been selling them many years and he hasn't done anything about it. Now I often wonder if the drug dealers are paying the Chief of Blacksburg.

The Chief of Police for the town of Blacksburg, Wayne Elder, filed a libel claim, alleging that the publication was false and defamatory. At trial, the plaintiff made no effort to prove either the state of mind of the publisher or that the statement regarding the caller's "wonderings" was false. Significantly, the plaintiff testified at trial that there were people in his community that he knew to be selling drugs but that he had been unable to do anything about it because of difficulties in getting warrants and using undercover operatives in a small town.

3. **Verdict:** For plaintiff
   Compensatory: $10,000
   Punitive: $300,000

4. **Length of Trial:** 2 days

5. **Length of Deliberation:** 1 hour, 25 minutes

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

Defendant's motion for summary judgment was denied as was a motion for reconsideration.

8. **Significant Mid-Trial Rulings:**

Defendant's motions for directed verdict at the close of plaintiff's case and at the close of all evidence were denied.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

Liability and damages were tried together. No special verdicts were requested.

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

The publisher and editor are life-long residents of Gaffney, a small town where the paper is published. The publisher and editor surveyed the jury venire and compiled information that we believed to be adequate to make an informed selection.

11. Pretrial Evaluation:

In advance of trial, there was concern that a jury could make an award because of generalized hostility to media even involving coverage and comment on public officials. There was some hope that a directed verdict motion might be granted.

12. Defense Juror Preference During Selection:

The ideal juror would have been literate, sophisticated, and suspicious of public officials. Unfortunately, such jurors are rare in any venue. We opted for jurors with ties to the community, no known biases against the newspaper, and the potential for anti-police experiences.

13. Actual Jury Makeup:

The jury seemed to match our target and for the most part, appeared to be attentive and capable of returning a verdict for the newspaper.

14. Issues Tried:

Plaintiff focused on publication and the police chief's wounded feelings. Defendant focused on the lack of actual malice and an experience where the plaintiff had tipped the editor that one of the editor's reporters was in the company of a drug dealer who was about to be busted.

15. Plaintiff's Theme(s):

This was an honest cop accused of taking bribes.

16. Defendant's Theme(s):

A citizen was asking a question that all citizens are entitled to ask.

17. Factors Believed Responsible for Verdict:

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

It was thought that the venire was at least neutral if not favorably disposed toward the publisher and through him to his newspaper.

b. Sympathy for plaintiff during trial:

The plaintiff offered testimony about how hard he had worked at being a good cop and how difficult it was to arrest drug dealers.

c. Proof of actual injury:

Plaintiff testified as to his wounded feelings.

d. Defendants' newsgathering/reporting:

Neither newsgathering nor reporting was involved here, as this was an electronic letter to the editor.

e. Experts:

None.

f. Other evidence:

Over objection, the plaintiff's wife testified that when she had come to purchase advertising for the plaintiff's campaign for Sheriff, the editor had treated her rudely. this testimony was admitted over objection by the defendant.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff was represented by experienced, capable trial lawyers. One was from the adjoining county and the other was from the county where the case was tried. The latter is a former congressman.

ii. Defendant's trial demeanor:

Defendant took the position that the plaintiff was misreading the publication and that it did not state as fact that the drug dealers were paying police chief bribes.

iii. Length of trial:

See item 4 above.

iv. Judge:

Perhaps the most telling comment was made by the judge in response to defendant's post-trial motions. The judge said, "I don't believe a newspaper should be allowed to ask the question, 'Are the drug dealers paying?'" The court also said the headline, "Are the Drug Dealers Paying?" implies actual malice.

h. Other factors:

None identified.

i. Lessons:

Anonymity in the item was a crucial problem.

18. Results of Jury Interviews, if any:

None.

19. Assessment of Jury:

No dispassionate assessment is available at this date. The defense was surprised by the verdict because we though the jury was a reasonably good one and that the evidence went in fairly well.

20. Post-Trial Disposition:

The defendant's motions for judgment notwithstanding the verdict, new trial, or new trial remittitur were denied. An appeal has been filed.

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G. **Case Name:** Mohammed Nagi Elshafei v. Maine Radio & Television Company
Cumberland County Superior Court, ME
Docket No. CV-95-371
June, 1997

1. **Date of Publication:** Two broadcasts in the Spring of 1993.

2. **Case Summary:**

The claim of Mr. Elshafei rose out of a television news broadcast by defendant Maine Radio & Television Company (WCSH-TV) and Harron Communications (WMTW-TV) in the spring of 1993. Those news stories reported on allegations made by Mr. Elshafei's former wife in connection with a then pending post-divorce proceeding that she believed her ex-husband intended to abduct their daughter and return with her to his native country, Egypt. At the time of the news broadcast, the court had already entered two temporary restraining orders prohibiting Mr. Elshafei from removing the child from the State of Maine. Subsequent to the first news broadcast, the divorce court held a full hearing on Mrs. Elshafei's allegations and concluded that they were without foundation. WCSH ran a story reporting on the judge's conclusion. WMTW did not. Approximately two years later (and a matter of days before the expiration of the statute of limitations), Mr. Elshafei sued the two television stations and his former wife, alleging defamation and intentional and negligent infliction of emotional distress and seeking compensatory damages from all parties and punitive damages from WCSH-TV.

3. **Verdict:** For the defendant.

4. **Length of Trial:** 7 days

5. **Length of Deliberation:** 4 hours

6. **Size of Jury:** 8

7. **Significant Pre-Trial Rulings:**

a. Prior to trial, WCSH moved to dismiss the suit on the grounds of the "fair reporting" or "neutral reportage" privileges. The motions were denied. The trial court held that although the story by WCSH in part reported on a matter pending in court, other aspects of the broadcast, notably reference to and comparison of the wife's allegations to a move entitled Not Without My Daughter took the news stories beyond the scope of the privilege.

b. Prior to trial, WCSH moved for an order in limine prohibiting the plaintiff from introducing into evidence the movie entitled Not Without My Daughter. WCSH showed that the movie had never been run on the station nor on the NBC network. The court ruled that to show the movie to the jury would be providing it with more information that would have been available to viewers and that it was improper to educate the jury by providing evidence extrinsic to the broadcast itself.

8. **Significant Mid-Trial Rulings:**

Immediately prior to the trial, the co-defendant Harron Communications settled the case. WCSH, under the unique provisions of Maine libel statutes, asked for permission to bring that settlement to the attention of the jury and to show to the jury the news broadcast of Harron Communications. Initially, the court agreed to permit the jury to be told of the settlement, but would not permit the WMTW broadcast to be shown. The court reversed itself during the course of the trial and did permit the broadcast to be shown. That fact permitted WCSH to compare its own broadcasts to the WMTW broadcast, and to argue to the jury that WCSH did a better job of reporting the full story than did WMTW.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

The court exercised no special trial management techniques. No mid-trial instructions were given to the jury. Mid-way through the trial, the plaintiff voluntarily dismissed the claim against the former wife, leaving only WCSH-TV as a defendant. That tactic undoubtedly was a source of much confusion to the jury. In the end, the case was tried only against WCSH-TV.

The former wife, being of very modest financial means, represented herself pro se, which caused some management problems for WCSH's counsel. However, she was entirely cooperative throughout the case. The jury was aware that she was unrepresented by counsel, a fact which no doubt made her far more sympathetic.

The court gave a copy of the written jury instructions to the jury to take into the jury room. Among other things, and over the objection of the defendant WCSH-TV, the court permitted the jury to determine the issues of privilege, including both the fair reporting privilege and certain family communication privileges. Specifically, a family member has a privilege to make statements to protect a family interest and a recipient of those statements has a derivative privilege. Thus, if Mrs. Elshafei was privileged to make public statements to protect what she reasonably thought was the legitimate interest of her daughter and WCSH broadcast a story reporting those statements, the privilege of Mrs. Elshafei also attaches to the television station. Notwithstanding defendant's argument that issues of privilege were legal issues to be ruled on by the court, the court sent all those issues to the jury.

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

None. In Maine, the information on the jury pool provided to the clerk of the court is very limited. Jurors are required to fill out a short questionnaire providing their name, education, occupation, and the occupation of their spouse. Abbreviated answers such as "business person" is sufficient. A home town is provided, but no address. Individual voir dire is not permitted and group voir dire by the trial judge is normally extremely limited.

11. Pretrial Evaluation:

Co-defendants Harron Communications settled prior to trial for $14,000. Defendant WCSH was prepared to settle in that same range. The plaintiff demanded $150,000 and would not budge. Based upon our evaluation of the facts and law, we did not make any offer.

12. Defense Juror Preference During Selection:

The defense attempted to select better educated persons and older women. The goal was to obtain a jury that would be as appreciative of First Amendment and free speech issues as possible and women who would be inclined to by sympathetic to the concerns of Mrs. Elshafei and her fears that her child was at risk for abduction.

13. Actual Jury Makeup:

Half men, half women; half college educated, and half not.

14. Issues Tried:

Defamation and intentional and negligent infliction of emotional distress.

15. Plaintiff's Theme(s):

The principal theme of the plaintiff was: Even though born in Egypt, I am a naturalized American citizen. It is wrong for the press to say things about me which are untrue. My wife said that I intended to abduct our child. That was a lie. The press never even tried to independently investigate that claim and never contacted me about it. They put my picture on television and held me up to public ridicule. That's not the American way.

16. Defendant's Theme(s):

It is the function of the free press to tell the public what goes on in public forums, whether the legislature, town meeting, or court. In this case, that is all that WCSH did. Mrs. Elshafei came to the press with a story about a case which was pending in court. We reported on that court case. We reported accurately and fairly. We contacted the plaintiff who refused to discuss the matter with us. We even gave him and his lawyer an opportunity on camera to speak to us and they declined. When the judge in the post-divorce proceeding ruled in favor of the husband, we fully and fairly reported that result, letting the viewers know that the plaintiff had been exonerated. We reported the story fairly and accurately, which is exactly what the public wants us to do. If you want the press to tell you what goes on in the courts of this state, then you must rule for the defendant.

17. Factors Believed Responsible for Verdict:

Not necessarily in order of importance, the following factors probably played a role:

- The plaintiff's overall lack of credibility and his tendency to exaggerate.
- The fact that the defendant WCSH reported the story accurately and fairly.
- The fact that WCSH gave the plaintiff an opportunity to comment on at least two occasions, but he refused.
- The fact that WCSH ultimately reported that he was exonerated.
- The fact that the plaintiff's evidence of his emotional distress resulting from the story was from his brother, a psychiatrist, who never in fact really examined him.
- The fact that we were able to show through a few witnesses that the plaintiff's reputation was never injured and that statements that he attributed to those witnesses were false.

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

b. Sympathy for plaintiff during trial:

It was hard to judge. On the one hand, the plaintiff told a sympathetic story about being subjected to a news report on a story which ultimately proved to be false. He lost that sympathy when he overplayed his hand and cried on the witness stand.

c. Proof of actual injury:

Very little. The only testimony regarding his state of mind as a result of the story was from his ex-girlfriend/fiancée who plainly exaggerated, and from his brother, a psychiatrist, who, although he never treated the plaintiff, claimed that the plaintiff suffered from post-traumatic distress disorder and clinical depression. The brother had never done a customary psychiatric workup of the plaintiff, had never treated him, was unaware of other circumstances surrounding his depression, and had never seen the news stories even though he said the stories were the cause of his brother's depression.

d. Defendants' newsgathering/reporting:

The reporter responsible for the story interviewed Mrs. Elshafei and contacted Mr. Elshafei's attorney to offer him an opportunity to speak. It is unclear whether the reporter ultimately looked at documents in the post-divorce dispute over the child.

e. Experts:

As noted above, the plaintiff had an expert psychiatrist, the plaintiff's brother. The defendant had no expert as such, although the news director for the defendant did testify. The reporter was unavailable, having since been employed by another station out of the area. A decision was made not to use the reporter as a witness for various tactical reasons.

f. Other evidence:

Videotapes of the story were shown several times. In addition, a newspaper story about the same incident was also introduced in evidence, as was the broadcast of the other television station that settled before trial.

g. Trial dynamics:

i. Plaintiff's counsel:

Competent, low-key. Did the best he could with what he had.

ii. Defendant's trial demeanor:

Defendant personally exaggerated. Sometimes would visually cry at counsel table, a tactic which seemed to overplay his hand.

iii. Length of trial:

Seven days.

iv. Judge:

Good trial demeanor, even handed. Not well informed about First Amendment law. Made a number of erroneous rulings with respect to jury instructions.

h. Other factors:

i. Lessons:

18. Results of Jury Interviews, if any:

None were performed.

19. Assessment of Jury:

Reasonably competent -- about average for a jury in Maine.

20. Post-Trial Disposition:

Plaintiff has appealed, presumably on the issue of the refusal of the court to permit him to play Not Without My Daughter to the jury.

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Portland, ME

Defendant's Attorneys:

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H. **Case Name:** Artie Fitzgerald and Lewis Jones, II v. The Macon Telegraph Publishing Company
Superior Court of Bibb County, GA
Civil Action No. 94-CV-06077
1996

1. Date of Publication: September 21 and 23, 1993.

2. Case Summary:

Plaintiff, Artie Fitzgerald, manufactured and sold African-American hairstyling products. Louis Jones, II was a salesman with a Macon automobile dealership. Fitzgerald and Jones filed their complaint contending that they were libeled by articles appearing in The Macon Telegraph on September 21 and 23, 1993, which were written by a young reporter. Plaintiff Fitzgerald, as a promoter of hairstyling competition events and seller of various hair products, promoted a hairstyling contest at a local hotel. After the contest was over, the apparent winner had her trophy taken away from her which resulted, among other things, in the police being called to the scene. The reporter was asked to go to the hotel and report on the incident, but he did not reveal to The Macon Telegraph that the lady whose trophy was taken was his girlfriend. In writing the articles, he reported that Fitzgerald was obligated to give away, as the first prize in the contest, a Porsche automobile, and the car was not given away because the dealership took it back due to a bad check which Fitzgerald gave to the dealer. Plaintiff Jones was quoted as having said that he came to the hotel to take the car back to the dealership due to the bad check. The articles also stated that Fitzgerald had left the hotel without checking out.

Fitzgerald complained primarily about the statements that he did not give a Porsche away as he was obligated to do, had given a bad check to the dealership and had not paid the hotel. He also complained about many other statements in the article which did not prove to be very important as the case progressed.

Plaintiff Jones contended that the article quoted him incorrectly and made it appear that he had made misstatements about Fitzgerald's payment to the dealership for the Porsche automobile.

After an investigation, it was determined that the reporter had failed to investigate the matter thoroughly and had no basis for making many of the statements which he had placed in the article. A reading of the brochure printed for the hair show clearly indicated that the Porsche did not have to be given away due to the small number of contestants who entered the styling contest. It was also false that Fitzgerald had given the dealership a bad check, and

Fitzgerald had prepaid his bill at the hotel before leaving. The Macon Telegraph did a substantial retraction of those statements which were apparently false.

In his initial complaint, Fitzgerald did not ask for punitive damages, but he amended his complaint shortly before trial to include a claim for punitive damages.

After a thorough and lengthy examination into the background of plaintiff Fitzgerald, it was learned that he had given numerous bad checks in connection with his business activities, and while he was not obligated to give away the Porsche automobile in the contest, he in fact did not give away the other prizes which were promised. The defense was based primarily on the fact that although false statements were made about the particular hairstyling contest in Macon, those statements were consistent with his actual reputation for giving bad checks and not giving away prizes that were promised. The defense to the complaint by Louis Jones, II, was that the statement made regarding him were simply not libelous as a matter of law.

3. **Verdict:** $125,000 for Plaintiff Fitzgerald
   Compensatory: $125,000
   Punitive: 0

(The case involving Louis Jones, II was never tried and was later disposed of on defendant's motion for summary judgment.)

4. **Length of Trial:** 8 days

5. **Length of Deliberation:** 1½ days

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

The court denied defendant's motion to dismiss the amendment to the complaint adding punitive damages within a week or two of trial. After Fitzgerald's trial, the trial court granted defendant's motion for summary judgment as to Louis Jones, II. Defendant made a motion for directed verdict on the grounds that the plaintiff had not proved any business loss, and the court denied the motion.

8. **Significant Mid-Trial Rulings:**

None.

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

On defendant's motion, the court bifurcated the case of Louis Jones, II from that of Artie Fitzgerald. Defendant requested the court to charge that substantial truth may be established by proof of similar bad act, but the court refused.

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

None.

11. Pretrial Evaluation:

The Macon Telegraph was open to some modest settlement with plaintiff Fitzgerald. Fitzgerald began by demanding $14,500,000 in damages, and after lengthy settlement discussions, Fitzgerald never made a demand for less than $7,500,00. The defendant's initial offer of $30,000 to settle was never increased based on the plaintiff's high demand.

12. Defense Juror Preference During Selection:

Defense favored jurors who could understand business transactions, including the significance of giving bad checks.

13. Actual Jury Makeup:

This information is not available from the file.

14. Issues Tried:

Defamation, falsity, fault, malice (for punitive damages). The defense did not deny the falsity of certain particulars in the article, but focused on two major issues:

a. While statements made about Fitzgerald were inaccurate, they did not, in fact, damage his reputation due to his past conduct.

b. Fitzgerald contended that the articles destroyed his entire business, and the defense focused on the fact that his business was so poorly run and unprofitable that the articles had nothing to do with his financial condition following the publication.

15. Plaintiff's Theme(s):

Plaintiff contended that the articles showed that Fitzgerald was a dishonest and disreputable businessperson and that these articles having been read by his customers, they refused to buy his products and he was forced out of business.

16. Defendant's Theme(s):

Defendant contended that in light of Fitzgerald's history of giving bad checks and his having failed to give away prizes that were promised at the contest, the statement about his giving a bad check and not giving away the Porsche were consistent with his actual reputation. Also, the evidence showed that Fitzgerald was such a poor businessman and had never made a profit in his newly formed business, and consequently, he was not entitled to any damages for loss of business or profits.

17. Factors Believed Responsible for Verdict:

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

There was no indication that any of the jurors were biased against the newspaper. Only one juror appeared to be particularly sympathetic with the plaintiff. The plaintiff was from Atlanta and had little or no connections with people in Macon other than customers and participants in his styling contests. The jury seemed to be neutral as to the plaintiff and defendant at the outset of the case.

b. Sympathy for plaintiff during trial:

Plaintiff did not come across as a sympathetic person due to the fact that he was caught making statements which either contradicted his prior testimony in the trial, or contradicted documents or other statements which he had made prior to the trial. Also, the plaintiff had clearly mistreated the participants in the contest, notwithstanding the fact that he did not have to give away a Porsche automobile. It was proved beyond dispute that the plaintiff had given numerous bad checks in the eighteen months preceding the styling contest in Macon, and plaintiff came across as an extremely poor and disorganized businessman.

c. Proof of actual injury:

Plaintiff contended that his entire business had been destroyed as a result of these articles and he was claiming both extensive economic loss and medical expenses due to the emotional trauma caused by the articles. He called an expert witness to prove the amount of damage to his business, and he also called a psychologist to discuss his emotional distress

after the articles were published. Plaintiff also relied on the doctrine of presumed damages for libel per se.

d. Defendants' newsgathering/reporting:

Unfortunately, the articles in question were written by a very young and inexperienced reporter who made several fundamental errors. First, the reporter did not investigate the article thoroughly and had no one who could back-up or verify the statements which he made about the plaintiff. In addition, the person bout whom the article was primarily written was the reporter's girlfriend which made it a clear conflict of interest and gave the plaintiff the ability to argue that the article was written with actual common law malice in order to get revenge for the way the reporter's girlfriend was treated during the styling contest.

e. Experts:

Plaintiff: Bruce Seaman, Ph.D., economics, Georgia State University, Atlanta (plaintiff's business losses); Chester Cavil, Target Marketing Group, Decatur, GA (plaintiff's market potential absent the article); R.C. Shah, M.D., Riverdale, GA (emotional distress). None of the plaintiff's experts was very effective.

Defendant: Ray Pippen, CPA, Macon, GA. This witness reviewed all of plaintiff's business records and prepared charts t show that Fitzgerald had never made any money and that he actually went out of business due to his own poor business practices and losses and not as a result of the articles. He has excellent jury demeanor, and is very able to simplify the case for the jury.

f. Other evidence:

Plaintiff produced numerous witnesses who said they had read the articles in question, thought less of the plaintiff, and at least one stated that he would no longer do business with the plaintiff because of what he read. Many of plaintiff's witnesses actually assisted the defense by saying that although they read the articles, they would have continued to buy his products, but he never made any effort to make further sales to them. The defense conceded at the outset of the trial that there were inaccuracies and mistakes made in the publication, but the evidence would show that the mistakes did not harm the plaintiff.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel tried to portray Artie Fitzgerald as a person who had struggled hard to get a business underway which was growing, and that Fitzgerald, as an African-American, had struggled against all of the problems faced by minority businesspeople, only to be

destroyed by the false statements made in the articles about his business practices. Plaintiff's counsel asks the jury to award $14,500,000.

ii. Defendant's trial demeanor:

Defendant's counsel decided not to defend statements which were clearly false, but simply place those statements in the context of Mr. Fitzgerald's overall reputation to show that no damage was in fact done. Defense counsel also pointed out the numerous inconsistencies in the plaintiff's testimony and suggested to the jury that the plaintiff was not being truthful and honest in the presentation of his case. The general theme was that while newspapers are not perfect, the plaintiff was not deserving of any damages based on his conduct and dishonesty.

iii. Length of trial:

The trial began on a Monday and ran through a Wednesday. On Thursday morning, it was learned that the presiding judge had a death in the family, and the trial was suspended for the remainder of the first week and resumed on Monday of the second week. The case proceeded through Thursday of the second week, and the jury got the case around noon on Thursday, and deliberated until late Friday afternoon.

iv. Judge:

The judge is relatively new to the bench but very conscientious and intelligent. Although it is believed that she had never tried or presided over a libel case, she did a very conscientious job of trying to understand libel law and the various types of damages. After lengthy charge conferences, the judge gave a very good charge on both libel law and the issue of damages. Given the fact that the plaintiff amended the complaint to request punitive damages just a week or two before trial, defendant's counsel was surprised that she did not grant a continuance for further discovery on the issue of punitive damages, or disallow the amendment altogether.

h. Other factors:

Most of the factors involved in this trial have already been discussed, but defendant's expert, a CPA, did an excellent job of preparing charts which demonstrated the losses which the plaintiff had suffered in his business over the preceding months before the case was tried. It is believed that these demonstrations were effective in holding down the amount of damages, and in particular, plaintiff's claim that his business had been destroyed as a result of the articles. This case was very fact-intensive on the question of plaintiff's actual business reputation and ability, and did not concentrate too much on the actual legal issues involving libel.

i. **Lessons:**

Don't try to defend the indefensible and try to prove statements which are clearly false and are not relevant. In a case such as this, the case must be tried based on the actual reputation and ability of the plaintiff. Plaintiff was the type of individual who would say anything under any circumstances if he thought it would benefit his position, and based on this attitude, we were able to demonstrate before the jury that the plaintiff had actually lied under oath on different occasions.

18. Results of Jury Interviews, if any:

The jury was out for almost a day-and-a-half in deliberations, and based on interviews, they were far apart. One juror wanted to give the plaintiff $6,000,000 and several jurors wanted to give the plaintiff nothing. Other jurors were somewhere in between. The foreman of the jury turned out to be a very level-headed businessman who seemed to understand the defense arguments and was very attentive to defense counsel during the entire trial. The interview with the foreman revealed that those jurors who started out at no damages were able to talk to those who were at the high end of the damages down over the course of the deliberations. It was finally decided that they would never reach a verdict on no damages, and they agreed on $125,000 hoping that this would satisfy the plaintiff and not result in an appeal by the defendant. The foreman also stated that they felt that the plaintiff was an extremely poor businessman and did not deserve any substantial damages.

The jurors who were interviewed thought that the attorneys on both sides had done a good job trying the case.

19. Assessment of Jury:

Those jurors who approached the case in a rational way and paid attention to the evidence clearly thought that the plaintiff was not deserving of any substantial damages. It was apparent that some jurors were in the middle and were capable of being swayed one way or the other depending on how the majority finally voted. There was at least one juror who was extremely upset with the newspaper, and he apparently was the juror who wanted to give $6,000,000 in damages.

20. Post-Trial Disposition:

In light of the difficulties with this case faced by the defense, the verdict of $125,000 was paid after the appeal time ran, and no appeal was ever considered.

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I. Case Name: J. Michael Fitzhugh v. Little Rock Newspapers
Ark. Cir. Ct., Sebastian County

1. Date of Publication: June 20, 1994

2. Case Summary:

This is a libel case brought by J. Michael Fitzhugh against Little rock Newspapers, which publishes the Arkansas Democrat-Gazette. Mr. Fitzhugh is a former U.S. Attorney for the Western District of Arkansas, who resigned from that capacity in August 1993 after an unsuccessful attempt to stay with the U.S. Attorney's office under the Clinton administration. Following his resignation, Mr. Fitzhugh became a partner in a Fort Smith, Arkansas, law firm.

Ten months after his resignation, the Democrat-Gazette published a photo of Mr. Fitzhugh with an article entitled "Whitewater Counsel Kicks Off First Prosecution." The article reported on events surrounding the indictment and prosecution of Charles Matthews and Eugene Fitzhugh., and was accompanied by two photographs, one of Charles Matthews with a caption of "Matthews," and another of J. Michael Fitzhugh with a caption of "Fitzhugh." The photo was mistakenly selected from photos that were computer filed alphabetically. The article identified the defendants as Charles Matthews and Eugene Fitzhugh, "a Little Rock lawyer," and further said, "the men are little known outside Little Rock."

The Democrat-Gazette moved for summary judgment because the article taken as a whole could not be reasonably construed to make false statements of fact of and concerning J. Michael Fitzhugh and because there was no evidence of actual malice. At trial, the paper also moved for a directed verdict on these grounds, and also on the grounds that plaintiff failed to prove injury to reputation. The court denied all of these motions. Additionally, the court ruled that the plaintiff was a private figure, and accordingly, instructed the jury that the requisite level of fault was negligence.

The jury returned a verdict for the plaintiff, for $50,000. Judgment was entered for that amount, and the paper has appealed to the Arkansas Supreme Court.

3. **Verdict:** For plaintiff
   Compensatory: $50,000
   Punitive: $0

4. **Length of Trial:** 2 days

5. **Length of Deliberation:** 1 hours, 40 minutes.

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

Trial court denied defendants' motion for summary judgment which had urged that the article did not concern the plaintiff and that there was not actual malice.

8. **Significant Mid-Trial Rulings:**

Trial court denied defendant's motion for directed verdict and found that plaintiff was a private figure and need only prove negligence. Significantly, the judge withheld the ruling on the public figure issue until the instruction conference, so that counsel had to preserve the public figure contention before the jury, only to have the "rug pulled" after the evidence was in.

Trial court's procedural and evidentiary rulings were overwhelmingly in favor of the plaintiff. The judge allowed unlimited hearsay from plaintiff as to conversations with others concerning the publication.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

None. General verdict form, with per se instructions.

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

None, other than reviewing with local counsel the court's questionnaires, completed by each potential juror.

11. Pretrial Evaluation:

The defendant believed that plaintiff was a public figure, and that he could show no actual damages. Offers for settlement were declined by defense counsel.

12. Defense Juror Preference During Selection:

Better educated individuals, readers of newspapers; avoided those likely to resent media, large companies, or to have resentments residual to a recent "newspaper war" in which the defendant was the victor.

13. Actual Jury Makeup:

Nine women, three men.

14. Issues Tried:

Loss of reputation, presumed damages, negligence.

15. Plaintiff's Theme(s):

Plaintiff argued that he was a private figure and the Democrat-Gazette was negligent and should be held accountable for that negligence. Plaintiff also attacked the paper for the size of the correction and the placement of the correction on an interior page, while the offending photograph ran on the front page of a section.

16. Defendant's Theme(s):

The Democrat-Gazette argued that it had made a mistake, admitted to that mistake, and published a correction, and further that plaintiff had suffered no damages. Defendant also asserted that "Gotcha" lawsuits should not be allowed to prevent newspapers from continuing to report matters of public interest.

17. Factors Believed Responsible for Verdict:

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

No great love for the media in this venire, but neither was there any strong animus.

b. Sympathy for plaintiff during trial:

Not overwhelming.

c. Proof of actual injury:

None. One witness testified that she briefly thought the plaintiff was indicted.

d. Defendants' newsgathering/reporting:

A mistake was, in fact, made and admitted by the Democrat-Gazette's employees.

e. Experts:

None.

f. Other evidence:

The defendant's explanation of its policy of placing corrections in a standard location on an interior page did not appear to be well received by the jury.

g. Trial dynamics:

i. Plaintiff's counsel:

Excellent trial attorney.

ii. Defendant's trial demeanor:

Managing editor, weary on cross, admitted to plaintiff's counsel that he could accept the proposition that plaintiff suffered some damage. This added a considerable challenge to defendant's principal trial theme.

iii. Length of trial:

Reasonable, not a factor in the result.

iv. **Judge:**

Plaintiff oriented, no love of the media.

h. **Other factors:**

None.

i. **Lessons:**

Since the action, the newspaper has reevaluated where corrections, particularly with photographs, should be published. Plaintiff's counsel successfully attacked the newspaper's refusal to give the retraction the same play as the story. The policy reasons for "correction boxes" ring hollow in this setting.

When such an obvious mistake is made, admit it at the first opportunity, i.e., in voir dire. (You can still ask if they are willing to follow instructions that protect the free speech rights of all of us.) Show the jury how mistakes in the daily newspaper business are inevitable, but don't push absence of fault as a trial theme. You probably won't win on fault anyway, and risk the jury's ire if you defend the error.

18. Results of Jury Interviews, if any:

None made. The judge disallowed post-trial contacts.

19. Assessment of Jury:

Fair and reasonable. The plaintiff asked for $350,000, and the jury awarded $50,000. Counsel intuits that the three jurors (two men, one older woman, all better educated) for the defense felt there was no damage. The fiscal conservatism of this middle-class, largely blue collar community may have been a factor in the low damage award. This case could have been won before the jury if the plaintiff had been found to be a public figure.

20. Post-Trial Disposition:

The Democrat-Gazette has appealed to the Arkansas Supreme Court, and waiting for the court to set the matter for oral argument. Issues raised: proof of reputation injury, public figure.

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J. Case Name: Food Lion, Inc. v. Capital Cities/ABC, Inc., ABC Holding Co., American Broadcasting Companies, Inc., Lynne Litt, Richard N. Kaplan, Ira Rosen, and Susan Barnett
United States District Court for the Middle District of North Carolina
No. 6:92 CV 00592
December 1996 and January 1997

1. Date of Publication:

The hidden camera investigation that gave rise to Food Lion's claims was conducted during April and May, 1992. The PrimeTime Live segment about Food Lion that included some of the hidden camera footage was broadcast November 5, 1992.

2. Case Summary:

In the spring of 1992, two ABC News producers conducted an undercover investigation in three supermarkets operated by Food Lion, a large and rapidly-growing regional food store chain based in Salisbury, North Carolina. Both Lynne Litt (now Lynne Dale), who worked in ABC's Atlanta bureau, and Susan Barnett, a PrimeTime Live producer based in New York, had received allegations about unsanitary food handling practices, consumer deception and unlawful labor practices from Food Lion employees and former employees. In an effort to determine the truth of these allegations, both applied for entry-level jobs at Food Lion stores. In seeking employment, the producers used their actual names and social security numbers but falsified some aspects of their personal biographies and work histories. In April 1992, Ms. Barnett worked for approximately one week as a deli clerk in a Food Lion store in Myrtle Beach, South Carolina. During May, Ms. Dale worked for about

ten days as a meat wrapper in two Food Lion stores in North Carolina. Between them they recorded approximately 45 hours of hidden camera videotape in the Food Lion stores.

Around August 1992, Food Lion learned that ABC News was working on a possible PrimeTime Live segment and deduced that Ms. Dale had conducted a hidden camera investigation during her employment. Food Lion threatened suit and demanded that ABC refrain from broadcasting any hidden camera footage recorded by Ms. Dale or any other ABC reporter. ABC refused.

On September 18, 1992, Food Lion filed suit against ABC and Ms. Dale in the Superior Court of Forsyth County, North Carolina, asserting claims of fraud and unfair trade practice against both defendants, negligent supervision by ABC, and breach of fiduciary duty by Ms. Dale. Among other things, the complaint asked that ABC be restrained from broadcasting any videotaped images, audiotaped conversations, or Food Lion documents gathered by Ms. Dale "while she was posing as a Food Lion employee." Simultaneously, Food Lion obtained an ex parte order requiring ABC to make Ms. Dale available for a deposition, and to produce all videotapes and documents related to her investigation, "within five days after service of the summons and complaint upon ABC." ABC immediately removed the suit to the U.S. District Court for the Middle District of North Carolina and moved to vacate the state court's discovery order. Magistrate Judge Trevor Sharp granted ABC's motion to vacate on September 24, 1992, ruling that the discovery was "in aid of a frivolous anticipated application for a prior restraint." Judge Sharp's order is reported at 1992 WL 456652, 20 Media L. Rep. 2263. On October 8, 1992, the defendants moved to dismiss the complaint.

When PrimeTime Live aired the Food Lion segment on November 5, 1992, Food Lion learned that Susan Barnett also had worked in a Food Lion store. After taking the producers' depositions, reviewing the videotape recorded in their stores, and conducting other discovery, Food Lion moved on March 30, 1993 for leave to amend its complaint to add a claims for trespass, "eavesdropping" in violation of federal wiretap statutes, violations of the federal RICO act, and civil conspiracy. Food Lion also sought leave to add additional defendants, including Ms. Barnett; Ira Rosen, a senior producer for PrimeTime Live; Richard Kaplan, the executive producer of the program; and two ABC corporate affiliates. The court granted Food Lion's motion in August, 1993, whereupon the defendants moved to dismiss the amended complaint.

On March 21, 1995, Judge J. Carlton Tilley granted the defendants' motion to dismiss Food Lion's RICO and wiretap claims, denied the motion with respect to Food Lion's claims of fraud, trespass and civil conspiracy, and deferred a ruling on the remaining claims. 887 F. Supp. 811, 23 Media L. Rep. 1673. On November 27, 1996, the court denied the defendants' renewed motions to dismiss and motions for summary judgment. 951 F. Supp. 1217, 25 Media L. Rep. 1161.

The liability phase of the trifurcated jury trial began December 9, 1996. On December 20, 1996, the jury found in favor of Food Lion on its claims for fraud, trespass and "breach of loyalty." After the jury returned its verdict, Judge Tilley informed the parties that Food Lion would not be permitted to offer evidence of damages resulting from lost profits, lost sales, or diminished stock value. Judge Tilley explained his rationale for this ruling in a post-trial opinion issued on May 9, 1997. 964 F. Supp. 956, 25 Media L. Rep. 1865.

The compensatory damages phase of the trial required less than a day. Food Lion presented a single witness, who testified that the costs incurred by Food Lion in hiring Ms. Dale and Ms. Barnett were $2,432.35. After a brief deliberation, the jury awarded Food Lion compensatory damages of $1,402 -- $1,400 on its fraud claim and $1 each on its trespass and breach of loyalty claims.

The punitive damages phase of the trial began January 6, 1997. On January 22, 1997, after a week of deliberations, the jury awarded Food Lion $5,545,750 in punitive damages -- $4 million against Capital Cities/ABC, $1.5 million against American Broadcasting Companies, and $45,750 against producers Kaplan and Rosen. The jury did not order either Ms. Dale or Ms. Barnett to pay punitive damages.

3. **Verdict:** For plaintiff

Compensatory: $1,402 ($1,400 for fraud, $1 each for trespass and "breach of loyalty")

Punitive: $5,545,750

Capital Cities - $4 million
ABC - $1.5 million
Richard Kaplan, executive producer - $35,000
Ira Rosen, chief of investigative unit - $10,750

4. **Length of Trial:** 24 days, including jury deliberations: 10 days on liability, one day on compensatory damages, and 13 days on punitive damages

5. **Length of Deliberation:** one day on liability, less than two hours on compensatory damages, approximately seven days on punitive damages

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

a. September 24, 1992. Magistrate Judge Sharp granted ABC's motion to vacate state court order for expedited discovery of videotape recorded in Food Lion stores on grounds that the discovery was "in aid of a frivolous anticipated application for a prior restraint." 1992 WL 456652, 20 Media L. Rep. 2263.

b. March 21, 1995. Judge Tilley granted the defendants' motion to dismiss Food Lion's RICO and wiretap claims, denied the motion with respect to Food Lion's claims of fraud, trespass and civil conspiracy, and deferred a ruling on the remaining claims. He also dismissed all claims for "reputational damages" allegedly caused by the broadcast, but deferred ruling on what categories of alleged broadcast damages were "reputational." 887 F. Supp. 811, 23 Media L. Rep. 1673.

c. April 19, 1996. Magistrate Judge Sharp granted in part and denied in part Food Lion's motion for sanctions based on defendants' failure to produce certain portions of the hidden camera videotape recorded during their investigation of Food Lion. 165 F.R.D. 454.

d. September 6, 1996. Magistrate Judge Sharp granted, on First Amendment grounds, defendants' motion for a protective order prohibiting Food Lion from proceeding with numerous third-party subpoenas directed to hotels, courier services and telecommunications companies. By the subpoenas, Food Lion sought to obtain information about where ABC's employees traveled and with whom they talked in connection with their newsgathering activities. 1196 WL 575946, 24 Media L. Rep. 2431.

e. November 8, 1996. Judge Tilley affirmed Magistrate Judge Sharp's earlier rulings permitting Food Lion to conduct discovery into two hidden camera investigations other than the Food Lion investigation. 951 F. Supp. 1211, 25 Media L. Rep. 1182.

f. November 27, 1996. Judge Tilley denied defendants' renewed motions to dismiss Food Lion's claims for breach of fiduciary duty and for violation of the North Carolina Unfair and Deceptive Trade Practices Act and defendants' motions for summary judgment on Food Lion's claims of fraud, trespass, negligent supervision and civil conspiracy. 951 F. Supp. 1217, 25 Media L. Rep. 1161.

g. Prior to trial, Judge Tilley ruled that Food Lion could not offer evidence in an attempt to show that ABC News' investigation of Food Lion was the product of a "conspiracy" between ABC and the United Food and Commercial Workers Union, or that the UFCW provided information to ABC in furtherance of a "corporate campaign" against Food Lion. He also ruled that defendants could not offer evidence that the investigation was motivated by allegations of consumer deception, unsanitary food handling and labor law violations that ABC had received from Food Lion employees and former employees. He also ruled that the jury would not be shown the November 5, 1992 broadcast that incorporated portions of the hidden camera videotape recorded by Ms. Dale and Ms. Barnett.

8. <u>Significant Mid-Trial Rulings:</u>

After the jury returned its verdict finding the defendants liable for fraud, trespass and breach of loyalty, Judge Tilley ruled that Food Lion could not pursue compensatory damages for lost sales, lost profits, diminished value of its stock, or other damages allegedly caused by

the November 5, 1992 PrimeTime Live broadcast. His rationale -- i.e., that Food Lion's lost profits, lost sales and similar damages were not proximately caused by the newsgathering activities targeted by Food Lion's claims -- was explained in an opinion issued May 9, 1997. 964 F. Supp. 956, 25 Media L. Rep. 1865.

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

The trial was trifurcated into liability, compensatory damages, and punitive damages phases. The jury was required to return a special verdict at the conclusion of each phase. Judge Tilley gave both preliminary and closing instructions during each phase of the trial.

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

Counsel deem it inadvisable to disclose this information while the case remains pending.

11. Pretrial Evaluation:

Counsel deem it inadvisable to disclose this information while the case remains pending.

12. Defense Juror Preference During Selection:

Counsel deem it inadvisable to disclose this information while the case remains pending.

13. Actual Jury Makeup:

1. Black male, 40s (foreperson). Resident of Greensboro, N.C. Two years of college. Supervisor for door manufacturing company. Spouse employed by cellular communications company. Married, two children.
2. Black male, 50s. Sanford, N.C. Employed by cosmetics manufacturing company. Married. Spouse not employed outside the home. Did not see November 5, 1992 PrimeTime Live broadcast.
3. White female, 60s. Southern Pines, N.C. Housewife. Two years of community college. Spouse employed by A.W. Perdue Poultry for 37 years prior to retirement. Did not see broadcast.
4. White female, 60s. Asheboro, N.C. High school. Retired after working 37 years with shoe manufacturing company. Did not see broadcast. Watches A&E, the Lifetime Channel, and the Family Channel. Does not shop at Food Lion because stores are "too dark."

5. Black male, 50s. Mocksville, N.C. High school. Employed by electronics manufacturing firm. Spouse works for same company. Daughter, age 17, works for Food Lion. Did not see broadcast.
6. White male, 60s. Asheboro, N.C. College degree. Retired civilian missile engineer with U.S. Army. Spouse retired. Did not see broadcast.
7. White male, 60s. Greensboro, N.C. Masters degree. Administers outside research contracts for chemical and pharmaceutical manufacturing company. Spouse not employed outside of home. Did not see broadcast.
8. Black female, 30s. Thomasville, N.C. Completed tenth grade. Employed by furniture manufacturer. Spouse employed by another furniture company. Saw broadcast.
9. White female, 40s. Reidsville, N.C. High school; two years of community college. Unemployed; former postal worker. Spouse is maintenance mechanic for tobacco company. Daughter had summer job at Food Lion in 1990. Did not see broadcast.
10. Black female, 30s. Winston-Salem, N.C. One and a half years of college. Receptionist for health care company. Married, no children. Spouse employed by public hospital. Did not see broadcast.
11. White female, 30s. Winston-Salem, N.C. High school. Manages family business (towing company) with husband. Saw broadcast.
12. White male, 40s. Reidsville, N.C. High school. Supervisor with Miller Brewing Company. Spouse not employed outside the home. Did not see broadcast.

14. Issues Tried:

Liability and compensatory damages for fraud, trespass, breach of loyalty and violation of the North Carolina Unfair and Deceptive Trade Practices Act; punitive damages.

15. Plaintiff's Theme(s):

Food Lion relied heavily on the biblical admonition that "No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to the one and despise the other." (Matthew 6:24) In furtherance of this theme, Food Lion's evidence and arguments stressed that Ms. Dale and Ms. Barnett lied to Food Lion in order to get jobs and gain access to information and places that would have been denied to them had they revealed their true purposes, and that once hired, they were disloyal employees who were serving their true "master" -- ABC -- while pretending to serve Food Lion. During the punitive damages phase Food Lion's theme was that PrimeTime Live used hidden cameras not in the pursuit of truth, but in the pursuit of ratings and profits.

16. Defendant's Theme(s):

Undercover reporting, which always involves some degree of deception, is a time-honored and valuable tool for uncovering unlawful or anti-social behavior. Although Ms. Dale and Ms. Barnett deceived Food Lion as to their true purposes in order to obtain entry-level jobs, they performed those jobs satisfactorily and rendered a day's work for a day's pay even as they recorded videotape for possible inclusion in a later broadcast.

17. Factors Believed Responsible for Verdict:

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

Both the responses of potential jurors on voir dire and the responses of the actual jurors in post-trial interviews revealed a diverse spectrum of pre-existing attitudes within the venire, ranging from overt hostility vis-à-vis the news media to equally overt hostility toward a food chain that would deceive customers or sell out-of-date products. This diversity is reflected in the fact that when the jury retired to deliberate about punitive damages, the initial range was from zero to one billion dollars. See "Results of Jury Interviews," below.

b. Sympathy for plaintiff during trial:

This factor is difficult to ferret out or quantify in a suit between large corporations; however, with the notable exception of the lone juror who held out for $1 billion in punitive damages for more than a week, Food Lion's witnesses did not appear to invoke the sort of sympathy that counsel have experienced in defamation suits brought against the news media by individuals or small businesses.

c. Proof of actual injury:

In light of Judge Tilley's rulings limiting the types of damages that Food Lion could pursue, Food Lion called a single witness during the compensatory damages phase of the trial -- a controller who testified that Food Lion's direct and indirect costs incurred in hiring Ms. Dale and Ms. Barnett totaled $2,432.35. The jury awarded Food Lion compensatory damages of $1,402: $1,400 on its breach of loyalty claim, and $1 each on its fraud and trespass claims.

d. Defendants' newsgathering/reporting:

This was the only activity at issue in the case. Food Lion never filed a claim challenging the truth of the broadcast, and the jurors were not told what motivated ABC's investigation of Food Lion, nor were they shown the broadcast. (However, at least two of the jurors had seen the broadcast when it aired in 1992.) They did see hours of videotape recorded in Food Lion's stores, the overwhelming majority of which was never broadcast.

After the trial NBC showed the broadcast to several of the jurors; some of them said that seeing it made them more sympathetic to ABC, while others said it made them more sympathetic to Food Lion.

e. Experts:

During the punitive damages phase Food Lion employed the testimony of Robert Lissit, an associate professor of journalism from Syracuse University, in an attempt to link hidden camera investigations with ratings and ratings with profits. The defense expert was Dr. Louis Hodges, a professor of religion from Washington & Lee University, who countered Mr. Lissit's testimony and testified about the history and social benefits of undercover journalism.

f. Other evidence:

The principal witnesses in the case were Ms. Dale and Ms. Barnett, both of whom testified extensively on both the plaintiff's case and the defense case. The jurors apparently liked them and found them very credible. (The jury did not award punitive damages against either producer.) The jury also found for Ms. Dale on the most hotly contested factual issue -- i.e., whether she had tampered with a hot water heater in order to "stage" footage detrimental to Food Lion.

g. Trial dynamics:

i. Plaintiff's counsel:

All proceedings in Judge Tilley's courtroom are, at his insistence, civil and dignified; accordingly, the entire trial was conducted in at atmosphere of courtesy and professionalism devoid of theatrics and showmanship. Several of the reporters who covered the trial wrote stories emphasizing that the trial was both high-tech (owing to the use of videotape, real-time transcript reporting, and electronic exhibits) and low-key.

ii. Defendant's trial demeanor:

Ms. Dale and Ms. Barnett were present for the entire trial. All other defendants appeared via videotaped deposition testimony. Except as noted under "Other evidence," above, counsel deem it inadvisable to discuss their evaluation of the plaintiff or defense witnesses while the case remains pending.

iii. Length of trial:

See "Results of jury interviews," below.

iv. **Judge:**

Judge Tilley's numerous substantive rulings as to the claims that were and were not tried and the types of damages that Food Lion could and could not pursue undoubtedly affected the verdict in ways that cannot be determined or measured, but by his evenhanded conduct of the trial and his courteous demeanor he avoided giving the jury any clues as to his opinions.

h. **Other factors:**

The punitive damages verdict appears to have been a compromise that resulted in part from the juror's perception that it was incumbent on them to reach a verdict. After approximately two days of deliberations, the jury twice reported that they were deadlocked and an "Allen charge" was given. Late in the afternoon of Friday, January 17, after four days of deliberations, the jury reported that they could not come to an agreement damages and felt they could "go no further." After several jurors indicated by a show of hands that they believed they could reach a verdict with respect to at least some of the 34 questions on the special verdict form, Judge Tilley gave them the weekend off -- including the Martin Luther King holiday on Monday, January 20 -- and asked them to resume their deliberations on the following Tuesday. After the jurors were released for the weekend Judge Tilley denied a defense motion for a mistrial. (See "Results of Jury Interviews," below.)

i. **Lessons:**

Counsel deem it inadvisable to disclose this information while the case remains pending.

18. **Results of Jury Interviews, if any:**

Several of the jurors, including the foreman, have granted extensive interviews that have been widely reported; indeed, eight of them were interviewed at length on a special edition of PrimeTime Live that was broadcast approximately three weeks after the trial. These interviews revealed that:

1. The jury had very little difficulty reaching agreement about the defendants' liability or compensatory damages, but they were highly polarized over whether to award punitive damages and, if so, in what amount.
2. The $5.5 million punitive damages award was a compromise verdict. Several jurors said on PrimeTime Live that a hung jury would have been a more accurate reflection of their thinking.
3. When the jury retired to deliberate about punitive damages, nine jurors initially favored no award or the award of a nominal amount, such as $1. Two others suggested amounts of $6 million and $7 million, respectively. One juror said

she would not support an award of less than $1 billion. This juror's refusal to budge from that amount was largely responsible for creating an impasse that persisted during the first five days of deliberations. When it appeared that failure to compromise might result in a mistrial, this juror came down from $1 billion to $8 million.

4. Several jurors said that on a reprehensibility scale of 1-10, they evaluated the defendants' conduct as a "2" or "3." The two jurors who proposed multi-million dollar awards pegged it at "6." The "billion-dollar" juror assigned a value of "10" because the producers lied on the employment applications, and because "they caused Food Lion to lose money."
5. The jurors did not assess any punitive damages against Ms. Dale or Ms. Barnett because they viewed them as having simply followed instructions.
6. There were personal and acrimonious exchanges between jurors during the punitive damages deliberations, but in the end apologies were exchanged.

19. Assessment of Jury:

The jury was very diligent and attentive. In terms of age, educational level, ethnicity, gender and attitude, the jury was very representative of the district in which the case was tried.

20. Post-Trial Disposition:

On February 5, 1997, Food Lion filed a Motion for Entry of Judgment on its claim pursuant to the North Carolina Unfair and Deceptive Trade Practices Act. On February 24, the defendants filed four post-verdict motions: (1) a motion by Capital Cities/ABC for judgment on all claims; (2) a motion by all defendants for judgment as a matter of constitutional law on punitive damages; (3) a Rule 50 motion by all defendants for judgment on the plaintiff's claims of fraud, trespass and breach of loyalty; and (4) a motion by all defendants except Ms. Dale and Ms. Barnett for a new trial or remittitur of the punitive damage award. Judge Tilley heard oral argument on these motions on June 24, 1997.

On March 25, 1997, a broad coalition of media companies filed a motion for leave to submit a brief amicus curiae in support of the defendants' post-trial motions. The accompanying brief asked Judge Tilley to set aside the punitive damages verdict as contrary to public policy and the First Amendment. The motion and brief were filed by Bruce Sanford of Washington, D.C. and John Hasty of Charlotte, N.C.

On July 9, 1997, Judge Tilley granted Food Lion's motion for entry of judgment on its Unfair and Deceptive Trade Practices claim. However, he also found that the conduct underlying that claim was duplicative of the conduct underlying Food Lion's fraud claim; accordingly, he ordered Food Lion to elect between treble damages on its Unfair and Deceptive Trade Practices claim and compensatory and punitive damages under the fraud

claim. On July 18, Food Lion responded by asserting that no such election was required, but alternatively elected to recover its compensatory and punitive damages on its fraud claim.

On August 4, 1997, Food Lion filed a motion for attorney fees pursuant to the North Carolina Unfair and Deceptive Trade Practices statute. Briefing on this motion was completed on August 18.

On August 29, 1997, Judge Tilley denied the defendants' post-trial motions. The denial of defendants' motion for a new trial on punitive damages was conditioned on Food Lion's filing a remittitur of all punitive damage amounts above $315,000 -- $50,000 from CapCities/ABC, $250,000 from American Broadcasting Companies, $7,500 from Richard Kaplan, and $7,500 from Ira Rosen. On the same day, Judge Tilley also denied Food Lion's motion for attorney fees on its unfair trade practices claim, holding that there was not unwarranted refusal to settle on the part of the defendants.

Food Lion's response to the remittitur order is due September 12, 1997.

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K. **Case Name:** Deborah Kastrin, William J. Kastrin, Socorro Kastrin, William F. "Fred" Kastrin, Veronica Kastrin Callaghan, and Kasco Ventures, Inc. v. CBS Inc.
Case No. EP 96 CA 433-DB (Western District of Texas, El Paso Division
Judge David Briones
August 13, 1997

1. **Date of Broadcast:** October 8, 1995

2. **Case Summary:**

Plaintiffs sued CBS Inc. over a 60 Minutes report "The Other America" which reported on living and health conditions in "colonias," subdivisions along the U.S.-Mexican border which generally lack running water and central sewer systems. Plaintiffs, members of a prominent El Paso family, owned colonias in El Paso County, several of which lacked water or sewer. Plaintiff Deborah Kastrin has served as Executive Director of the Texas Department of Commerce and, at the time of the broadcast, served as a Presidential appointee to a U.S.-Mexican Commission formed to try and solve the colonias problem. Deborah Kastrin agreed to be interviewed on camera by 60 Minutes and appeared in broadcast.

Plaintiffs proceeded on a libel by implication theory, complaining that the broadcast implied that (1) plaintiffs were illegal developers; (2) plaintiffs caused the spread of serious infectious diseases; (3) plaintiffs engaged in unscrupulous business practices; (4) plaintiffs used their political relationship with congressman to impede the Texas Attorney General's office investigation into the plaintiffs' colonias ownership.

Shortly before trial, the court granted CBS Inc.'s motion for summary judgment as to plaintiffs Socorro Kastrin and Veronica Kastrin Callaghan. During trial, the court granted CBS Inc.'s motion for judgment as a matter of law as to plaintiff William J. (Bill) Kastrin.

3. **Verdict:** For defendant

Plaintiffs remained (Deborah Kastrin, Fred Kastrin, and Kasco Ventures). Jury unanimously found no defamatory statements as to 2 Plaintiffs (Fred Kastrin and Kasco Ventures) and to false statements as to any Plaintiff.

4. **Length of Trial:** 7 days.

5. **Length of Deliberation:** 6 hours (over 2 days).

6. **Size of Jury:** 10 (7 men, 3 women) - all Hispanic

7. **Significant Pre-Trial Rulings:**

(a) Court imposed sanctions on plaintiffs in connection with their journalism expert's delay in preparing a written report containing her opinions. (b) Summary Judgment granted as to 2 Plaintiffs. (c) Court granted many of CBS's Motions in Limine, including those seeking to exclude evidence on the use of hidden cameras, confidential sources, and fairness. (d) Court ruled that Deborah Kastrin was a public official and public figure, but that other plaintiffs were private figures.

8. **Significant Mid-Trial Rulings:**

(a) The plaintiffs' journalism expert was excluded. (b) A directed verdict was granted as to one more plaintiff (Bill Kastrin). (c) Plaintiffs' rebuttal evidence (photographs) and demonstrative evidence were excluded for failure to comply with deadlines. (d) The court adhered to its favorable rulings on CBS's motions in limine.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

Special verdict form was used.

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

Jury questionnaire was used by agreement of the parties.

11. Pretrial Evaluation: Not available.

12. Defense Juror Preference During Selection: Not available.

13. Actual Jury Makeup:

7 men, 3 women. All Hispanic. Range of employment backgrounds. Presiding juror was an engineer.

14. Issues Tried:

Truth, Actual Malice, Negligence, Of and Concerning Defamatory Meaning, Damages.

15. Plaintiff's Theme(s):

Plaintiff urged the libel by implication theory described above. This was entertainment, not news. CBS needed a villain and lied about the Plaintiffs to make their colonias seem worse than they really are.

16. Defendant's Theme(s):

Deborah Kastrin voluntarily sat for an interview after CBS informed her of the interview topics. Sometimes the truth hurts. This was an important newsworthy story that needed to be told. CBS did nothing wrong and would not do anything differently.

17. Factors Believed Responsible for Verdict:

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

Not available.

b. Sympathy for plaintiff during trial:

Not available.

c. Proof of actual injury:

None. Plaintiffs claimed only damage to reputation and convinced the court to charge the jury on libel per se and presumed damages.

d. Defendants' newsgathering/reporting:

Thorough documentation from government reports and knowledgeable sources.

e. Experts:

No journalism experts testified. CBS did not put on its journalism expert after the Plaintiffs' journalism expert was withdrawn and then excluded. CBS had a terrific (uncompensated) medical expert, a nun/doctor who runs a family clinic close to Plaintiffs' properties and who testified persuasively about the health problems caused by lack of access to water and sewer services on Plaintiffs' properties. CBS also used an accountant to consult about Plaintiff's business records and practices.

f. Other evidence:

The Attorney General of Texas and the former head of the Texas Attorney General's Colonias Strike Force, both of whom had been CBS sources, testified voluntarily for CBS.

g. Trial dynamics:

i. Plaintiff's counsel:

Not available.

ii. Defendant's trial demeanor:

Correspondent Ed Bradley and associate producer Jonathan Wells were present in the courtroom throughout the trial.

iii. Length of trial:

7 days

iv. Judge:

Judge David Briones ran an efficient, no nonsense trial.

h. Other factors:

Not available.

i. Lessons:

Not available.

18. Results of Jury Interviews, if any:

Not available.

19. Assessment of Jury:

Not available.

20. Post-Trial Disposition:

Judgment entered August 20, 1997. CBS is seeking recovery of its substantial court costs from Plaintiffs..

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L. **Case Name:** Alan B. Levan and BankAtlantic Financial Corporation v. American Broadcasting Companies, Inc. and William H. Willson
S.D. Fla.
December 18, 1996

1. **Date of Publication:** November 29, 1991

2. **Case Summary:**

ABC's 20/20 broadcast a report entitled "Too Good To Be True" that focused on a complicated financial transaction called a roll-up, whereby one investment is exchanged for another. Bill Willson was the producer of the report. At the time of the broadcast, roll-ups were controversial because, although the transactions were legal, many investors in real estate limited partnerships who had their partnership interests rolled up lost large amounts of money, while the general partner who proposed the roll-up appeared to benefit. The broadcast used roll-ups perpetrated by Alan Levan as examples of deals that were grossly unfair to the limited partners.

"Too Good To Be True" was the second of three segments broadcast on 20/20 that evening. When the program opened, there was a brief introduction to each of the three reports. As part of that introduction, the following statement was included: "The man behind it [the roll-up] wouldn't talk to us." After another report and commercial breaks, "Too Good To Be True" began with video footage of Alan Levan's home, and a description of his success in real estate. It then turned to the subject of roll-ups. The report stated that the transactions were perfectly legal, and described them in detail: the limited partners received unsecured debentures in BankAtlantic Financial Corporation (BFC) that, at the time of the broadcast, were trading for 20% of face value and were not payable until after the turn of the century. In exchange for the debentures, the real estate formerly owned by the limited partnerships was transferred to BFC and sold, with the proceeds kept by BFC. The broadcast also included interviews with limited partners who were unhappy with the transaction, and excerpts from a congressional hearing where roll-ups in general -- and Levan's roll-up in particular -- were criticized. The report stated that ABC had wanted to interview Levan, but that he "would not face the cameras." Instead, the report stated, "he hired his own camera and taped answers to questions he thought [ABC would] ask." Excerpts from the videotape sent by Levan were included in the report.

3. **Verdict:** For plaintiffs.
   Compensatory: $10 million
   Alan Levan -- $8.25 million from ABC; $500,000 from Willson
   BFC -- $1 million from ABC; $250,000 from Willson
   Punitive: $0

4. **Length of Trial:** 24 trial days

5. **Length of Deliberation:** 4 days

6. **Size of Jury:** 11 empaneled; 7 deliberated

7. **Significant Pre-Trial Rulings:**

A. Another trial judge in the Southern District of Florida denied ABC's motion to intervene in Purcell v. BankAtlantic Financial Corp., et al., a securities fraud lawsuit that had been filed against Alan Levan and BFC by their limited partners. In Purcell, a jury found Levan and BankAtlantic liable for securities fraud in connection with the roll-ups that were the subject of the ABC broadcast, and ordered them to pay $8 million in damages. Based on this verdict and applying the principles of collateral estoppel, the magistrate in Levan recommended that summary judgment be granted to ABC on grounds of substantial truth. Before the recommendation was reviewed by the district judge, the parties in Purcell entered into a settlement agreement that provided for Levan and BFC to pay the plaintiffs $8 million -- the full amount of the jury verdict -- and for that verdict to be vacated. The Purcell district judge denied ABC's motion to intervene to challenge the vacatur, and acceded to the parties' request to vacate the verdict. The 11th Circuit upheld the Purcell's Court's denial of ABC's motion to intervene, and the United States Supreme Court refused to hear the case.

B. The trial court held that plaintiffs were public figures and therefore were required to prove actual malice.

8. **Significant Mid-Trial Rulings:**

A. At the close of plaintiffs' evidence, the trial judge granted ABC's motion for judgment on the claims for false light invasion of privacy and punitive damages. With respect to the false light claim, the Court held that it was duplicative of the libel claim and therefore must be dismissed. With respect to the punitive damages claim, the Court held that plaintiffs had failed to bring forth sufficient evidence that the "primary purpose" of the broadcast was ill will towards plaintiffs and an intent to defame, as required by Florida law for the recovery of punitive damages in a defamation case.

B. The trial court granted plaintiff's motion to exclude the bulk of ABC's evidence on the subject of Alan Levan's reputation, and specifically prohibited any reference

to the Purcell verdict. Alan Levan sought damages from ABC for harm to his reputation from the date of the ABC broadcast to the present. As a result, defendants sought to cross-examine Levan with newspaper articles that described the Purcell jury verdict to show that Levan's "bad" reputation, and his claimed inability to re-enter the real estate business, were caused by factors other than the ABC broadcast. The trial judge excluded the evidence under Rule 803.

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

The jury was required to return a special verdict form.

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

Counsel deem it inadvisable to disclose this information while the case remains pending.

11. Pretrial Evaluation:

Counsel deem it inadvisable to disclose this information while the case remains pending.

12. Defense Juror Preference During Selection:

Counsel deem it inadvisable to disclose this information while the case remains pending.

13. Actual Jury Makeup:

1. White male, age 26, single. Supervisor for a telephone/alarm company, college degree.
2. Hispanic female, age 44, married. Manager for an insurance company, college degree.
3. Hispanic male, age 36, married. Computer operator for Dade County schools, college degree. (Foreperson).
4. Hispanic female, age 36, divorced. Accounts payable clerk, college degree.
5. Black female, age 49, married. 911 Operator, college degree.
6. Black female, age 24, single. Clerk for life insurance company, high school.
7. White female, age 49, married. Office administrator, high school.

14. Issues Tried:

Libel.

15. Plaintiff's Theme(s):

Plaintiffs' primary theme was to present Alan Levan as the victim of an over-aggressive news media. Although there was no claim for intrusion -- nor could there have been -- Levan complained repeatedly about ABC's newsgathering, which he portrayed as an invasion of his privacy. Specifically, Levan objected to the use of pictures of his home that were taken from a helicopter; to the use of pictures of the security gates of his house that were taken from the public street; and to the ABC crew "stalking" him in the halls of Congress by following him with a camera from the hearing room until he got into a taxi outside. Plaintiff's second theme was that ABC did not produce a fair broadcast. Plaintiffs emphasized Levan's offer to do a live, unedited interview and his attorney's requests for meetings with ABC news management prior to the broadcast, and cited ABC's refusal to accede as evidence that there was no effort to produce a balanced report.

16. Defendant's Theme(s):

Defendants' primary theme was that the broadcast was a valuable public service -- warning viewers about a potentially unfair, but legal, business transaction -- and that plaintiff's conduct made him an unworthy recipient of any damage verdict. In essence, this theme translated into proof of what a terrible deal the roll-ups were from the perspective of the limited partners, and, conversely, how well Levan and BankAtlantic did by comparison.

17. Factors Believed Responsible for Verdict:

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

Given the outcome and plaintiff's themes during trial, it appears that jurors pre-existing negative attitudes towards the news media, whether conscious or subconscious, likely played a significant role in the result.

b. Sympathy for plaintiff during trial:

This factor is more difficult to identify because plaintiff does not, on the surface, fit the profile of a sympathetic figure. He is wealthy, successful, and not particularly emotional. However, during his testimony, Levan spent time talking about his family and other personal experiences that, in combination with perceived excesses on the part of defendants, may have engendered sympathy from the jury.

c. Proof of actual injury:

There was little proof of actual injury, and it is unlikely to have played a role in the result. On the other hand, actual injury that was presumed by the jury to have occurred from a national television broadcast likely played a significant role in their damages verdict.

d. Defendants' newsgathering/reporting:

See supra, "Plaintiffs' Themes."

e. Experts:

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Not a significant factor.

ii. Defendant's trial demeanor:

Not a significant factor.

iii. Length of trial:

Not a significant factor.

iv. Judge:

Not a significant factor.

h. Other factors:

i. Lessons:

Juries are going to hold journalists to a standard of perfection, or literal truth, as well as a high standard of fairness. The question is not whether the broadcast is substantially true or whether the plaintiff is a "good guy" or a "bad guy," but whether the journalists live up to the jurors ideal of how a journalist should conduct him- or herself.

18. Results of Jury Interviews, if any:

The parties were prohibited by local rule from interviewing jurors. In an interview reported in the Miami Daily Business Review, the jury foreman stated that the jurors did not believe that the roll-up was fair, but that the fairness of the transaction that was the subject of the report was "beside the point." "What they showed, and what they didn't show" is what mattered. The foreman felt that ABC should have done a more balanced report. First, the foreman stated that the statement, "The man behind it wouldn't talk to us" was false because Levan had an off-the-record meeting with Willson and because Levan had offered to do a live, unedited interview. He then stated that ABC should have given Levan that opportunity, if live and unedited were Levan's conditions for appearing on the broadcast. The foreman also claimed that ABC did not try hard enough to find someone to defend Levan's roll-up on the program.

19. Assessment of Jury:

20. Post-Trial Disposition:

On appeal.

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M. **Case Name:** Francis A. Marsico v. The Patriot News Co. and Jack Sherzer
Dauphin County Court of Common Pleas, Harrisburg, PA
May 6, 1997

1. **Date of Publication:** April and May of 1992 (series of 8 articles)

2. **Case Summary:**

The plaintiff, delinquent in his child support payments, was arrested and imprisoned on a charge of non-support, only to be released at the request of the support beneficiary six hours later. His brother, a state legislator, complained to the President Judge regarding the procedure employed (lack of due process). The President Judge then suspended all Bureau enforcement proceedings pending review of the procedures employed. Child support payments fell precipitously. The newspaper reported all of this with the initial headline reading: "County Takes Heat Off Deadbeats."

3. **Verdict:** For defendants (10-2).

4. **Length of Trial:** 7 days

5. **Length of Deliberation:** 6 hours

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

The court refused to grant the defense motion for summary judgment. Defendants asked the entire county bench to recuse (due to political interconnects). The court agreed and asked the Supreme Court to appoint an out-of-county judge to try the case. Defendants were successful in having the court preclude the plaintiff from using his linguistic expert.

8. **Significant Mid-Trial Rulings:**

Dismissal of the false light invasion of privacy count.

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

The judge accepted our argument that the dismissal of the false light count on the basis of lack of actual malice (Time v. Hill) dictated that there be no charge to the jury on punitive damages. The judge refused to allow the jury to answer any specific questions, other than: are the defendants liable?

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

None.

11. Pretrial Evaluation:

The politically connected plaintiff could win in front of a jury, but legally, we believed we were in a good position. Defendants made no settlement offer.

12. Defense Juror Preference During Selection:

Educated and female.

13. Actual Jury Makeup:

Three had college degrees, but there were only three women and nine men, including a former "deadbeat dad" whom we could not remove without retaining another risky prospect.

14. Issues Tried:

Did the newspaper negligently defame plaintiff when it used the word "deadbeats" to generically describe delinquent support obligors, notwithstanding the newspaper never referred to the plaintiff as a "deadbeat."

15. Plaintiff's Theme(s):

I was defamed by the repeated references to me and my brother in articles discussing deadbeat dads and delinquent child support. The publication of my arrest invaded my privacy.

16. Defendant's Theme(s):

Everything in the eight articles was true and based upon official records.

17. Factors Believed Responsible for Verdict:

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

The deadbeat dad on the jury was one of the two voting for the plaintiff.

b. Sympathy for plaintiff during trial:

What sympathy existed at the beginning was substantially diminished by testimony of a former court clerk who told of the anguish of mothers not receiving their support payments due to suspension of support enforcement procedures.

c. Proof of actual injury:

Plaintiff's attempt to prove financial damage was substantially diminished during cross-examination of plaintiff and his expert regarding plaintiff's tax returns. Plaintiff's counsel remarked at a sidebar that we "made him look like a tax cheat."

d. Defendants' newsgathering/reporting:

Excellent, accurate reporting by the defendant reporter.

e. Experts:

None. We were successful in excluding plaintiff's linguist. The judge then balanced the ledger and excluded our journalistic expert (Tom Berner, Department of Journalism, Pennsylvania State University, State College, PA).

f. Other evidence:

The use of county records to prove plaintiff's support delinquency was effective. In closing arguments, defendants' counsel emphatically made the point that if plaintiff's brother did not contact the President Judge, why then was he not called as a witness by his brother, the plaintiff.

g. Trial dynamics:

i. Plaintiff's counsel:

Two very capable plaintiff's lawyers attempted to portray their client as an innocent person victimized by a large newspaper.

ii. **Defendant's trial demeanor:**

The defense witnesses presented themselves as conscientious and sincere. Defense counsel consistently hammered on plaintiff's delinquency in his own child support obligation, and the lack of any false statement in any of the articles.

Both counsel and witnesses contended that the word "deadbeat" was accurately used to generically describe delinquent support obligors. In any event, plaintiff fit the dictionary definition of "deadbeat," as he failed to pay the court-ordered support for a long time and owed more than $12,000.

iii. **Length of trial:**

Not a factor.

iv. **Judge:**

The judge conducted a trial that was precise and professional, although his charge to the jury was of his own creation, as he rejected the points submitted.

h. **Other factors:**

i. **Lessons:**

Keep the number of points for charge to the very minimum.

18. **Results of Jury Interviews, if any:**

They jury was turned off by what they perceived as a cold demeanor of plaintiff's counsel during voir dire, and was favorably impressed by the warm friendly attitude of defense counsel during voir dire.

19. **Assessment of Jury:**

The jury thought the words used in the articles were harsh, but did not warrant a verdict for the plaintiff.

20. **Post-Trial Disposition:**

No appeal was taken.

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N. **Case Name:** Merco Joint Venture v. Hugh B. Kaufman, TriStar Television, Inc., Tri-State Broadcasting Co., Roy Sekoff, and Willard Addington, Jr.
In the United States District Court for the Western District of Texas, Pecos Division
Civil Action No. P-94-CA-055
March 8, 1996, judgment entered march 28, 1996

1. **Date of Publication:** August 2, 1994

2. **Case Summary:**

On August 2, 1994, NBC broadcast the third installment of a summer replacement series entitled TV Nation, a satirical news magazine program produced by the Dog Eat Dog production company of Michael Moore (of Roger & Me fame). The last segment on the August 2, 1994 TV Nation installment was entitled "Sludge Train," a tongue-in-cheek look at the "journey" of New York City's sewer sludge from the time it is flushed down the city's toilets until the time it is "land applied" at a 118,000 acre parcel of land near Sierra Blanca, Texas. Roy Sekoff, the on-camera correspondent, followed the sludge from New York City's wastewater treatment plants to Sierra Blanca, where it is transported by rail. Mr. Sekoff interviewed Ed Wagner, the head of New York City's wastewater treatment program at the time of the broadcast, regarding the sewage treatment process, as well as representatives and employees of Merco Joint Venture, who had been in 1992 awarded a six-year, $168 million contract with New York City to ship a significant percentage of its sewer sludge out of state for "beneficial land application." Mr. Sekoff also interviewed Billy Addington, the leader of Sierra Blanca's local opposition to the Merco Joint Venture, as well as Hugh Kaufman, an

outspoken EPA representative who believe the, and still believes, that the "beneficial land application" of sludge on semi-arid desert land is a dangerous proposition to animal and human health. Mr. Sekoff also interviewed Judge Billy Love, the Hudspeth County judge at the time of the broadcast, regarding his title company's involvement in the sale of the 118,000 acre property to Merco Joint Venture in early 1992.

The principal statements in the "Sludge Train" broadcast of which Merco complained in its lawsuit were:

a. Hugh Kaufman's statement that Merco was "poisoning the people of Texas," and that the Merco operation was "masquerading" as a beneficial project, "and that's all it is -- a masquerade.";

b. Roy Sekoff's statement (citing Kaufman) that the sludge being shipped to Sierra Blanca had "high levels of lead, mercury and PCBs";

c. An alleged implication that Judge Love, a county official, had improperly profited from a conflict of interest in the sale of the land to Merco;

d. "The smell of money," a phrase repeated a couple of times in the broadcast, as a play on words depicting Sierra Blanca's acceptance of the olfactory byproduct of the Merco operation in exchange for the economic benefits that Merco brought to Sierra Blanca, an impoverished town of 600; and

e. An on-camera statement by Bill Addington attributing the arson of his family's lumberyard in August 1993 to "my speaking out against the sludge."

Merco claimed that these statements falsely portrayed it and the Merco Project and damaged the largely positive image of Merco, both in West Texas and nationally.

The defendants claimed that the above-referenced statements were fair commentary on a matter of pubic importance, and that Merco had been given equal time during the broadcast to present its case for its project.

3. **Verdict:** The jury returned a decision that both TriStar Television, Inc. and Hugh Kaufman had knowingly and willfully defamed Merco, with actual knowledge of the falsity of the statements on the broadcast.

Compensatory: $1 actual damages awarded against both TriStar Television, Inc. and Hugh Kaufman.

Punitive: $5 million

TriStar Television, Inc. - $4.5 million.

Kaufman - $500,000.

4. **Length of Trial:** 5 days.

5. **Length of Deliberation:** 1 day.

6. **Size of Jury:** 8

7. **Significant Pre-Trial Rulings:**

The court dismissed Tri-State Broadcasting Co. (the NBC affiliate) as well as Billy Addington prior to trial. The court denied the defendants' motion for summary judgment, which contended that Merco had adduced no evidence during discovery of any actual malice on the part of any of the defendants. A large part of the defendants' pre-trial motion for summary judgment briefing appears in the Fifth Circuit's opinion reversing and rendering the verdict in favor of TriStar and Kaufman. The court also granted a motion for summary judgment on behalf of Tri-State Broadcasting, Inc., the owner of the NBC affiliate in El Paso who was also a named defendant to the case, on the grounds that no duty will be imposed upon a network affiliate station to conduct an independent "libel" review of network programming, particularly in cases such as this one, where there was no advanced feed or tape of the broadcast provided t the affiliate, but rather it simply "relayed" the network's satellite signal. While the court's decision was mooted by Merco's eve-of-trial decision to non-suit Tri-State, the court felt that the issue was important enough to publish its decision at 923 F. Supp. 924. Finally, the court inexplicably granted that portion of Merco's motion in limine which effectively prevented the defense from mentioning during trial the reputations of the three companies that comprised Merco Joint Venture: Peter Scalamandre & Sons, Inc., John P. Piccone, Inc., and RGM Liquid Waste Management Corp., even though these companies were named plaintiffs until the eve of trial, were commonly known among the people of Sierra Blanca and the surrounding areas as being the Merco principals, and had been publicly linked to organized crime.

8. **Significant Mid-Trial Rulings:**

At the close of plaintiff's case, the court granted the defendants' motion to dismiss Roy Sekoff as a matter of law, based on the evidence to that point that Mr. Sekoff, the on-camera correspondent, had not participated in the research or pre-shoot interviews for the show, but merely acted as a "mouthpiece" whose job was simply to follow the script he had been given.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

Nothing unusual.

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

The plaintiff used a jury consultant who as present through the trial.

Defense counsel conducted an abbreviated mock trial approximately two months prior to the trial date in El Paso, using a pre-selected cross representation of members of the El Paso community selected by professional jury consultants as a likely representative West Texas jury pool. The sessions indicated that many of the less educated jurors had no real appreciation for (and could not understand) the burdens of proof a plaintiff is required to meet in a "public figure" libel trial, but, nonetheless, largely reached a verdict similar to that of the actual jury.

11. Pretrial Evaluation:

Defense counsel evaluated liability as a roughly 40-60 proposition, if it were presented to the jury, but were very confident that Merco could not show it had been damaged by the August 2, 1994 telecast. Counsel was also confident about the chances of success on appeal on a finding of liability.

12. Defense Juror Preference During Selection:

The defense looked for jurors with occupations that would require analytical thinking, as well as jurors who had occupations which would normally indicate an appreciation for the First Amendment right to freedom of speech and the importance of refraining from "chilling" the media's ability to critically analyze newsworthy stories. Counsel for both sides were somewhat impaired in their ability to ask the sorts of probing questions which would better enable them to select the jurors they thought would be most sympathetic towards their respective positions, as it is the practice of the presiding judge to conduct voir dire himself, and on an extremely abbreviated basis (30-45 minutes in total). The court refused to allow the use of jury questionnaires.

13. Actual Jury Makeup:

Predominately female and Hispanic with little post-high school education.

14. Issues Tried:

a. Were the statements plaintiff complained of false?

b. Whether TriStar Television had actual knowledge of the statements' falsity or was recklessly indifferent to same.

c. Whether Hugh Kaufman had actual knowledge of the statements' falsity or was recklessly indifferent to same.

d. Damages.

15. Plaintiff's Theme(s):

Plaintiff centered its case around an April 1994 memo by a TV Nation employee in which the seeds of the "Sludge Train" segment were first sown. Plaintiff referred to the memo as the "blueprint" for the premeditated attack on Merco Joint Venture, and played to the jurors' sense of regional pride by focusing on the memo's suggestion that the segment play up the big city/backwater town element of the New York City/Sierra Blanca dynamic; i.e., that the residents of Sierra Blanca were not smart enough to realize what residents of the Big Apple were perpetrating upon them by dumping their sewage sludge in Sierra Blanca's back yard via the "Poo-Poo Choo-Choo." Plaintiff also focused heavily on contrasting experts from the raw footage for the "Sludge Train" segment, which was several hours in length, with the nine-and-a-half minute finished product that aired August 2, attempting to bolster their argument that the complained-of statements were included in the show because of the premeditated malice of the defendants, and not for the practical reason that all of the raw footage simply could not be shown in the time slot allocated for the "Sludge Train" segment.

16. Defendant's Theme(s):

The defendants presented the following themes: (1) TriStar Television, as the reporter of the controversy, was an impartial observer and reporter of the controversy over the land application of sludge in Sierra Blanca, presenting both Merco's and the opposition's point of view. TriStar also attempted to show the numerous and detailed research and developmental steps it followed in researching, producing, "clearing" and airing the broadcast. (2) Hugh Kaufman, the EPA official who was individually named as a defendant, took the more aggressive approach that not only did he believe what he said on the broadcast was true, but that his job activities and responsibilities, and the information he learned in his own independent investigation of the Merco Joint Venture project, led him to the unwavering knowledge that what he said on the broadcast was true. (3) The defendants also focused on establishing no damages suffered by the plaintiff and the fact that no one's opinion of the project changed as a result of the broadcast. (4) Finally, defendants argued that plaintiff's true motive in filing the suit was not to recover damages but to stop further discussion and criticism of the project in the local and regional media.

17. Factors Believed Responsible for Verdict:

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

Most of the jurors had heard of Merco Joint Venture; relatively few had ever heard of any of the defendants. It is believed, however, that plaintiff was somewhat successful, largely because of the ruling it obtained in its motion in limine, in portraying itself as essentially a locally located business pumping money into the Sierra Blanca economy. Residents of the community were bussed in to sit in the gallery in support of the plaintiffs. Meanwhile, the defense was unavoidably required to bring as its principal witnesses natives of the northeast and west coasts, which may have raised "outsider" anti-defense sentiment among the jury.

b. Sympathy for plaintiff during trial:

Whatever sympathy Merco gained during trial was probably generated by their two best witnesses -- George Fore, a Texas native and experienced ranch manager, who served as Merco's representative during trial, and Julie Porter, a lower-level employee of Merco who was depicted on the show as describing the odor from the Merco project as "the smell of money." Ms. Porter tearfully denied that she had ever intended that implication to be drawn (Merco, in fact, was able to show that her statement had been significantly edited to create that impression in the final broadcast), and, though her testimony was short, it was also at the end of plaintiff's evidence and extremely powerful for the plaintiff.

c. Proof of actual injury:

Merco's counsel spent an inordinate amount of time focusing on the liability issues in the case and, under time restrictions imposed by the presiding judge as a result of their doing so, spent little time describing the impact of the broadcast (if any) on their business, for which they were seeking $60 million in actual damages and $30 million in punitive. Defense counsel was able to show somewhat conclusively that, in fact, Merco had absolutely no evidence that the broadcast had any impact on their business.

d. Defendants' newsgathering/reporting:

The jury may very well have been influenced to believe that Michael Moore and Roy Sekoff, who are chiefly comedians by profession, did not take their newsgathering/reporting roles seriously enough. Sekoff, in particular, made several impromptu jokes during his testimony, which were not well received by the jury. Moore showed up wearing jeans and sneakers in court, which may have added to the jury's belief that he did not view the broadcast or the trial as a serious matter.

e. Experts:

Plaintiff's:

Richard Agular, Ph.D., Texas Tech University (environmental science), in the alleged widespread acceptance and safety of the "beneficial land application" of sewage sludge.

Peter Balderston, Bedford Capital Company, New York (economic losses).

Ed Scott Jones, E. Bruce Harrison Co., Houston, TX (concerning study of focus group's reaction to the broadcast, need for and expense of public relations effort to remedy broadcast).

Plaintiff's most effective expert testimony was that concerning the environmental benefits of sewage sludge. The firm, however, was supported financially by "pro-sludge" powers such as Merco and the Water Environment Federation. Plaintiff's public relations expert, who attempted to set a dollar figure on the amount Merco would have to spend to rehabilitate itself in the public eye, was less effective, as evidenced by the verdict.

Defendants':

Wayne Ruhter, Ph.D., Sartain & Co., Dallas, TX (absence of economic losses).

Stanford Tackett, Ph.D. (environmental science and sewer sludge and its potential for harm to local residents, and particularly the impact that lead could have on the local children's mental development).

Phillip Morobito, Pierpont Communications, Houston, TX (public relations).

Defendants' damage and public relations experts effectively attacked Merco's experts' underlying assumptions, methodology, and conclusions, as evidenced by the nominal damage verdict.

f. Other evidence:

N/A.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's counsel, Joseph Tydings (a former U.S. Senator), was competent and stuck to the plaintiff's "blueprint" theme.

ii. Defendant's trial demeanor:

TriStar's chief witness, Fran Alswang (the producer of the segment) was well-prepared, respectful, and extremely patient during plaintiff's 1½ day examination of her. Hugh Kaufman, on the other hand, was boisterous, at times abusive, and very indignant when it was suggested that he had some sort of self-promoting agenda at stake and that he had lied about Merco to advance it.

iii. Length of trial:

Not a factor.

iv. Judge:

Judge Lucious Bunton played a prominent role in the trial, particularly with respect to time management. He made certain that the trial would end within the week to the point of working the jury well into the night.

h. Other factors:

N/A.

i. Lessons:

Counsel believes that this trial reinforced the common perception that it is more difficult to successfully defend the media on the liability issue in a libel case in predominately rural areas. The jury seemed to be the sort to believe in a general mistrust of the media and that, once you've "lied" about someone in public, no amount of proof that you were not acting with "actual malice" (as that term was defined and explained) will deter them from finding against you on liability.

18. Results of Jury Interviews, if any:

None.

19. Assessment of Jury:

Counsel does not believe that the jury fully appreciated, or wanted to recognize, the Sullivan protection afforded to the press for stories involving public figures. Fortunately, the jury was not willing to simply give Merco the benefit of the doubt in the absence of evidence and award Merco any actual damages. It was clear from their verdict that they wanted to punish the defendants but not give a windfall to the plaintiff.

20. Post-Trial Disposition:

TriStar and Kaufman appealed the liability finding and damage awards to the Fifth Circuit who, on June 3, 1997, reversed and rendered for TriStar and Kaufman on all counts. In addition, though it was not necessary to their decision, the court made a point of noting that nominal actual damages would not support punitive damages in the kind of rations that the jury awarded Merco against TriStar and Kaufman. The Fifth Circuit's opinion is published at 113 F.3d 556 and at 25 Media L. Rep. 1782 and contains numerous quotes and statements which will be very helpful to any libel defense effort.

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O. **Case Name:** Gregory Michael v. Judy Beavan
W.Va. Ct. of C.P., Marion County
May 1, 1997

1. **Date of Publication:** May 10, 1995

2. **Case Summary:**

The Morgantown Dominion Post, published a news story written by Judy Beavan reporting criminal indictments issued by a county grand jury, including an indictment against a corporation which operated a local strip club for violation of the local obscenity statute. No individuals were named in the indictment. In preparing its story, the Post contacted the West Virginia Secretary of State's office by telephone to determine the identity of individuals involved with the corporation. The story identified Gregory Michael, the plaintiff, as the "chief officer" of the corporation as well as its "sole incorporator," and reported that the strip club was under investigation by local, state, and federal officials, and the IRS.

In fact, Mr. Michael was an attorney who filed articles of incorporation for the corporation and was identified on public records as the "incorporator." He was not, however, an officer of the corporation and had never participated in its business operation. At the time of incorporation, the business operated a pool hall and only changed to a strip club after plaintiff's engagement as an attorney had ceased.

Mr. Michael claimed that the description of his relationship to the corporation caused readers to believe that his conduct was involved in the obscenity charge. His suit was based on both libel and invasion of privacy. Additionally, he alleged that there was a foreseeable republication of the news story by three radio stations and that the Post was responsible for that republication. He did not sue the radio stations.

3. **Verdict:** For defendants

4. **Length of Trial:** 1 day

5. **Length of Deliberation:** 1.25 hours

6. Size of Jury: 6

7. Significant Pre-Trial Rulings:

Plaintiff did not seek punitive damages. On the eve of trial, plaintiff withdrew his claims for invasion of privacy and foreseeable republication by the radio stations. Plaintiff also elected to try the case on actual malice because under West Virginia law such is required where there are no special damages.

8. Significant Mid-Trial Rulings:

Motion for directed verdict denied with leave to renew after verdict.

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

The jury was picked in early March at the beginning of the term for a trial that was scheduled to begin May 1. There was one special verdict interrogatory on whether there was constitutional malice.

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

General background information provided by venire summary and from local counsel.

11. Pretrial Evaluation:

It was believed that plaintiff's case would reach the jury on the libel count.

12. Defense Juror Preference During Selection:

Counsel was happy with the venire, which was consisted almost entirely of non-professional working people. On voir dire, counsel probed for impressions, positive or negative, concerning the defendant newspaper (which was published in an adjacent county), the plaintiff, and the subject matter (obscenity), but none of these appeared.

13. Actual Jury Makeup:

Three men, three women.

14. Issues Tried:

Whether defendant acted with actual malice in the investigation and publication of the news story.

Whether plaintiff was damaged. (Not reached by jury)

15. Plaintiff's Theme(s):

Plaintiff argued that he was merely a lawyer who incorporated the indicted company and had no involvement in its business activities, but that the news story created the impression that as the chief officer he was involved in activities that led to a criminal indictment, and that being associated with an obscenity is one of the worst accusations to which one can be subjected.

16. Defendant's Theme(s):

Defendants (Judy Beavan and the Post) argued that they reasonably relied on information supplied over the telephone by the Secretary of State's office, and that they were not negligent and did not act with actual malice. Additionally, prior to publication, Beavan attempted to reach plaintiff for comment. At that time, he had closed his law office without leaving a forwarding telephone number. Defendants also emphasized that the only effect of the news story was to cause plaintiff's friends and acquaintances to tease him or kid him, and his reputation had not been damaged.

17. Factors Believed Responsible for Verdict:

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

The venire was middle-class and mostly blue collar. No pre-existing prejudices were detected. No juror knew the plaintiff, nor was any a subscriber to the Post, which publishes in an adjacent county.

b. Sympathy for plaintiff during trial:

None apparent.

c. Proof of actual injury:

Plaintiff was unable to prove actual injury. He admitted that he was not aware of specific damage to his law practice, and that he knew of no one who actually believed he was involved in a strip bar.

d. Defendants' newsgathering/reporting:

The reporter was competent, affable and humble, and was a good witness. The fact that the Post's reporter attempted to reach plaintiff by telephone prior to publication, although without success through the plaintiff's own failure to provide a forwarding number, was significant.

Additionally, the Post had frequently relied on information provided over the telephone by state agencies without prior problems.

e. Experts:

None.

f. Other evidence:

Playing to the jurors' tendency to think in terms of common law malice, counsel was able to elicit admissions that the newspaper was not out to get him, had no "axe to grind," etc.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff represented himself.

ii. Defendant's trial demeanor:

Judy Beavan, the Post's reporter, with many years of experience, appeared professional and concerned about doing a responsible job as a journalist.

iii. Length of trial:

One day, not a factor.

iv. Judge:

Hon. Fred Fox, both competent and fair.

h. Other factors:

When the plaintiff was given the opportunity to voir dire, he said, "any one of these fine people is fine with me, your honor," and sat down.

i. **Lessons:**

At trial, counsel elicited the admission that the inactive status of the plaintiff's practice was completely unrelated to the defendant's article, but elected not to bring out the unrelated factors as they were not necessarily pertinent and could create sympathy for the plaintiff. The result shows no basis for questioning this decision.

18. **Results of Jury Interviews, if any:**

None.

19. **Assessment of Jury:**

Blue-collar, full of common sense, attentive throughout the trial.

20. **Post-Trial Disposition:**

Plaintiff initially indicated his intention to appeal, but he did not do so.

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P. **Case Name:** Leslie Parra v. King Broadcasting Co., d/b/a KGW-TV, an Oregon corporation, and Oregon Fair Share, an Oregon nonprofit corporation
Multnomah County District Court, Oregon
Civil No. 9507-04668
November 2, 1996

1. **Date of Publication:** May 9, 1995

2. **Case Summary:**

Plaintiff, an operator of an adult foster care facility, asserted claims for defamation and false light based upon issuance of a report by Oregon Fair Share, a public interest group, that labeled her one of the "dirty dozen" adult foster care operators which provided substandard care and should be shut down. Defendant KGW-TV aired a brief story on the issuance of the Oregon Fair Share report and, in the course of the story, identified plaintiff as one of the members of the list.

3. **Verdict:**

Compensatory: $250,000 non-economic; $200,000 economic damages against KGW; $250,000 non-economic, $228,000 economic damages against Oregon Fair Share. The judgment was several against the defendants.

Punitive: Not allowed under Oregon law.

4. **Length of Trial:** 2½ weeks

5. **Length of Deliberation:** 1 day

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

Denial of KGW-TV's motion for summary judgment based upon the truth of the broadcast, the broadcast of only protected opinion, failure of plaintiff to comply with Oregon retraction statute.

8. **Significant Mid-Trial Rulings:**

Denial of defendant KGW-TV's motions for directed verdict at close of plaintiff's case and at close of all evidence based upon the same arguments.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

N/A.

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

None.

11. Pretrial Evaluation:

Believed the case should be disposed of on directed verdict. Settlement offer $0.00.

12. Defense Juror Preference During Selection:

Intelligent persons who read or viewed media with regularity.

13. Actual Jury Makeup:

7 men, 5 women. No professionals; manual laborers and retirees.

14. Issues Tried:

Plaintiff's (private individuals) defamation and false light claims against both defendants.

15. Plaintiff's Theme(s):

Oregon Fair Share was factually inaccurate in its reporting of plaintiff's history of rules violations and, therefore, its inclusion of plaintiff on the list of the "dirty dozen" foster care providers was defamatory. Defendant KGW-TV did not provide a truthful broadcast because, plaintiff alleged, it was aware that there was a question as to whether plaintiff should be included on the list but broadcast the existence of the list nonetheless.

16. Defendant's Theme(s):

Defendant KGW-TV broadcast merely a truthful and accurate report of a newsworthy event, the issuance of the Oregon Fair Share report, which was a matter of public concern.

17. Factors Believed Responsible for Verdict:

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

Skeptical of the media.

b. Sympathy for plaintiff during trial:

Plaintiff presented herself in a very sympathetic fashion.

c. Proof of actual injury:

Plaintiff presented proof of significant psychological injury and loss of business.

d. Defendants' newsgathering/reporting:

Plaintiff presented testimony from a county bureaucrat claiming that she had been interviewed by KGW-TV on the date of the broadcast and had told the reporter on camera that she disagreed with the inclusion of plaintiff in the broadcast. KGW-TV disputed this and there was no evidence that the county employee had been interviewed on that date. The employee had been interviewed subsequently and her comments were aired approximately six weeks after the initial broadcast. Plaintiff argued that this showed evidence of knowledge on the part of KGW-TV that the statements regarding plaintiff were false. KGW-TV argued that even if the statements by the county employee had been made, they were merely matters of opinion.

e. Experts:

No standard of care experts.

Plaintiff presented experts on damage calculation and psychological injury.

f. Other evidence:

See h. below.

g. Trial dynamics:

i. Plaintiff's counsel:

Work person-like.

ii. Defendant's trial demeanor:

Reasonable.

iii. Length of trial:

Not a factor.

iv. Judge:

Not a factor with the jury.

h. Other factors:

Defendant Oregon Fair Share's critical witness was presented merely by videotape deposition for his testimony. Juror comments to media representatives after the trial indicated that the jurors were displeased that the witness did not testify in person. Also, over objection, the judge admitted evidence in the form of plaintiff's testimony regarding communications she had with KGW-TV personnel after the broadcast. Plaintiff claimed that an individual from the station had been rude and discourteous to her and this individual no longer works for the station, nor was he amenable to subpoena. Plaintiff's testimony served to inflame the jury and should have been irrelevant to the claims in the case.

i. Lessons:

Interviews with jurors by a local newspaper also indicated that the jurors were "unpersuaded by KGW's technical legal defenses." The lesson to be drawn from this is that this jury pool considered the First Amendment to be merely a technical legal defense.

18. Results of Jury Interviews, if any:

Oregon procedure does not allow attorneys to contact jurors.

19. Assessment of Jury:

Biased against media defendants.

20. Post-Trial Disposition:

Motions for judgment notwithstanding the verdict and for new trial were denied. Appeal is pending before the Oregon Court of Appeals.

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Robert E. Franz, Jr.

Q. **Case Name:** Harvey Peeler v. Spartanburg Radiocasting
S.C. Ct. of C.P., Spartanburg
1992

1. **Date of Publication:** August 29 and September 1, 1988

2. **Case Summary:**

WSPA-TV in Spartanburg broadcast two local news reports during the 1988 election season about an investigation into forged voter registration forms, which were submitted by a candidate for the state senate. The candidate, J.R. Stroupe, was challenging the incumbent Harvey Peeler, a member of a prominent South Carolina political family. In the news reports, the station showed "man-on-the-street" interviews in which two interviewees suggested that Peeler might have had something to do with the forgeries.

Peeler sued the station for libel, claiming that voters might have believed the speculation of the citizens interviewed in the news report that he was involved in the voter fraud. In fact, Stroupe was later found to be responsible for the forgeries.

At trial, the defendant's reporter held up well on cross during the plaintiff's case. The defendant did not put on an affirmative case, relying on its contention that the plaintiff had failed to prove either that the broadcasts were false or that there was actual malice.

3. **Verdict:** For plaintiff
Compensatory: $50,000
Punitive: $625,000

4. **Length of Trial:** 1 week

5. **Length of Deliberation:** 10 hours

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

Denial of defendant's motion for summary judgment which was based on lack of constitutional malice and falsity.

8. **Significant Mid-Trial Rulings:**

The court denied defendant's directed verdict motion at close of plaintiff's case and at conclusion of all evidence The motions were based on same contentions as made in the motion for summary judgment and appeal.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

Detailed special interrogatories submitted to jury including whether or not publication was false, proof by clear and convincing evidence, malice, and all other findings which had to be made by jury.

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

Jury list circulated in law firm, which produced significant information from defense counsel and several other members of the firm who had spent lifetimes in Spartanburg.

11. **Pretrial Evaluation:**

No specific monetary evaluation ever placed on case. The case was thought to be dangerous because of disfavor of the media by many jurors. Mitigating factor was that Senator Peeler was handily reelected after publication of story.

12. **Defense Juror Preference During Selection:**

The defense had difficulty coming up with a preferred juror profile. The defense generally wanted educated people who would think most politicians were up to something and that politicians ought to be thick-skinned.

13. **Actual Jury Makeup:**

Typical cross section of this relatively conservative, middle-class community.

14. Issues Tried:

(a) Whether or not publications were false;
(b) Whether or not there was actual malice; and
(c) What damages did plaintiff suffer.

15. Plaintiff's Theme(s):

Plaintiff shifted attention from the specific broadcasts, and portrayed television news as unfair and biased, pointing to the use of man-on-the-street interviews as particularly egregious.

16. Defendant's Theme(s):

Everything in publications was accurate. Even if there were minor inaccuracies, the publications were substantially true and were certainly made without malice.

17. Factors Believed Responsible for Verdict:

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

Generally, the jurors looked upon the media with disfavor and felt the media is biased.

b. Sympathy for plaintiff during trial:

Some.

c. Proof of actual injury:

Not really a factor.

d. Defendants' newsgathering/reporting:

Jury probably felt this was sloppy and that due care was not exercised.

e. Experts:

None used.

f. Other evidence:

Not applicable.

g. Trial dynamics:

i. Plaintiff's counsel:

Crafty, slick, willing to do almost anything to win case.

ii. Defendant's trial demeanor:

The station is well respected in this area. It was started by very popular local man who is now deceased.

iii. Length of trial:

It is felt that after a week, the jury thought this was a big case whether it was or not.

iv. Judge:

Very good trial judge who is quite conscientious and good friend of this writer. Only negative was that Judge Cole did permit plaintiff's counsel to get away with too much.

h. Other factors:

None.

i. Lessons:

Notwithstanding strong legal positions and even strong factual positions, jurors often disfavor the media. Further, as has been learned in many other type of cases, as well as First Amendment cases, jury without leadership in the way of a strong foreman will wander around and graze through evidence and award a plaintiff a bunch of money.

18. Results of Jury Interviews, if any:

Secondhand word substantiated the lesson learned above.

19. Assessment of Jury:

Consisted of some pretty good folks, but sorely lacking in leadership. The verdict seemed out of character.

20. Post-Trial Disposition:

On appeal, and after a reargument because of changes in membership on the court, the South Carolina Supreme Court reversed the verdict, finding that there was insufficient evidence of actual malice. 478 S.E.2d 282, 25 Media L. Rep. 1310 (S.C. 1997).

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R. Case Name: Pollution Control Industries, Inc. v. Howard Publications, Inc., d/b/a The TIMES
Lake County Superior Court, Division 2, East Chicago, IN
Cause No. 45 D02-9309-CP-778
September 1996

1. Date of Publication:

August 22, 1993, "A Toxic Fiasco"
August 22, 1993, "Neighbors Complain About Intense Odors from PCI Plant"
August 28, 1993, "IDEM Will Probe PCI Allegations"
August 29, 1993, "PCI Tied to Kansas Misdeeds"
September 5, 1993, "PCI: We're Safe, Clean, Legal"

2. Case Summary:

Plaintiff, PCI, an East Chicago, Indiana industrial waste recycler, and its owner Kevin Prunsky, brought a defamation lawsuit based on a series of articles by investigative reporter, William Lazarus, and published in The TIMES on August 22, 28, 29 and September 5, 1993. The plaintiffs asserted that The TIMES allegedly libeled PCI by deliberately leading its readers to believe that PCI was involved in three different kinds of criminal behavior: (1) paying bribes at the East Chicago Incinerator; (2) owning a company in Kansas City called PCB, Inc., which committed numerous and varied crimes and allegedly was associated with organized crime; and (3) bribing some person or persons unknown at the Indiana Department of Environmental Management ("IDEM") so that PCI would be given advanced warning of IDEM inspections and thus could prepare for them.

Lazarus and The TIMES relied on the statement of a disgruntled ex-employee, Danny Alston, who stated that PCI made pay-offs at the East Chicago Incinerator. Alston claimed he had an envelope containing cash, a name on the envelope, and allegedly handed the envelope to the guard for delivery to a third person.

The defendant TIMES did what is called a "group edit" of the articles in question before they were printed in the newspaper.

Because of the allegations of criminal conduct in the articles, PCI lost a $16.5 million sale of the company to Chemical Waste Management, Inc.

The defendants asserted that William Lazarus conducted an extensive investigation before publication which included interviews of local residents, past and present employees, and officials from the City of East Chicago, as well as state and federal regulatory agencies. Additionally, he reviewed documents obtained from state agencies, the federal government, and court files. After the articles were prepared, they were subject to editorial review to assure their accuracy and fairness. Despite being given several opportunities to do so, PCI officials declined to be interviewed or furnish information for the preparation of the articles. The TIMES published PCI's denials of statements contained in the articles.

PCI did not disagree that PCB, Inc. and its principals were engaged in numerous criminal activities. A report prepared by a subcommittee of the United States House of Representatives confirmed this fact. And, PCI did not dispute that it used stationery which specifically represents that PCB, Inc. was one of its operating divisions. PCI agreed that it had even represented the fact of its ownership of PCB, Inc. to regulatory agencies and customers. Lazarus confirmed with William Sessions, a Kansas City attorney with knowledge of the PCB, Inc. transaction, that the shares of PCB, Inc. stock had been transferred in 1986 to PCI. Thereafter, the principals of PCI and PCB, Inc. even pursued additional business ventures together.

Pollution Control Industries of America, a predecessor corporation, was incorporated by Kevin Prunsky and Jack Van Gundy, the principal of PCB, Inc., for the express purpose of acquiring, owning, managing, and controlling PCB, Inc. Kevin Prunsky, PCI's Chairman of the Board, drafted a binding contract for the merger of plaintiffs with PCB, Inc., by an exchange of stock. Prunsky's binding contract called for the payment of $100,000 for the PCB, Inc. stock, and Prunsky admitted this money was paid. PCB, Inc. transferred its stock to PCIA in 1986.

As to the bribery at the East Chicago Incinerator, Lazarus reported accurately an allegation of bribery furnished to him by Danny Alston, a former employee of plaintiffs. Alston told Lazarus in a taped on the record interview how he was instructed to deliver money to the gate at the incinerator on one or more occasions. Lazarus received other information from Alston about plaintiffs' practices and misconduct which he confirmed with others. Lazarus therefore concluded that Alston was a credible source and had no reason to doubt the truth of what Alston told him.

As to the advance notice of inspections, numerous former and present employees of PCI confirmed that they were told in advance of inspections to be conducted by regulatory agencies. The employees told Lazarus that the time of the advance notice varied from hours to a day or more, and Lazarus printed this in the articles.

3. **Verdict:** for defense

4. **Length of Trial:** 8 days

5. **Length of Deliberation:** 6½ hours

6. **Size of Jury:** 6 plus 2 alternates

7. **Significant Pre-Trial Rulings:**

Defendants' motion for summary judgment denied; defendants' motions in limine granted as to barring evidence of lost business or customers, barring evidence of professional liability coverage, barring evidence of other libel claims against defendants, barring evidence concerning the fact that Alston's deposition was taken while he was in jail. Plaintiffs' motion in limine granted limiting issues to only three categories of libelous statements and denied as to PCI's alleged ownership of PCB, Inc. other than the two pieces of stationery, the PCB stock transfer to PCI and Jack Van Gundy as the incorporator of PCI.

8. **Significant Mid-Trial Rulings:**

Defendants' motion for judgment on the evidence denied.

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

Court entered limiting instruction as to the prior criminal convictions of plaintiff's principal, Kevin Prunsky.

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

A focus group was utilized. See "Lessons" below.

11. Pretrial Evaluation:

Plaintiffs' demand was $3.0 million. Defendant decided the case should be tried.

12. Defense Juror Preference During Selection:

Persons familiar with the plaintiff or reputation of East Chicago for graft and corruption and who indicated no prejudice against the defendant newspaper.

13. Actual Jury Makeup:

One HM from Hammond, age and occupation no longer known; one 45-year-old WM steel mill pipefitter from Munster; one 32-year-old WM in sales from Crown Point (foreman); one 61-year-old WM psychology professor at local Purdue campus; one 35-year-old WF bank worker from Crown Point; one 50-year-old HF registered nurse from Schereville, one 50-year-old cleaning lady from Crown Point, with prior jury experience (alternate); one 40-year-old WM steelworker from Crown Point (alternate).

14. Issues Tried:

a. Whether the statements complained of were defamatory per se.

b. Whether plaintiffs showed, with clear and convincing evidence, that the statements complained of were false.

c. Whether the plaintiffs showed, with clear and convincing evidence, that defendants published the articles with actual malice, i.e., with knowledge of the falsity of the statements or with reckless disregard of the falsity (standard applicable in Indiana even when plaintiff is not a public figure).

d. The damages sustained, if any.

e. Whether plaintiffs' claims were barred by the First Amendment to the United States Constitution.

15. Plaintiff's Theme(s):

PCI was a small family business which Kevin Prunsky, through hard work, developed into a thriving corporation. The Prunskys and their business helped the community and neighborhood of East Chicago by providing jobs and recycling industrial waste. Prunsky was a young man duped by Jack Van Gundy into getting involved in PCB, Inc. When Prunsky found out that his partner, Van Gundy, was less then lily white in his dealing in the waste treatment industry and PCB disposal industry, Prunsky cut all ties and managed to get his stock transferred back. Prunsky allegedly wasn't given an adequate chance to explain the allegations brought by Lazarus. When the articles were published, Prunsky was just about to consummate a sale of the family business to a large waste management concern. He was trying to sell the business as a retirement nest egg for his parents who were the original owners. Lazarus was a "who cared nothing about the loose canon."

16. Defendant's Theme(s):

Lazarus thoroughly and carefully researched his subjects before writing the articles. He tape-recorded over fifty interviews of present and former employees of PCI, IDEM, and people who could corroborate the Kansas City connection of PCI with PCB. He, the publishers, and editors of The TIMES were not on a vendetta against East Chicago businesses and politicians. The edited the articles as a group and with input from counsel.

17. Factors Believed Responsible for Verdict:

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

There is a pre-existing sentiment in Lake County that East Chicago politicians and businesses are crooked.

b. Sympathy for plaintiff during trial:

There is very little sympathy for corporate plaintiffs in Lake County, Indiana. Prunsky was a very well dressed and well-to-do young man that the jury didn't seem to relate to.

c. Proof of actual injury:

It was purely coincidence that the sale was not consummated in the time frame during which the articles appeared. Documentary evidence indicated there were other reasons why

the sale fell through, i.e., corporate downsizing and upper management decisions at Chemical Waste Management that suggested that buying PCI would be adding excess capacity.

d. Defendants' newsgathering/reporting:

Lazarus worked very hard to be a likeable fellow in the jurors' eyes. He was more down to earth than the plaintiff. He explained to the jury how he thoroughly researched the story and gave Prunsky ample opportunity to respond to allegations before the story was published.

e. Experts:

Plaintiffs used Steven Bouch, from First Analysis Securities Corp. concerning the value of lost sale of the business. Bouch was also a fact witness for the plaintiff, as a broker who was marketing the business.

Defendants used James Bernard, Professor of Economics, Valparaiso University, and Robert Musur, Principal of KPMG - Peat Marwick on the issue of business valuation.

f. Other evidence:

A very significant "time line" demonstrative exhibit was utilized in closing argument pulled together all the documentary evidence.

g. Trial dynamics:

i. Plaintiff's counsel:

Counsel had a theme which he tried to assert throughout trial -- that a small family-owned company had been wronged by a newspaper.

ii. Defendant's trial demeanor:

We know of no behavior on the part of the reporter that adversely influenced the outcome.

iii. Length of trial:

Not a factor.

iv. Judge:

Relatively new to bench with ties to the plaintiff's bar. However, he did allow the written final instructions to go to the jury room during deliberations. He has not done so subsequent to this trial.

h. Other factors:

Defendant's instruction 20 given as modified stated that in order to reach a plaintiff's verdict the jurors must find falsity as to all of the following: "that PCI was responsible for the crimes and violations of PCB, Inc.; that PCI once owned a company called PCB, Inc.; that plaintiffs engaged in bribery at the East Chicago Incinerator; and that plaintiffs were given illegal advance notice of environmental inspections." (emphasis added.) Plaintiffs' counsel did not object to the conjunctive use of the word "and." He thus waived his right to ask that it be phrased in the disjunctive. After approximately 3½ hours of deliberation, the foreman posed the question, "Do we have to find all of the elements or just one?" (question paraphrased.) The jurors did not receive additional instruction and returned their verdict for the defendants thereafter.

i. Lessons:

The focus group proved very useful. They reported that near the beginning of the presentation, they were against the publisher, but by the end felt that the plaintiff was "dirty" and that the defendants had done their jobs. Based on the debriefing of this group, defendants decided on a theme without flag waiving or invoking of the First Amendment, but instead urging that the defendant reporters were conscientiously doing their jobs and uncovering the facts, but were frustrated in part because of the plaintiffs' refusal to respond candidly to questions. The jury interviews supported this tactical decision. Another lesson is that demonstrative exhibits are important in a complicated case.

18. Results of Jury Interviews, if any:

The foreman and two other jurors were interviewed. They indicated that the problem over the charge on falsity was not critical, and that they believed that constitutional malice had not been proved. They also said that the defendants' visual aids (prepared by graphics company, the consisted of a time line and other graphics demonstrating the relationships in issue) to guide them through the voluminous documentary evidence and complicated testimony.

19. Assessment of Jury:

This was a good cross-section of Northwest Indiana.

20. Post-Trial Disposition:

Plaintiffs did not appeal.

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S. Case Name: Q-Tone Broadcasting Co. and Anthony Quartarone v. Musicradio of Maryland, Donald Chappell, and John O'Brien
New Castle County Superior Court, Delaware
February 1996

1. Date of Publication: Summer 1994

2. Case Summary:

Musicradio operates WOCQ, an FM radio station operating from Whaleysville, Maryland. Musicradio's station is in direct competition with WKRE, which is operated by Q-Tone Broadcasting out of Ocean View, Delaware, and is also known as KISS FM. WOCQ was the more dominant station, ranking second among 21 radio stations in the market during the summer of 1993, while WKRE was ranked tenth according to Arbitron ratings.

WOCQ arranged a promotion with the Wicomico Civic Center in Wicomico, Maryland, that it would be the "welcoming station" for a rock concert at the civic center. Unbeknownst to WOCQ, however, the civic center also gave promotional tickets to WKRE. When WKRE's on-air personalities began giving away promotional tickets, defendant radio station's morning hours (6:00 to 10:00 a.m.) DJ made a number of comments which could have been construed as referring to plaintiff and plaintiff's station. In private conversations, the WOCQ personnel also disparaged Quartarone to officials for RCA Records, claiming that Quartarone was not fulfilling his contractual obligations with RCA. The comments were homosexual in nature and ridiculed certain aspects of the other station's programming. The court held the latter to be slander per se.

3. **Verdict:** For plaintiffs
Compensatory: $5,000
Punitive: $52,000

4. **Length of Trial:** 1 week

5. **Length of Deliberation:** 5 hours

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

1. Held radio broadcast without script to be libel, 1994 WL 555391 (Del. Sup. 1994).

2. Held station owner to be public figure for the on-air statements, but not those made privately, 24 Media L. Rep. 1979 (Del. Sup. 1995).

8. **Significant Mid-Trial Rulings:**

None.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

Separate findings for each defamation count, no breakdown.

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

Voir dire by counsel not allowed in Delaware.

11. Pretrial Evaluation:

The on-air statements were not defamatory and could not be linked to plaintiff. The private conversations did not cause damage and were opinion.

12. Defense Juror Preference During Selection:

Young jurors who would empathize with morning radio show.

13. Actual Jury Makeup:

Diverse, older than preferred.

14. Issues Tried:

1. Whether plaintiff was defamed by on-air statements, whether such statements were published with constitutional malice, and whether such statements caused drop in ratings.

2. Whether private statements defamed plaintiff, and whether such statements were published with negligence.

3. Punitive damages.

15. Plaintiff's Theme(s):

The statements were a preconceived plan by defendant to destroy the plaintiff's business.

16. Defendant's Theme(s):

On-air statements would not be taken by listener to refer to plaintiff. The statements were not defamatory in any event. The private statements either not made as alleged by plaintiff or not defamatory.

17. Factors Believed Responsible for Verdict:

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

The jury did not like the homosexual overtones of some of the on-air comments.

b. Sympathy for plaintiff during trial:

Mild.

c. Proof of actual injury:

Plaintiff tried to prove that Arbitron ratings decreased after statements. Statements were made during rating period. Plaintiff also alleged health problems arose because of worries concerning on-air statements. Jury awarded $5,000 compensatory damage. Plaintiff alleged around $12,000 medical damage and over $100,000 lost revenue.

d. Defendants' newsgathering/reporting:

Not applicable.

e. Experts:

Each party presented testimony on Arbitron ratings.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Well prepared.

ii. Defendant's trial demeanor:

The disk jockeys involved may have been a little cavalier.

iii. Length of trial:

Not a factor.

iv. Judge:

Very good.

h. Other factors:

Counsel believes the jury did not like the homosexual overtones.

i. **Lessons:**

Even though plaintiff is public figure, there are some things a jury believes one should not say even by innuendo. Those statements taken together with private statements regarding business practices caused problems.

18. **Results of Jury Interviews, if any:**

Not allowed.

19. **Assessment of Jury:**

Limited opportunity to observe.

20. **Post-Trial Disposition:**

On post-trial motions, 1996 WL 494177 (Del. Sup. 1996). No appeal.

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T. **Case Name:** Felipe Ramos v. Telemundo CATV, et al.
D.P.R.
April 11, 1995

1. **Date of Incident:** January 24, 1992

2. **Case Summary:**

Co-defendant El Monóculo/Gabriel Juan is the producer of a television show named Te Veo. This program is similar to the well-known Candid Camera. They make practical jokes to people on the street and videotape them. The finished program is then aired by Telemundo under a "licensing agreement" -- the same one used to broadcast other programs such as Baywatch, etc.

El Monóculo prepared the script for a practical joke in which an ambulance stopped in front of plaintiff's house, a patient was taken out, all bandaged (looking like a mummy), and a fake nurse rang the bell at plaintiff's house door, told them that they were bringing this patient so that the plaintiffs continue taking care of this poor man. Mr. Ramos, plaintiff, was a very sick old man, with heart problems, diabetes, etc., who was not aware that a joke was afoot and reacted negatively to it. Ramos alleged that because of the incident he suffered a stroke and it was necessary to implant a pacemaker. The suit was filed, claiming more than $1 million in damages, before the Federal District Court for the District of Puerto Rico.

Telemundo was included, alleging that it was responsible because the producer was an agent or employee, or that Telemundo was co-producer of the program. Telemundo alleged that El Monóculo was an independent contractor, that Telemundo was not a participant in any part of the production of the program, that the station purchased the rights to air a final product under a licensing agreement. It was also alleged that the program was not aired because the producer did not comply with the terms and conditions of the licensing agreement.

The case went to trial and the jury returned a verdict for Telemundo but against the producer of the program, but granting only an award of $50,000 for Felipe Ramos and $10,000 for his wife, but nothing for co-plaintiffs son and daughter.

3. **Verdict:** For defendant Telemundo, but for plaintiff as to defendant El Monóculo (program producer)

Compensatory: $50,000 -- El Monóculo
0 -- Telemundo

Punitive: $0

4. **Length of Trial:** 2 weeks

5. **Length of Deliberation:** about 3-4 hours

6. **Size of Jury:** 9

7. Significant Pre-Trial Rulings:

Motion for summary judgment (Telemundo) denied, based on the absence of an agency relationship with the producer.

8. Significant Mid-Trial Rulings:

Motion under Rule 50 -- argued by Telemundo -- denied based upon mainly the same legal grounds of the motion for summary judgment.

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

None.

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

None.

11. Pretrial Evaluation:

The defense was concerned that the jury may perceive the television station as one and the same as the program producer, therefore missing a very important issue of law -- that the producer was an independent contractor and that the programs were broadcast under a licensing agreement, and that the particular program was not aired.

12. Defense Juror Preference During Selection:

Young to middle-aged men, preferably with less educated, blue collar workers; people who may enjoy practical jokes or "bad taste humor."

13. Actual Jury Makeup:

Generally fit the preferred profile.

14. Issues Tried:

For Telemundo it was mainly a matter of two principal issues of law:

1. The producer was not a part of the station, but an independent contractor.

2. The television station broadcast the program under a licensing agreement which was breached in this case by the producer, so the program was not aired.

15. Plaintiff's Theme(s):

The plaintiff attempted to force the issue that by broadcasting the program generally, the television station was in fact a part in the creation of an audience for the program. That there was a relationship between the station and the producer, where the latter was basically an alter-ego.

16. Defendant's Theme(s):

The program was independently produced and the station aired the final product under a licensing agreement, where there was no participation or involvement on how the program was made.

17. Factors Believed Responsible for Verdict:

The plaintiff exaggerated the television station's involvement in the program and failed to prove or establish any contractual duty.

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

None detected.

b. Sympathy for plaintiff during trial:

Plaintiff was impeached in at least ten instances related to daily life and damages, that his credibility was seriously damaged.

c. Proof of actual injury:

For the above reasons the jury evidently penalized the plaintiff, granting merely $50,000.

d. Defendants' newsgathering/reporting:

Television station presented just one witness, its general manager, who testified about the relationship with the producer and contractual issues. The program was not aired.

e. Experts:

No industry experts.

f. Other evidence:

The licensing agreement.

g. Trial dynamics:

i. Plaintiff's counsel:

Too overreaching and exaggerated.

ii. Defendant's trial demeanor:

Intentionally played a low-key strategy, giving all the space to the producer defense attorneys.

iii. Length of trial:

Two weeks.

iv. Judge:

Jaime Pieras, judge, maintained strong grasp during the entire proceedings.

h. Other factors:

None.

i. Lessons:

That juries may understand and correctly apply legal principles by exercising plain common sense, even if they are the so-called blue collar workers.

18. Results of Jury Interviews, if any:

None.

19. **Assessment of Jury:**

The fact that the jury was mainly formed by young to middle-aged men, most with just a high school diploma, low income, worked from the standpoint that the practical jokes were of their liking.

20. **Post-Trial Disposition:**

Plaintiff appealed the judgment, but Mr. Ramos died before due date for the filing of the brief. They decided not to spend more in the case and take the $50,000 from the program producer.

Plaintiff's Attorneys:

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Defendant's Attorneys:

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Luis Gonzales
Jane Becker

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U. **Case Name:** Barbara B. Rumph, v. John G. Southerland, acting in capacity as the Sheriff of Dorchester County, John G. Southerland, individually, and Evening Post Publishing Company, d/b/a The Post and Courier
Court of Common Pleas for the First Judicial Circuit (Dorchester County, SC)
Case No. 94-CP-18-651
April 30, 1997

1. **Date of Publication:** November 5, 1994

2. Case Summary:

Plaintiff was a deputy sheriff under the former sheriff who was defeated in the Republican primary preceding the November, 1992 election by defendant Southerland. The race was hotly contested.

On November 8, 1994, the former sheriff was running for a seat on County Council. In late October, 1994, the newspaper's reporter received a tip from an anonymous source that Sheriff Southerland had requested the South Carolina Law Enforcement Division to investigate the status of $1,300 collected from a judgment debtor by the former sheriff's department three years previously. The reporter, sensing a matter of public interest and concern, began her investigation by interviewing those involved.

She confirmed the tip in an interview with Sheriff Southerland. Southerland told the reporter that the money was paid into the department in 1991 by a judgment debtor to settle a judgment. In 1994, the judgment debtor applied for a mortgage. During the process, the debtor discovered the judgment against him still appeared of record. He contacted the judgment creditor. The creditor indicated that he had never received the money. Southerland told the reporter the money was receipted by a deputy who turned it over to the plaintiff, who was mentioned by name in the published article. After identifying plaintiff, the newspaper article contained this sentence [not in quotes in the news article]: "That's where the trail ends, Southerland said, with no more mention of the money in the computer or on paper."

The reporter interviewed the plaintiff and the former sheriff on November 4, 1994. The article included their side of the story. The plaintiff said there was no missing money; that she had a computer printout that showed when the money was received and when a check was mailed to the judgment creditor's attorney. The former sheriff said he could prove a check was sent to the judgment creditor's attorney and would produce the canceled check on the following Wednesday, the day after the election. The article reported that both the plaintiff and former sheriff said audits would have shown a problem if the money were missing.

The newspaper published a follow up article on November 17, 1994, when SLED completed its investigation. The money had, in fact, been paid to the judgment creditor's law firm back in 1991. The law firm had deducted its fees and expenses and sent a check to the creditor for the balance. The law firm did not satisfy the judgment of record. Three years later, the judgment creditor had no record of receiving the money, the law firm had disbanded and there was confusion over which attorney was responsible for the transaction.

Plaintiff sued Southerland, both individually and in his capacity as sheriff, and the newspaper, claiming that Southerland had accused her of stealing the missing money; that she was a private figure; that the accusation amounted to libel per se; and that she was entitled to a presumption of general damages and jury determination of special and punitive damages.

Defendant newspaper contended the article was substantially true; that plaintiff was a public official; that there was no constitutional malice; that the article was not libelous per se; and that the newspaper had a qualified privilege to report matters of public interest and plaintiff could recover only if she proved actual malice.

3. **Verdict:** For the defendant newspaper (12 - 0, unanimity required in South Carolina). (Southerland, defended by the State Insurance Fund, settled prior to trial.)

4. **Length of Trial:** 2 days

5. **Length of Deliberation:** 10 minutes

6. **Size of Jury:** 12 (+ 1 alternate released when deliberation began)

7. **Significant Pre-Trial Rulings:**

Defendant made a tactical decision not to file a pre-trial motion for summary judgment for two reasons. First, the trial judge assigned to the Circuit had been the focal point of previous newspaper editorials reporting on his competence, or lack thereof, in connection with his bid for reelection as a Circuit Court Judge. The chances were very good that he would hear the motion. The chances were even greater that he would deny the motion. Secondly, defendant had the distinct impression that plaintiff was simply "rolling the dice" against a deep pocket defendant. Plaintiff's attorney had never before tried a libel case, and appeared not well versed in what he must prove to get to a jury. Defendant saw no need to educate him in a proceeding in which there was little chance for success.

8. **Significant Mid-Trial Rulings:**

At the close of the plaintiff's case, defendant moved for a directed verdict. Although the plaintiff had "resigned" her position as a deputy sheriff when the former sheriff lost the election, which occurred one year and nine months prior to publication of the article, the article related back solely to her duties as a public official. Under South Carolina case law, she was a public official for purposes of her lawsuit. There was not a word of testimony of actual malice under the Sullivan rule or to defeat the affirmative defense of qualified privilege.

The trial judge's ruling confirmed defendant's decision not to file the motion for summary judgment. The judge started out by ruling correctly that the plaintiff was a public official, but then ruled the question of actual malice was for the jury to decide. He ruled the article was not libelous per se, the only cause of action against the defendant. At the end of his ruling, defendant's attorney stood up, closed his file and thanked the trial judge. The trial judge responded, "call your first witness." The attorney, thinking he had heard the judge

incorrectly called his witness, the last for the day. Following the testimony, he confirmed with co-counsel and client that he had heard correctly and asked the court reporter to play back the trial judge's ruling, which confirmed that the judge had ruled that the article was not libelous per se. Before the jury was brought in the next morning, the defendant's attorney tried to explain to the trial judge that his ruling of the previous afternoon, that the plaintiff had not proved libel per se nor supported her claim with special damages, had ended the case. Incredibly, the trial judge reversed himself and submitted all issues to the jury, including punitive damages.

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

None

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

None

11. Pretrial Evaluation:

Defense verdict or reversal on appeal in case of a verdict for plaintiff. The defendant was of an opinion that there was no evidence of actual malice that would allow the case to go to a jury.

12. Defense Juror Preference During Selection:

During voir dire the defendant's attorneys asked all jurors to rise who subscribed to its newspaper. The attorneys reasoned that the newspaper had an excellent reputation forged over nearly two centuries of publication. The substantial percentage of jurors stood up invoking smiles, laughter and a clubhouse effect. Defendant wanted subscribers (but not people from the small town where plaintiff's attorney resided and practiced), working women (the reporter was female), and professional men who would identify with the Executive Editor.

13. Actual Jury Makeup:

33 WF, homemaker	35 WF, homemaker
20 WF, WalMart employee	40 WM, furniture dealer employee
40 WM, manufacturing employee	45 WM. postal service employee
55 WM, retired shipyard employee	40 BM, retired military
40 WF, hospital clerk	35, WM, manufacturing employee
40, WF, computer programmer	30, WF, unknown

14. Issues Tried:

Was defendant guilty of libel per se, falsity, and constitutional malice in publishing what Southerland told its reporter.

15. Plaintiff's Theme(s):

Southerland had personal animosity for the former sheriff and had invariably come up with some incredulous story about the former sheriff on the eve of every election. This time, the plaintiff was an innocent victim of that animosity. Anyone reading the article would assume Southerland accused her of stealing the money. The newspaper was guilty because it rushed to print the article without waiting for the plaintiff and former sheriff to clear their names with the canceled check.

16. Defendant's Theme(s):

From the opening statement, the defendant sought to educate the jury on the constitutionally protected duty and responsibility of the newspaper in a free society. The theme in summary:

A free society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must remain one our most cherished rights. It has been that way for over 200 years. It is elemental that our democracy will not long survive unless the people are provided information needed to form judgments on issues that affect our ability to intelligently govern ourselves. In order to intelligently govern ourselves, we need to know what is going on in our local governments and police departments, run by people we elect to serve us, the governed. That is what is at issue in this case. The basic freedom of the press to report on a matter of utmost concern to you, the people of Dorchester County: the handling of your money by the Dorchester County Sheriff's Department so you, the governed, can decide for yourself how the governors are acting. It is not the role of the press to decide for you. We report the facts from both sides, if there are two sides, and leave it to you on how you will act or react.

17. Factors Believed Responsible for Verdict:

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

Defendant felt free of anti-media bias prevalent in other parts of the country.

b. Sympathy for plaintiff during trial:

Plaintiff went for the tissues too early in her testimony. A former deputy sheriff and current police officer does not normally shed tears at the first question following the preliminary questioning. The jury did not buy it. Secondly, the plaintiff testified in her deposition that she had voluntarily resigned from the sheriff's department and left office when her boss left office. Defendant subpoenaed her personnel file and found a letter signed by the former sheriff discharging her on his last day in office. Defendant then subpoenaed the employment security records which disclosed plaintiff immediately applied for and received the maximum unemployment benefits for six months. When the benefits ended, she immediately found employment as a police officer. Defendant's attorneys sent copies of the records to plaintiff's attorney as required by the court rules. During cross-examination, the plaintiff inexplicably stuck to her story that she resigned. After a few questions stressing her voluntary resignation, the letter from her personnel file was produced. She admitted typing it herself. The defendant was of an opinion that she lost any credibility she may have garnered up to that point.

c. Proof of actual injury:

None

d. Defendants' newsgathering/reporting:

The reporter and Executive Editor made excellent witnesses. The attorney and reporter went through the article sentence by sentence. The reporter gave her source for each sentence; she testified that she believed the source to be trustworthy, and that the sentence was fair and accurate. Southerland, the plaintiff and former sheriff all confirmed that the statements attributed to them were accurate. The jury was informed that the Executive Editor held that same position with his former newspaper which was awarded a Pulitzer Prize. He had served as a Pulitzer juror on two occasions and returned from the West Coast on the eve of the trial where he had served as a juror for that state's newspaper competition. He had impeccable credentials. He faced the jurors and talked to them on their level. Under the heading: you never know what is going to stick with a juror, in carrying out defendant's theme, the Executive Editor compared our free press with the press in totalitarian countries, like the former USSR and Red China where the government tells the newspapers what to print. As the attorneys and Executive Editor were exiting the courthouse, a female juror born in Korea stopped them and said, "I want to thank you. In my country they say we are free, but we are not. The government tells the newspapers what to print."

e. Experts:

None. Defendant considered retaining an expert, but decided it might send wrong message to the jury, i.e. the case was more complex than defendant contended.

f. Other evidence:

Not a factor.

g. Trial dynamics:

i. Plaintiff's counsel:

Popular, talented, well connected, small town, county seat, plaintiff's lawyer who has tried hundreds of cases. May have been a problem if more people from the jury panel had been from his area. Attorney thought he would get a settlement. He was unaware of defendant's policy in such cases: If we make a mistake, we pay for it. If we don't, we don't.

ii. Defendant's trial demeanor:

Defense counsel had previous experience with and reversal of trial judge. With that experience, plus newspaper's prior unfavorable editorials concerning the judge, the focus was to remain respectful and professional in front of jury and hope that their common sense would outweigh any error the judge might make.

iii. Length of trial:

Not a factor.

iv. Judge:

Clueless, but not a mean or arrogant person on the bench. Off the bench, he is a likable sort. He hurts both sides equally during trial.

h. Other factors:

None.

i. Lessons:

(1) Lesson relearned: Do not print an individual's name in an article unless its inclusion is essential to the story and its exclusion would confuse the reader. (2) Where theme is similar, look for jurors with family ties or connections with totalitarian governments.

18. Results of Jury Interviews, if any:

Limited to talk with Korean lady in courthouse. She told attorneys and Executive Editor that she did not know if she should say it, but they had decided the case the day before when the plaintiff rested.

19. Assessment of Jury:

Used what they were assured would enable them to decide the case, their common sense.

20. Post-Trial Disposition:

No post trial motions, no appeal.

Postscript: The former sheriff lost his 1994 election for the seat on County Council. Sheriff Southerland lost his bid for re-election in 1996.

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V. **Case Name:** Raymond A. Sales and William A. Clement, Jr. v. Cox Enterprises, Inc. d/b/a The Atlanta Journal and The Atlanta Constitution
Fulton County State Court, Atlanta, Georgia
Civil Action No. 94-vs-87064-b
December 11, 1996
Judge John Goger

1. **Date of Publication:** March 10, 1994

2. **Case Summary:**

A bond counsel and financial advisor to the City of Atlanta brought this libel action based on a newspaper article published by the Atlanta Journal-Constitution. The article at issue addressed the City's last-minute cancellation of a $150 million bond referendum intended to finance infrastructure repairs prior to the 1996 summer Olympics. Seizing a number of deficiencies in the public notice announcing the vote, a local tax activist had spearheaded a legal challenge to the referendum, a challenge that ultimately prevailed with Atlanta mayor Bill Campbell voluntarily agreed to cancel the referendum less than ten days before the announced vote. Because of the rash of infrastructure problems that had plagued the city for months -- including deadly sinkholes and closed bridges -- the cancellation was big local news and resulted a day later in a package of two follow-up stories, including the article at issue. The article, headlined "'Rookie mistakes' doomed measure," stated that "in the rush to referendum, the city's bond counsel, Raymond Sales and its financial advisor, William A. clement, Jr., along with city law and finance officials, apparently overlooked or ignored some rudimentary legal requirements for issuing municipal bonds."

Sales and Clement immediately criticized the newspaper for tying them to the aborted referendum, claiming that they were only minimally involved in the City's preparations for the referendum and were not the City's "bond counsel" and "financial advisor" as the article stated. Although they admittedly had continuously held these positions for years prior, they contended they were not in these positions at the time the referendum documents were prepared.

Following the newspaper's article, at plaintiffs' request, Mayor Campbell wrote the newspaper a letter echoing plaintiffs' contentions that their involvement in the referendum preparations had been, at most, minimal and that The Journal-Constitution had falsely blamed them for the referendum's cancellation. He repeated this as plaintiffs' first witness at trial.

After a one-week trial and tree days of deliberations -- deliberations which included the court issuing the "dynamite" charge in an effort to get the jurors to resolve their "strong division" on the issue of falsity -- the jury returned a compromise verdict, finding that the article at issue was false but that it was not published negligently.

3. **Verdict:** For defendant

4. **Length of Trial:** 6 days (liability phase only)

5. **Length of Deliberation:** 3 days

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

Prior to trial, the trial court granted The Journal-Constitution summary judgment with respect to a number of opinion columns that commented on the referendum and subsequent city municipal finance issues, but refused to do so with respect to the challenged news article. The trial court held that plaintiffs were private figures and had raised a triable issue as to actual malice and could seek punitive damages at trial.

In response to a defense motion in limine, the trial court excluded plaintiffs' anticipated testimony and argument that The Journal-Constitution was a racist entity and that the article at issue was racially motivated. The court also barred the introduction of any evidence or argument that plaintiffs should be awarded greater damages because minority professionals allegedly have more fragile reputations. The court also excluded reference to the opinion columns that the court had rules were non-actionable as a matter of law, rejecting plaintiffs' argument that these columns showed a pattern of hostility towards plaintiffs.

8. **Significant Mid-Trial Rulings:**

The trial court excluded evidence sought to be offered by The Journal-Constitution demonstrating that plaintiffs had a history of informally advising the City and its previous and present mayors on financial and legal issues, and thus effectively acting as bond counsel and financial advisor, even during intervals when they were not officially appointed to these positions.

When the loss of two jurors reduced the jury to the Georgia minimum of twelve shortly after the December trial began and The Journal-Constitution refused to consent to a jury of less than twelve, the court suggested bifurcating the trial into a liability and damages phase. Although The Journal-Constitution had always been amenable to bifurcation and in fact encouraged the court to utilize this approach from the outset of discovery in the case, plaintiffs agreed to it for the first time in response to the court's proposal.

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

A special verdict form was used. It required the jury to decide with respect to each individual plaintiff whether the plaintiff had met his burden sequentially of proving substantial falsity, and, if so, negligence, actual malice, and, if so, specific intent to harm (a Georgia punitive damages standard).

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

A modest survey was done to identify demographic groups that felt that The Journal-Constitution's reporting was too critical of City of Atlanta government.

11. Pretrial Evaluation:

Particularly because the current and former mayors of Atlanta were planning to testify on plaintiffs' behalf, the case carried a significant risk that the jury would be swayed by emotion. Nevertheless, the evidence demonstrating plaintiffs' involvement in the aborted referendum, and thus the accuracy of the article, was compelling.

12. Defense Juror Preference During Selection:

Educated jurors, not likely to have a stake in city government.

13. Actual Jury Makeup:

Age/Sex	Occupation	Spouse Occupation
28/F	Graduate Student	Clinical Manager
49/F	Admin. Asst.	(single)
50/F	Housekeeper	(divorced)
40/F	Domestic Worker	(single)
22/M	Clerk	(single)
59/M	Tel. Installer (retired)	Homemaker
19/M	Security Guard	(single)
28/F	Accounting Clerk	(single)
23/M	Personal Trainer	(single)
46/M	Truck Driver	(separated)
44/F	Clerk	(divorced)

14. Issues Tried:

Substantial falsity, negligence, actual malice, and specific intent to harm (a Georgia punitive damages standard).

15. Plaintiff's Theme(s):

Plaintiff's principal theme was that the challenged article falsely implied that plaintiffs themselves were responsible for making the 'rookie' mistakes that led to the cancellation of Atlanta's March 1994 infrastructure referendum, despite the fact that none of the reporter's sources specifically attributed blame to either plaintiff. Plaintiffs conceded to some extent the accuracy of most, although not all, of what the article actually stated (i.e., that they either overlooked or ignored the mistakes that led to the cancellation of the referendum), but argued that the article as a whole conveyed the false implication that they themselves were to blame for the mistakes.

16. Defendant's Theme(s):

The Journal-Constitution emphasized the actual language of the article and its accuracy. The article reported not that plaintiffs made the mistakes in the referendum, but that plaintiffs "apparently overlooked or ignored" the mistakes. The evidence demonstrated that this was accurate and that Pulitzer Prize-winning reporter Rich Whitt and The Journal-Constitution had acted responsibly and reasonably in publishing this report.

17. Factors Believed Responsible for Verdict:

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

Not a substantial factor.

b. Sympathy for plaintiff during trial:

Although highly articulate and successful professionals, plaintiffs' self-assuredness often bordered on arrogance.

c. Proof of actual injury:

Plaintiffs claimed that the competitiveness of the municipal finance market made them particularly susceptible to injury from false reports bearing on their professional reputation, and that The Journal- Constitution's report (rather than a then declining market) was responsible for a decline in their business.

d. Defendants' newsgathering/reporting:

The reporter who prepared the challenged article was a Pulitzer Prize winner with substantial expertise in reporting municipal finance issues.

e. Experts:

Plaintiffs called University of Georgia School of Communications professor William Lee, whose primary experience was in the field of communications and libel law. His last practical experience as a reporter was at Guitar Player Magazine in San Francisco in the late '60s. Lee was compensated for his work on the case at $250 per hour.

Plaintiffs' damages expert, who would have testified had the case reached the damages phase, was former mayor of Atlanta (and first cousin to plaintiff Clement) Maynard Jackson.

Defendant called Philadelphia Inquirer Atlanta Bureau Chief Larry Copeland. He refused any compensation for his testimony.

f. Other evidence:

Plaintiffs' first witness was Atlanta Mayor Bill Campbell who testified that "other than the spelling, there's not a word of truth" in the article. Plaintiffs then testified that they did not act as bond counsel and financial advisor with respect to referendum and that they were not responsible for its failure. Plaintiffs called reporter Whitt and had him repeatedly admit that no one had ever told him that plaintiffs were responsible for the referendum's failure. Plaintiffs then called two Atlanta bond lawyers not involved with the referendum who testified that they had been interviewed by Whitt but had never told him that plaintiffs had acted as bond counsel and financial adviser with respect to the referendum or were otherwise responsible for its failure. Plaintiffs' final witness was their journalism expert Lee.

In addition to recalling Whitt, The Journal-Constitution called various City of Atlanta officials including the mayor's chief of staff, deputy chief of staff, and the then-city attorney and his principal assistant. Each of these witnesses criticized the newspaper article at issue as inaccurate or unfair but each also confirmed, albeit begrudgingly, that plaintiffs in fact had advised the City with respect to the referendum and its defective notice. In addition, former city official Michael Bell, who was the City's chief financial officer at the time of the referendum, testified that The Bond Buyer, a publication that plaintiffs' damages expert characterized as the "bible" of the municipal finance industry, had published an article the same day that independently identified plaintiffs as bond counsel and financial advisor to the City on the aborted referendum. The Journal-Constitution also called Wall Street Journal reporter Doug Blackmon, who had been the Journal-Constitutions' city beat reporter at the time of the challenged article and who testified that his understanding continued to be that plaintiffs were involved in the referendum's preparation. In addition, the local lawyer who

had filed the lawsuit that challenged the referendum testified that that had also been his understanding, based on his informal investigation that he had undertaken prior to the lawsuit and based on in and out of court statements made to him by the then-acting city attorney. Philadelphia Inquirer Atlanta Bureau Chief Copeland testified last as a journalism expert.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff Clement was represented by counsel with substantial trial and appellate experience in defamation cases. Plaintiff Sales was represented by counsel who had no defamation experience but who enjoyed a reputation as a successful plaintiff's trial attorney. In his rebuttal closing, Sales' attorney said he would not further address falsity, "I have to believe, ladies and gentlemen, you sat here with me, if you don't think this is false, then I'm wasting my time." It appears this did not work.

ii. Defendant's trial demeanor:

Reporter Whitt, a serious, responsible journalist, was present at counsel table for the entire trial. Although plaintiffs attempted to antagonize him during the trial, apparently in an effort to get him to reveal animosity toward the plaintiffs in front of the jury, he remained generally composed. During one period of provocation, he did testify that he viewed plaintiffs as persons whose primary life endeavor was "feeding at the public trough."

iii. Length of trial:

Six days for the liability phase. If it had been necessary, the damages phase was expected to be of approximately equal duration.

iv. Judge:

The trial judge was relatively new to the bench with a background as a civil plaintiffs' lawyer and criminal defense lawyer. He consistently ruled against The Journal-Constitution prior to trial. Trial rulings also favored the plaintiffs, and the judge's attitude appeared evident to the jury. The judge barely disguised his displeasure with the jury's verdict.

h. Other factors:

At the end of the liability phase, the twelve-person jury was given a special verdict form on which they were required to reach sequential, unanimous agreement on the issues of substantial falsity, negligence, actual malice, and specific intent to harm (a Georgia punitive damages standard). After approximately 2½ days of deliberations, they informed the court that they were "strongly divided" on the first question going to falsity and were given the

Allen charge. After another half-day of deliberations, the jury returned what the foreperson called a "compromise" verdict, finding that certain unspecified statements in the article were false but had been published without negligence, actual malice, or ill intent.

i. Lessons:

The trial judge put enormous pressure on the defense and its witnesses to "admit" and, all but instructed the jury, that the article was false in stating that plaintiffs were involved with the aborted referendum. The defense refusal to concede the point was likely critical in leading the jury to compromise not on damages, but on falsity.

At every opportunity, keep the focus on what the defendant said, and not what the plaintiff claims it implies. Give the jury the article during opening or as soon as possible thereafter.

18. Results of Jury Interviews, if any:

The jury devoted almost all of their deliberations to whether the article had stated false facts about plaintiffs, with eight or nine of the jurors reportedly concluding that it had not and three or four concluding the other way. Who had the burden of proof or falsity was a subject of heated debate with two jurors reportedly adamant that the newspaper had the burden of proving beyond a reasonable doubt that the plaintiffs had done something wrong.

19. Assessment of Jury:

Uneven but with strong, positive leadership from its foreperson, an English graduate student.

20. Post-Trial Disposition:

Notwithstanding plaintiffs' pre-trial settlement demand of more than $3 million, plaintiffs publicly claimed after the verdict that their goal had been simply to "clear their names" and that the jury's compromise verdict of falsity but no negligence had accomplished that. Plaintiffs did not appeal.

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W. **Case Name:** Sanders v. American Broadcasting Companies, Inc.
Los Angeles Superior Court, Case No. BC 081196
combined with Kersis v. American Broadcasting Companies, Inc.
Los Angeles Superior Court, Case No. BC 077553
Case No. while on appeal before the California Court of Appeal, Second Appellate District, Division One -- Case No. B09425
Case No. on review by California Supreme Court -- Case No S059692
Final Jury Verdict July, 1994; Judgment entered - May, 1995; Judgment reversed by Court of Appeal - January, 1997;
California Supreme Court review granted - May, 1997

1. **Date of Incident:** Investigation began in 1991 for broadcast in February, 1993

2. **Case Summary:**

ABC's Prime Time Live conducted an investigation in 1992 into the "tele-psychic" industry, including plaintiff's employer which was then providing psychic advice over the telephone for $3.95 per minute. An ABC extern secured a job with this company as a tele-psychic, even though she admitted that she had no psychic experience or abilities. Wearing a "lipstick" video camera hidden inside her hat, she proceeded to record activities inside the telephone boiler-room where she worked in close proximity with plaintiff Sanders, as well as many other tele-psychics. The investigative report as broadcast included a six-

second clip of plaintiff Sanders in conversation with the ABC extern. After the broadcast, plaintiff sued for common law invasion of privacy by intrusion into seclusion, violation of California Penal Code section 632 (electronic eavesdropping), false light invasion of privacy, publication of private facts, and numerous other theories of recovery. Plaintiff did not sue for libel

3. **Verdict:** For ABC on Penal Code section 632 claim; for plaintiff on the claim of common law intrusion only.

Compensatory: $335,000
Punitive: $300,000

4. **Length of Trial:** Approximately 45 days

5. **Length of Deliberation:** The jury deliberated separately for a day or more on each of the following issues:

Phase 1 (Penal Code Liability)
Phase 2 (Common Law Liability)
Phase 3 (Compensatory Damages)
Phase 4 (Punitive Damages)

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

On ABC's motion for summary judgment, the trial judge dismissed all claims based directly on the broadcast itself (e. g., false light invasion of privacy, publication of private facts), finding the broadcast true as to plaintiff and finding no broadcast of matter that was embarrassing or private to plaintiff.

8. **Significant Mid-Trial Rulings:**

See below -- "Trial Management."

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

After the opening statement of plaintiff's counsel regarding all plaintiff's claims and alleged damages, but before ABC's opening statement, the trial judge sua sponte bifurcated the trial so that the initial phase (and ABC's opening statement) was limited to a trial of liability with respect to plaintiff's claim under Penal Code section 632. In bifurcating the case, the trial judge ruled that if ABC won on liability under the Penal Code claim, ABC would prevail on all plaintiff's other claims as well. However, after ABC won the Penal

Code claim, the trial judge reversed himself and ruled that -- notwithstanding the jury's unanimous finding that plaintiff had no reasonable expectation of privacy, since he expected his recorded conversations with ABC's investigator to be overheard by others -- plaintiff still had a viable common law claim under a so-called "sub-tort" of "the right to be free of photographic invasion." Under special jury instructions created sua sponte by the trial judge for this "sub-tort," the jury found ABC liable, and in subsequent phases, awarded compensatory and punitive damages.

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

Not available.

11. Pretrial Evaluation:

Not available (due to pending appeal).

12. Defense Juror Preference During Selection:

Not available (due to pending appeal).

13. Actual Jury Makeup:

Not available (due to pending appeal).

14. Issues Tried:

See item 9 -- "Trial Management."

15. Plaintiff's Theme(s):

Not available (due to pending appeal).

16. Defendant's Theme(s):

Not available (due to pending appeal).

17. Factors Believed Responsible for Verdict:

Not available (but see item 9 -- "Trial Management")

18. Results of Jury Interviews, if any:

Not available (due to pending appeal).

19. Assessment of Jury:

Not available (due to pending appeal).

20. Post-Trial Disposition:

Motions for JNOV and new trial were denied as to plaintiff Sanders, and his attorney was awarded $635,618 in attorneys fees under a "private attorney general" statute. The trial court also denied plaintiff's post-trial motion for equitable relief, including requests for an injunction against any future use of hidden cameras in California, on-air time for a "rebuttal," and a court-ordered apology. As to plaintiff in Kersis, the companion case that was tried with Sanders' case, the trial court granted a new trial in light of the fact that plaintiff Kersis (a/k/a Highland) died during an alcohol binge while the jury deliberated over punitive damages.

On appeal, the California Court of Appeal reversed the verdicts in Sanders' favor and ordered judgment to be entered for ABC. (See attached majority and dissenting opinions filed January 31, 1997.) The California Supreme Court has granted review in Sanders, thereby vacating the decision of the Court of Appeal, but has ordered review to be held in abeyance pending the Supreme Court's decision in Schulman v. Group W. Productions.

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X. **Case Name:** Michael Schafer v. Time Inc.
N.D. Ga.
Case No. 1:93-CV-833
Judge Willis B. Hunt, Jr.
April 12, 1996

1. **Date of Publication:** April 27, 1992.

2. **Case Summary:**

The lawsuit stemmed from a Time cover story, written by retired veteran reporter and editor Roy Rowan, that examined an alternative theory of the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland. In connection with the story, Time published a photograph identified by Pan Am in a court affidavit as that of David Lovejoy, a reported double agent who had allegedly been involved in a plot to bomb the flight. Because Rowan's investigation had convinced him that the identification was accurate, Time's caption identified the photograph as that of David Lovejoy without attribution to the court affidavit.

Immediate after publication, it became clear that the photograph was of Michael Schafer, a resident of Austell, Georgia, who came forward, announced that it was his picture, and claimed to have had nothing whatsoever to do with the bombing. Following a retraction demand from Schafer, Time published a correction stating that it regretted the error. The article and the error was the subject of critical reviews by other media. Schafer filed suit, seeking $26 million in actual and punitive damages.

At trial, Schafer presented testimony that the alternative theory of the Pan Am 103 bombing discussed in the article was, in general, contrary to federal government theories as to the bombing and that Time's Washington bureau had expressed concerns about the story for this reason. Schafer presented little testimony with respect to the photograph at issue.

In response, Time presented evidence establishing Rowan's long history of conscientious journalism, the care and diligence exercised by Time in connection with the story, the efforts to confirm the accuracy of Pan Am's sworn identification of the photograph and Time and Rowan's belief that the identification was accurate. Time also presented

evidence that the plaintiff, given his prior history, his actions following publication and various inconsistencies in his testimony, was not truthful in testifying that the article had caused him damage.

3. **Verdict:** For defendant

4. **Length of Trial:** 2 weeks

5. **Length of Deliberation:** 5 hours

6. **Size of Jury:** 8

7. **Significant Pre-Trial Rulings:**

In summary judgment motions filed prior to trial, Time argued that its repetition of Pan Am's erroneous identification of plaintiff's photograph in a sworn court affidavit was protected by the fair report privilege and, that, in any event, with respect to plaintiff's punitive damages claim, there was no clear and convincing evidence of actual malice. The trial court rejected both contentions.

8. **Significant Mid-Trial Rulings:**

The defense sought to show the plaintiff's background to show absence of damages, but the judge significantly limited these efforts.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

The court refused to submit special interrogatories to the jury. Although Georgia law would have permitted the issue of amount of punitive damages to be submitted in a second phase of the trial, the court, with the agreement of the parties, submitted the issue of amount of punitive damages together with the issues of liability and actual damages.

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

No unusual pre-selection jury work.

11. **Pretrial Evaluation:**

Because of the admitted misidentification of plaintiff's photograph, there was concern that a jury would award some amount to plaintiff even absent evidence of negligence or actual malice or tangible damages.

12. Defense Juror Preference During Selection:

Educated jurors who were either employed or retired.

13. Actual Jury Makeup:

The jury was composed of seven men and one woman. Four of the eight had college degrees, and two more had attended college but not graduated. Seven of the eight were employed, and the eighth was retired from a position with the Boys' Club. All of the jurors were over 35. Two of the jurors had served on juries before. Seven of the eight were married, and the eighth was divorced. All eight of the jurors had children. Although the misidentification of plaintiff's photograph, Time's correction and plaintiff's lawsuit had been front page news in Atlanta, only one prospective juror reported ever hearing anything about the case.

14. Issues Tried:

Falsity, negligence, constitutional malice (for punitive damages), and damages.

15. Plaintiff's Theme(s):

That Time falsely branded plaintiff an international murderer in a 'wanted poster' published worldwide to more than 20 million people. That the entire story was fallacious. That, although himself sympathetic, Time's reporter was let down by Time and its editors who failed to devote to the story adequate investigation and fact-checking resources and who failed to heed clear signals that the story was inaccurate. That Time's 'correction' was nothing of the sort and actually compounded plaintiff's injuries.

16. Defendant's Theme(s):

That the story as a whole was sound. (Defendants avoided placing the alternative bombing theory in issue, as it was complicated, and an unnecessary diversion from the simpler issue of how the photograph came to be part of the story.) That the misidentification of plaintiff's photograph was an isolated mistake that occurred despite the defendant's care in preparing the story. Given plaintiff's peculiar history and persona, it did not cause plaintiff any damage.

17. Factors Believed Responsible for Verdict:

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

Not a substantial factor.

b. Sympathy for plaintiff during trial:

Plaintiff came across as likeable but lazy and an opportunist who actually enjoyed his moment in the sun both at the time of publication and at trial.

c. Proof of actual injury:

Plaintiff testified that as a result of the misidentification of his photograph he suffered the humiliation and distress of an FBI investigation and would always worry that others, including his own children, might consider him an international assassin.

d. Defendants' newsgathering/reporting:

Even plaintiff's journalism expert conceded that the article's author, Roy Rowan, was, for good reason, a "marquis name" in journalism. Rowan was present at counsel table for the entire trial. He testified in both plaintiff's case in chief and during the defense case and established that he had exercised great care with respect to both the article in general and plaintiff's photograph. His avuncular personality conveyed that he was not the kind of person who would ever try to hurt anyone. Henry Muller, Time's managing editor at the time of publication, and John Stacks, the magazine's then chief of correspondents, each gave effective testimony as to the care exercised by Time throughout the editorial process.

Time placed the correction on the "letters" page as its custom. Plaintiff attacked the location, but when questioned, Muller noted that the number to call for subscriptions was on the same page, and added, "you don't think we'd put that there if nobody would read it, do you?" Plaintiff also attacked the correction because it merely stated that Schafer claimed he was not involved, rather that itself embracing that position itself. The Time witnesses and the defense expert explained that the media is only in a position to correct what it knows to be false.

e. Experts:

For plaintiff: Edwin Diamond, professor of journalism at NYU, whom defense witnesses described as a failed Newsweek editor pursuing a vendetta against Time. While Diamond's testimony was colorful, it seemed to lack substance, particularly after he admitted that he had delegated the lion's share of his preparation (but a proportionately meager portion

of his fee) to one of his graduate students. One juror later described him as a parody of an expert witness.

For defendant: Claude Sitton, a Pulitzer Prize-winning former reporter and editor for The New York Times and The Raleigh News and Observer. While Sitton testified that he was not familiar with Diamond's reputation, Diamond described Sitton as "one of the giants in our field." Sitton's straightforward style won over the jury and made sense of the journalism issues in the case.

f. Other evidence:

Plaintiff presented Lee Kreindler, the lead counsel for the families of those killed in the crash, and Vincent Cannistraro, the CIA's counterterrorism chief at the time of the bombing, who each testified that the Time story gave credence to a theory of the bombing that had been rejected by federal investigators. Plaintiff also presented Dennis Suit, an Atlanta freelance photographer and friend of plaintiff, who gave patently incredible testimony that Time's Atlanta bureau chief had shown him a copy of the "Lovejoy" photograph prior to publication and that he had specifically responded that it was a photograph not of David Lovejoy but of the plaintiff. Plaintiff's other evidence consisted of deposition testimony from Time editors and researchers regarding the editorial process.

In addition to the four witnesses described above, Time presented its Atlanta bureau chief who rebutted the testimony of Dennis Suit.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff was represented by an accomplished Atlanta trial lawyer who, in discovery and at trial, drew on the substantial resources of the large Atlanta insurance defense firm of which he is a name partner. In the early 1980s, he had successfully defended Ted Turner in a libel action brought by a sports agent.

ii. Defendant's trial demeanor:

Roy Rowan was present at counsel table throughout the entire trial and his demeanor was calm and professional.

iii. Length of trial:

No significant impact.

iv. Judge:

The trial judge, a former state trial judge and chief justice of the Georgia Supreme Court with less than a year's experience on the federal bench, was respectful of the jury and its decision.

h. Other factors:

None.

i. Lessons:

Juries do not always punish honest mistakes or assume that a libel plaintiff has suffered damage. Be straightforward, early and often, about any error the defendant made, and how he made it. Try the error only, not the issue that the plaintiff tries to make of it, in this case the validity of the alternative conspiracy theory. Defense counsel repeatedly pointed out that "if not for the photograph, we would not be here."

18. Results of Jury Interviews, if any:

Although two of the eight jurors initially voted in favor of substantial damage for plaintiff, after a night's sleep the jury quickly reached unanimous agreement that Time had acted responsibly and that plaintiff had failed to prove injury. The jury liked Roy Rowan. They also liked the defense expert, but said the experts were not much of a factor. Some of the jurors did not appreciate the extent to which the defense went into the plaintiff's background, others appreciated that this tended to show plaintiff was not damaged. Some thought that plaintiff's photo would not have been noticed had plaintiff not created publicity over it. The jury seemed untroubled over Time's handling of the correction.

19. Assessment of Jury:

They were attentive and took their job seriously.

20. Post-Trial Disposition:

Plaintiff's new trial motion was denied. The case is currently before the United States Court of Appeals for the Eleventh Circuit, where it was orally argued July 16, 1997.

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Y. **Case Name:** Schlegel v. Ottumwa Courier
Ia. Dist. Ct., Ottumwa
1996

1. Date of Publication:

2. **Case Summary:**

The newspaper published, in tiny print in its "Courthouse Records Section", a listing of persons having filed for bankruptcy and erroneously included the name of a local attorney who had in fact not filed for bankruptcy but was listed on the bankruptcy petition as counsel for the petitioner. The paper published a front page correction the next day.

3. **Verdict:** For plaintiff
Compensatory: $380,000
Punitive: $2 million

4. **Length of Trial:** 10 days

5. **Length of Deliberation:** 3-4 hours

6. **Size of Jury:** 8

7. **Significant Pre-Trial Rulings:**

That publication was not a matter of public concern and plaintiff was not a public figure; that wife could bring a claim for loss of consortium and that punitive damage evidence could come in, including evidence of newspaper employee's past drug and alcohol treatment; and that plaintiff did not have libel per se claim.

8. **Significant Mid-Trial Rulings:**

Denial of directed verdict; determination to allow evidence of employee's drug and alcohol problems; submission of punitive damage claim.

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

None in particular.

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

Pre-selection questionnaires.

11. Pretrial Evaluation:

Case was problematic but no damages were apparent, particularly in light of next day correction; plaintiff had stipulated he'd suffered no monetary harm to his law practice or business; plaintiff's settlement demand was exorbitant.

12. Defense Juror Preference During Selection:

Jury pool problematic from outset due to make up. Ideally, defense sought to find persons not likely to identify with plaintiff, and persons not susceptible to "victim" mentality.

13. Actual Jury Makeup:

Blue collar; the only person even in low management level position was struck by plaintiff in preemptory challenge.

14. Issues Tried:

Plaintiff's claim of libel, plaintiff's wife's claim for loss of consortium, punitive damages on issue of whether error was intentional.

15. Plaintiff's Theme(s):

Newspaper was owned by big conglomerate which only cared about profits and not about ruining people's lives in community; paper had made many such mistakes in the past including one involving the plaintiff, or former employee responsible for reviewing the article held a personal grudge against the plaintiff because the plaintiff, years before, had been county prosecuting attorney and was "tough on drugs," and editor had had a drug and alcohol problem and disliked law enforcement; that newspaper had conspired against plaintiff because they did not like him and thought incident was humorous.

16. Defendant's Theme(s):

Newspaper made an innocent human error, typing wrong name from form into section; immediately corrected it next day on front page; plaintiff was not harmed; newspaper's standard method for inputting information was not different from the standards of other newspapers.

17. Factors Believed Responsible for Verdict:

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

Pre-existing attitude that the paper makes too many errors.

b. Sympathy for plaintiff during trial:

They did not particularly like plaintiff but put themselves in his shoes and saw how "humiliated" they would have been had it happened to them.

c. Proof of actual injury:

None. Only proof offered was that plaintiff did not socialize or entertain anymore and no longer took "walk in" appointments at his law office; that he carefully managed who he spoke to, to avoid humiliation of having to discuss it and ensuing anger.

d. Defendants' newsgathering/reporting:

Records were input from court records by typist.

e. Experts:

Defendants called one to testify as to standard in industry, Herb Strentz, professor of journalism and mass communications, Drake University and director of the Iowa Freedom of Information Council; plaintiffs did not call one.

f. Other evidence:

g. Trial dynamics:

i. Plaintiff's counsel:

Loud, theatrical, sometimes comedic; reargued every evidentiary ruling against him until he wore the judge down.

ii. Defendant's trial demeanor:

Sincere, earnest, concerned about the mistake, but convinced that procedures were adequate and that mistakes are going to occur.

iii. **Length of trial:**

10 days.

iv. **Judge:**

Reluctant to exclude evidence (and did not generally); Judge was clearly shocked by verdict and had believed that "letting it all in" would prevent appeals and jury would render defense verdict despite it.

h. **Other factors:**

Court's rulings allowing clearly irrelevant evidence relating to personal problems of prior employee; evidence of several other similar errors, including one on the first day of trial involving another attorney in the community.

i. **Lessons:**

Jurors may place themselves in plaintiff's shoes even if they dislike the plaintiff, and are clearly concerned about the impact of newspapers' errors humiliating people.

18. Results of Jury Interviews, if any:

N/A.

19. Assessment of Jury:

See above.

20. Post-Trial Disposition:

Judge granted new trial on liability and compensatory damages, and granted judgment as a matter of law for defendants on punitive damages; held verdict was clearly result of passion and prejudice and ruled that various evidence would not come in on re-trial. Currently on cross-appeals.

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Z. **Case Name:** Bobby Seale v. Gramercy Pictures, PolyGram Filmed Entertainment Distribution, Inc., Working Title Group, Inc., and Tribeca Productions, Inc.
95 Civ. 2174
Decision granting in part and denying in part defendants' motion for summary judgment reported at 949 F. Supp. 331 (E.D. Pa. Dec. 18, 1996). Decision, following bench trial, entering judgment in favor of defendants and against plaintiff reported at 964 F. Supp. 918 (E.D. Pa. May 15, 1997).

1. **Date of Publication:** The film "Panther" was first exhibited in or about May 1995.

2. **Case Summary:**

Plaintiff brought claims for invasion of his right of publicity, false light invasion of privacy and Lanham Act violations alleging that various scenes in the film "Panther" (the "Film") portrayed him in a false and highly offensive manner and that his likeness was impermissibly used in the Film and on the packaging for the soundtrack album released in conjunction with the Film.

On motion for summary judgment, the court held that plaintiff's depiction in the Film was not a use "for purposes of trade" and was protected First Amendment expression and granted summary judgment dismissing plaintiff's publicity and Lanham Act claims with regard to the Film itself. The court denied summary judgment on the issue of whether plaintiff's name or likeness was used on the soundtrack and whether such use was for purposes of trade. The court also denied summary judgment on the false light claim finding issue of fact regarding the falsity of the depictions.

After a bench trial before Judge Raymond Broderick of the Eastern District of Pennsylvania, the court found that one of the two remaining scenes complained of did not depict plaintiff in a false light. With respect to the second scene complained of, the court held that although the depiction of plaintiff in such scene was false, plaintiff had failed to prove that defendants had presented the false depiction with "actual malice." The court also found

that plaintiff had failed to prove that the use of plaintiff's likeness in the packaging to the CD soundtrack was "for purposes of trade." Accordingly, the court denied plaintiff's claims in their entirety and entered judgment for defendants.

The case builds favorably on the case law established by Davis v. Costa Gavras, 654 F. Supp. 653 (S.D.N.Y. 1987) and Street v. National Broadcasting Co., 645 F.2d 1227 (6th Cir. 1981) by acknowledging that the conventions inherent in docudrama filmmaking (as opposed to documentary filmmaking) allow for a certain deviation from strict and absolute fidelity to actual events. The decision further establishes that the utilization of historical consultants and scholarly research can rebut an allegation of actual malice. Finally, however, the decision is troubling in one minor respect, in that it suggests -- without addressing the issue directly -- that the use of a photograph of the actor portraying Bobby Seale could be considered the use of Bobby Seale's likeness despite the fact that the actor is not a Bobby Seale "look alike," and there was no evidence indicating that anyone understood the photograph's actor (Courtney B. Vance) to be Bobby Seale. By glossing over the issue of whether Seale's "likeness" had, in fact, been used at all, the decision ignored the law established in such cases as Allen v. National Video, Inc., 610 F. Supp. 612, 623 (S.D.N.Y. 1985) and Onassis v. Christian Dior N.Y., Inc., 122 Misc. 2d 603, 472 N.Y.S.2d 254, 261062 (Sup. Ct. N.Y. Co. 1983), which stand for the proposition that unless the actor/impersonator is a professional "look alike," the only likeness presented is that of the actor/impersonator.

3. **Verdict:** N/A -- bench trial resulted in judgment for defendant.

4. **Length of Trial:** March 4, 1997 - March 11, 1997

5. **Length of Deliberation:** N/A.

6. **Size of Jury:** N/A.

7. **Significant Pre-Trial Rulings:**

Grant in part and denial in part of defendants' motion for summary judgment. Decision reported at 949 F. Supp. 331.

8. **Significant Mid-Trial Rulings:**

Denial of defendants' motion for judgment as a matter of law pursuant to Rule 52(c).

9. **Trial Management (mid-trial jury instructions, special verdict, sequential issue determination, bifurcation):**

None. All issues tried together.

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

N/A.

11. Pretrial Evaluation:

Defendants disagreed with partial denial of motion for summary judgment since, as a matter of law, depictions were not highly offensive, substantially false, or made with actual malice. Defendants believed that plaintiff's claims were without merit on the facts and the law.

12. Defense Juror Preference During Selection:

N/A.

13. Actual Jury Makeup:

N/A.

14. Issues Tried:

Whether plaintiff was portrayed in the film in a false light.

Whether plaintiff's name and/or likeness were impermissibly used on the packaging to the motion picture soundtrack.

15. Plaintiff's Theme(s):

That defendants did not obtain permission to depict plaintiff in the film and that his depiction was substantially and materially false and highly offensive to a reasonable person.

16. Defendant's Theme(s):

As a docudrama, the Film permissibly utilized the conventions inherent in the medium including a telescoping of events, the creation of composite characters and simulated dialogue. The filmmakers hired uniquely qualified consultants (a U. Cal. Berkeley professor of African-American studies who teaches about the Panthers, and an ex-Panther) to ensure that the portrayals in the film maintained fidelity to historical sources. Accordingly, the resulting portrayal of the plaintiff was not false, could not be considered "highly offensive" and, even if there were some inaccuracies, such portrayal was not presented with "actual malice."

As for the alleged use of plaintiff's name and likeness in the packaging to the soundtrack CD, it was a picture of the actor portraying plaintiff and not plaintiff himself who appears in the brochure and, a photograph of that actor is not the likeness of plaintiff. Further, since the soundtrack contained thematically important songs from the historical period depicted in the Film, it too was protected First Amendment expression and, thus, any use of plaintiff's likeness was not for "purposes of trade."

17. Factors Believed Responsible for Verdict:

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

N/A.

b. Sympathy for plaintiff during trial:

c. Proof of actual injury:

None.

d. Defendants' newsgathering/reporting:

e. Experts:

Plaintiff called a film studies professor to discuss the alleged standards and practices followed by the makers of docudramas and the alleged effects of the narrative tools and cues used by the filmmakers in the scenes at issue.

Defendants' expert, Robert Berger, is a preeminent producer of docudramas (his credits include "Murrow," "Holocaust," and "Sakharov"). Mr. Berger testified about the nature of the "docudrama," the use of cinematic conventions, and presented his expert opinion regarding the narrative effect of the scenes at issue.

f. Other evidence:

Defendant also called Melvin Van Peebles, the screenwriter, Preston Holmes, the producer, J. Tarika Lewis, a former Panther member and consultant on the Film, and Ula Taylor, a historian and consultant on the Film.

g. Trial dynamics:

N/A.

h. **Other factors:**

N/A.

i. **Lessons:**

18. **Results of Jury Interviews, if any:**

N/A.

19. **Assessment of Jury:**

N/A.

20. **Post-Trial Disposition:**

Plaintiff's post-trial motion for reconsideration denied.

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AA. **Case Name:** Turner v. Dolcefino, et al.
165th Judicial District, Harris County, Texas
Hon. Elizabeth Ray
October 22, 1996

1. **Date of Publication:** December 1, 1991

2. **Case Summary:**

Unsuccessful candidate for mayor of Houston brought suit against investigative reporter and ABC television affiliate in Houston alleging that a story that was broadcast six days before the 1991 election linked him to an insurance fraud and cost him the election. The insurance fraud involved the staged disappearance of a man who was a client of the plaintiff, and signed his will in the plaintiff's office immediate before disappearing.

3. **Verdict:** For plaintiff. (10-2)
Compensatory: $550,000
Punitive: Dolcefino - $500,000;
KTRK - $4.5 million, reduced post trial to $2.2 million.

4. **Length of Trial:** 7 weeks

5. **Length of Deliberation:** 1 week

6. **Size of Jury:** 12

7. **Significant Pre-Trial Rulings:**

See Dolcefino v. Ray, 902 S.W.2d 163 (Tex. Ct. App. 1995) (denying petition by reporter ordered by the trial court to answer questions concerning confidential sources).

The court granted summary judgment on amended petition to subsequent broadcast based on statute of limitations, finding that subsequent broadcast did not relate back to original broadcast on which plaintiff had sued. The court also granted summary judgment in favor of Capital Cities/ABC and CC Texas Holdings Co., parent companies of KTRK, Inc., which owned and operated KTRK-TV Channel 13 in Houston. Because it appeared that the attorneys gave only legal advice and exerted no editorial control, the court did not accept a theory of agency based on pre-broadcast vetting by lawyers employed by the parent company. The court allowed dismissal of members of jury panel who said they could not award more than $10 million in damages.

8. **Significant Mid-Trial Rulings:**

Court denied admissibility of testimony of expert witnesses on criminal law presented by defendants who testified in bill of exception that the activities of the plaintiff would be an indictable offense. Court denied the admissibility of testimony from U.S. Secret Service agents regarding criminal investigation of plaintiff. Court denied admissibility of portions of an affidavit prepared by plaintiff's ex-wife (married at the time of the affidavit) which investigative reporter had seen and relied on before the broadcast, which belied the plaintiff's

denial, during the campaign, of allegations that he and his wife were estranged, and which the reporter believed showed that Turner was untruthful.

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

Court liberally allowed introduction of electronic and demonstrative exhibits. Court used 125-question questionnaire -- believe to be the longest jury questionnaire in any court in Houston.

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

Counsel deem it inadvisable to disclose this information while the case remains pending.

11. Pretrial Evaluation:

Counsel deem it inadvisable to disclose this information while the case remains pending.

12. Defense Juror Preference During Selection:

Counsel deem it inadvisable to disclose this information while the case remains pending.

13. Actual Jury Makeup:

1. Hispanic female, age 41, married. Receptionist, high school.
2. Hispanic female, age 22, single. PBX Operator, high school.
3. White male, age 41, married. Plant Engineer, high school.
4. White female, age 42, married. Human Resources, graduate degree.
5. White male, age 49, married. Family Counselor, graduate degree.
6. Black male, age 47, married. Welder, high school.
7. White female, age 33, single. Records Assistant, some college.
8. White female, age 38, married. Secretary, some college.
9. White female, age 34, married. Manager/Accountant, college degree.
10. Male, age 34, single. Side Loader.
11. White male, age 40, married. Shift Operator, vocational/technical degree.
12. White female, age 37, married. Some college.

14. Issues Tried:

Substantial truth of broadcast; actual malice damages.

15. Plaintiff's Theme(s):

Plaintiff was a sympathetic minority candidate who came from a poor background and worked himself into a position where he was a candidate for Houston only to be done in by the media establishment. Plaintiff did not do anything wrong in connection with the representation of a client who had faked his death. All people are entitled to representation, and plaintiff merely prepared a will for a client, but had no idea that his client would be faking his death.

16. Defendant's Theme(s):

The reporter was thorough, diligent and professional in his investigation and presentation of this story and got the story right. Plaintiff's "fingerprints" were all over the faked disappearance of a man in order to collect insurance proceeds, and defendants had an obligation to reveal the information that they had to the voters of the City of Houston to allow them to make up their minds about the candidate. Defendants never accused the plaintiff of being a knowing participant in an insurance fraud, but merely presented what they had uncovered. At no time did they doubt the veracity of that information.

17. Factors Believed Responsible for Verdict:

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

Questionnaire responses, voir dire, and post-verdict interviews indicated that a number of jurors believed the press has a tendency to be arrogant and irresponsible, and that plaintiff, a Harvard-educated lawyer, would have more to lose than gain by being involved in an insurance fraud.

b. Sympathy for plaintiff during trial:

Extensive. Under direct examination, plaintiff cried and spoke of his poor background and how he had pulled himself out of poverty to educate himself at Harvard Law School.

c. Proof of actual injury:

Plaintiff lost the election. No proof of economic damages. No proof of mental anguish other than plaintiff crying on the witness stand.

d. Defendants' newsgathering/reporting:

The jury felt that defendants had an obligation to air testimonials from supporters of plaintiff at a press conference called immediately after the initial story.

e. Experts:

Probate experts on each side spoke about the normal duties of a lawyer to a client in preparing a will and estate planning. Judge's denial of admissibility of testimony from two former U.S. attorneys regarding criminal statutes that were violated by plaintiff's conduct was extremely prejudicial to defendants.

f. Other evidence:

There was ample evidence of plaintiff's involvement in the scheme, but much of it was not known to the defendant's reporter at the time of the broadcast. Reporter/client became contentious on the witness stand, and lost the jury.

g. Trial dynamics:

i. Plaintiff's counsel:

Extremely passionate; contentious and argumentative; at times on or over the ethical line; but an extremely effective examination style. Jury impressed with his passion.

ii. Defendant's trial demeanor:

Reporter testified three days after his mother's death, and became very combative on the witness stand.

iii. Length of trial:

Seven weeks.

iv. Judge:

h. Other factors:

i. Lessons:

The jury's presumptions regarding arrogance of the press need to be defused at all times.

18. Results of Jury Interviews, if any:

The jury did not like the fact that defendants may have gotten lucky, i.e., that the story was right but that defendants did not know it was right at the time. Rather, the substantial truth evidence that was presented was uncovered after the story ran. As one juror said, the plaintiff may have been "guilty," but that did not excuse the conduct of defendants in running the story. Plaintiff's counsel was very effective in putting criminal law notions into the minds of the jurors -- i.e., that what they had to decide hinged on whether the defendants could prove that the plaintiff was "guilty" and whether they could prove it at the time they ran the broadcast. The plaintiff argued about implications of the broadcast, and though the jurors could not point to specific language that was false, they thought the impression the broadcast created was false.

19. Assessment of Jury:

Juror interviews suggest that they were bothered by the fact that although the story may have been right, the defendants did not have proof that it was right at the time they ran the story. Much of the substantial truth evidence was evidence that was developed after the story ran.

20. Post-Trial Disposition:

Damages cut from $5.5 million to $3.2 million on post-verdict motion. Judgment in the amount of $3.2 million now on appeal in the Houston Court of Appeals, with briefing to take place this fall.

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BB. **Case Name:** Steven Wynn v. John L. Smith, Lyle Stuart, and Barricade Books
NV Dist. Ct., Las Vegas
August 6, 1997

1. **Date of Publication:** None

2. **Case Summary:**

Author John L. Smith wrote an unauthorized biography titled Running Scared: The Life and Treacherous Times of Casino King Steve Wynn. The book was published by Barricade Books. Lyle Stuart, who is the President and part-owner of Barricade Books, published a catalog which included an advertisement for the book. This action concerned only the advertisement - a separate suit exists in Kentucky based upon the publication of the book. The advertisement outlined the contents of the book and included four sentences which Mr. Wynn found objectionable. (1) The fact that Wynn was waltzed precariously close to the gangster world throughout his meteoric career; (2) Thus would Steve Wynn's 3-percent investment in the Las Vegas Frontier blow up when investigators discovered the true owners of the hotel were members of the Detroit mob; (3) Wynn's father ruled New York's scandal ridden world of illegal bingo. Michael Wynn dealt closely with a front man for the Genovese crime family boss, Anthony Salerno; (4) It details why a confidential Scotland Yard report called Wynn a front man for the Genovese Family." Ultimately, the first sentence was dismissed from the action because it was rhetorical hyperbole; the third sentence was dismissed from the action because it did not concern Steve Wynn; and summary judgment was entered on behalf of John L. Smith because he did not participate in the production of the advertisement. The jury found that Mr. Wynn did not prove the falsity of the second sentence (concerning the Las Vegas Frontier). The jury found Mr. Stuart and Barricade Books liable for the fourth sentence (concerning the Genovese crime family) and imposed punitive damages.

3. **Verdict:** For plaintiff.

Compensatory:

Harm to reputation:	$2,000,000
Presumed:	$ 100,000
Emotional harm:	$ 500,000

Punitive:

Against Lyle Stuart:	$1,000,000;
Against Barricade:	$ 73,000 (profit from the book)

4. **Length of Trial:** 12 days

5. **Length of Deliberation:**

Liability:	10 hours
Punitive:	4 hours

6. **Size of Jury:** 8

7. **Significant Pre-Trial Rulings:**

Fair Report Privilege

The court found that this privilege does not apply to a confidential Scotland Yard Report because the report was not meant to be publicly disseminated and because a supervisor testified that he refused to sign off on the report.

"Moldea Doctrine"

The court rejected defendants' contention that there can be no independent action for an advertisement on a book so long as the statements in the book are reasonably supported by reference in the book.

Discovery

Despite extensive requests for production of documents, defendants were given only seven pieces of paper from the plaintiff. The court found that all of the requests are irrelevant.

Source of Materials

Plaintiff contended that the book's author could be liable for defamation because he supplied the publisher with two confidential reports and other information that was used in the creation of the advertisement. The court granted summary judgment in favor of the author after finding that plaintiff could pursue this theory of recovery in the action on the book which is taking place in Kentucky.

8. Significant Mid-Trial Rulings:

Other publications

Defendants wanted to introduce as evidence a videotape of a CBS West 57th Street program concerning Wynn and his associations with organized crime. Wynn testified that he was emotionally devastated and lost sleep due to the publication of the advertisement here, but was only disappointed by the West 57th Street program. Defendants contended that the program was relevant to show Mr. Wynn's existing reputation and his insincerity regarding his emotional harm. The court precluded defendants from introducing the tape.

Prior defamation actions

In a pretrial ruling, the judge agreed that introduction of evidence concerning two prior defamation judgments against our clients would be unduly prejudicial and was irrelevant. The judge changed her mind and permitted introduction of the evidence after we brought out the fact that he had been in the publishing business for 40 years.

Publishing expert

Over defendants' objection, the trial judge permitted plaintiff to present a "publishing expert." He testified that it was the industry norm to have a completed manuscript before publishing a catalog advertisement for a book; that fact checkers are routinely employed for advertisements; and that legal vetting takes place before an advertisement is published.

Insurance evidence

During the punitive damages portion of the trial, defendants wanted to introduce evidence concerning their lack of insurance and inability to pay the $2.1 million compensatory award. The judge excluded evidence.

Former law enforcement officer testimony

Plaintiff presented several former law enforcement officers who testified that during their law enforcement careers, they were familiar with organized crime figures; that they reviewed agency records; and that they did not recall any reference of any kind to Steve Wynn. Defendants objected to this testimony as negative hearsay. Defendants also contended that the former officers were not competent to testify about the contents of agency records as they were not the custodians of record and defendants were not given the opportunity to review the records. The judge permitted the testimony to be introduced.

Punitive damages

Defendants contended that punitive damages were always unconstitutional in cases involving public figure plaintiffs and media defendants. Defendants also contended that Nevada's statutory scheme for imposition of punitive damages was unconstitutional. Finally, defendants asked that the jury be instructed in accordance with the Supreme Court's decision in BMW v. Gore. The trial court rejected each of these arguments.

Punitive standard

Defendants contented that punitive damages could be awarded only if there was a finding of "malice in fact" -- or hatred, ill-will and spite. The judge ruled that punitive damages could be awarded if there was malice in law -- which was defined as essentially actual malice.

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

Mid-trial jury instruction

The Court denied defendants' requested mid-trial jury instruction on actual malice. The court gave a mid-trial jury instruction on the republication doctrine several times throughout the trial.

Special verdict

A special verdict form was used for the liability portion of the trial. Defendants were not given the opportunity to review the verdict form prior to the court's decision to use it, and were not able to contest the decision to permit the jury to award both presumed damages and compensatory damages.

Bifurcation

Pursuant to Nevada law, the trial was bifurcated. The amount of punitive damages was decided in a separate proceeding.

Preferential treatment

The trial judge permitted the plaintiff to interrupt our cross-examination of the book's author -- on two occasions -- so that the Governor of Nevada and the Mayor of Las Vegas could testify on behalf of the plaintiff without unduly interfering with their vacation schedules.

Exclusion of party

The trial judge refused to grant a Rule 54(b) certification after summary judgment was granted in favor of the book's author (thus permitting Wynn to postpone payment of a $7,000 cost award). We contended that the author was still a party to the action and entitled to be in the courtroom. We relied on this pretrial ruling and planned to have the author's assistance during trial. On the first day of trial, the judge excluded him from the courtroom.

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

Defendants engaged a jury consultant and the venire completed a questionnaire a week prior to trial.

11. Pretrial Evaluation:

We were discouraged by the trial court's decisions on the Fair Report Privilege and "Moldea Doctrine." We believed defendants would prevail on the statement concerning the Frontier Hotel. We thought we had a marginal chance of prevailing on the statement concerning the Genovese Crime Family -- but also believed that the jury might find liability on the statement, and impose nominal damages. We did not anticipate $2 million in compensatory damages.

12. Defense Juror Preference During Selection:

Our preferences for jurors were: anti-establishment, older, long-time Nevada resident, and working class. We also liked people who were from New York or New Jersey.

13. Actual Jury Makeup:

For the most part, we received what we wanted. The average age was about 45. Responses on the questionnaires indicated feelings of anti-establishment. Residency ranged from 6 months to 20 years. Five men, three women. Most were working class. The juror who favored Defendants on all issues was very anti-establishment, in his early 60s, and retired.

14. Issues Tried:

Falsity, actual malice, damages

15. Plaintiff's Theme(s):

Wynn has been thoroughly investigated 15 times for gaming licenses, and has been licensed 15 times, so there could be no truth to the allegation that he is associated with organized crime.

Defendant did nothing to investigate the truthfulness of the statements in the catalog page. All he had to do was pick up the telephone and call any of the former law enforcement officers who testified at trial.

16. Defendant's Theme(s):

Scotland Yard, the New Jersey Division of Gaming Enforcement, and John L. Smith were reliable sources -- no independent investigation was required.

This was an advertisement. Readers expect hype in advertisement and to not expect a full recitation of every fact. The book contained a full story.

The plaintiff was not harmed by the publication. He was still friends with the Mayor and Governor. He hosted the President of the United States and 45 governors the first week of the trial. His job was secure and his net worth was at an all time high. He did not lose any business or social contacts.

The fact that Wynn was licensed 15 times meant nothing because the licensing was approved by Commissions who were appointed by Governors, who received large campaign contributions from Wynn. The political payoff circle was not designed to elicit the truth.

17. Factors Believed Responsible for Verdict:

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

Plaintiff is a "home town hero" and the two defendants remaining in the case were both from out-of state. Gaming is the industry in this state.

b. Sympathy for plaintiff during trial:

Plaintiff dressed down for the trial and "lost" his body-guard. His partial blindness was noticeable. Plaintiff and his wife both testified about the emotional distress caused to them by the advertisement. Plaintiff's wife testified that she knew everyone was wondering whether her family was associated with organized crime -- even the elementary school children that she met with each week. Plaintiff emphasized that he employs 18,000 people

and their jobs would be at risk if his gaming license were denied due to the allegations in the advertisement.

c. Proof of actual injury:

Plaintiff's employee first testified that someone from the Connecticut Governor's office asked about the advertisement and some other materials concerning Wynn at a time when Wynn was seeking legislative changes in Connecticut. The employee also testified that the legislation to permit private gaming was defeated because of tax revenue concerns. Wynn testified that he had a few sleepless nights and was upset about the publication. The judge instructed the jury that proof of actual injury did not need to be introduced under a "libel per se" theory.

d. Defendants' newsgathering/reporting:

Defendant Stuart testified that he primarily relied on a confidential Scotland Yard Report, a confidential new Jersey Division of Gaming Enforcement Report, and a FBI 302 Report. He also drew on information contained in the partial manuscript of the book, the book proposal, and his own knowledge of many of the people mentioned in the confidential reports. He did not conduct any independent investigation. Defendants attempted to introduce evidence concerning the extensive research conducted by the book's author to show that it was reasonable to rely on the author. The court precluded introduction of this evidence. Mr. Stuart testified that he knew that the Scotland Yard Report was not 100% correct in each of its details. The book's author testified that the report was not completely accurate on all points, but was correct for the most part and was well supported by other research.

e. Experts:

Over defendants' objection, the court permitted the plaintiff to present a "publishing expert" (Allen Whitman, Whitman & Assoc., publishing consultant for trade and technical books, New York, NY) and a linguist (Edward Finnegan, Professor of Linguistics, U.S.C.). In response, defendants also presented a publishing expert ((Martin Greenberg, publishing consultant, New York, NY) and a linguist (Tom Clark, U.N.L.V., Las Vegas). The court excluded the testimony of a journalism professor (Ted Glasser, Department of Journalism, Stanford University) who wanted to testify for plaintiff that the same standards apply to both journalists and advertisers.

f. Other evidence:

Plaintiff produced several law enforcement officers who testified that they were familiar with organized crime and that they had never heard of any organized crime affiliation by Steve Wynn. Plaintiff also presented the testimony of a former Nevada Gaming Control Board investigator concerning the steps taken for a gaming inspection. Plaintiff produced a

former Scotland Yard Supervisor who testified that the confidential Scotland Yard Report was the product of an unreliable investigation that was conducted for political reasons. He presented the testimony of a New Jersey Division of Gaming Enforcement attorney who stated that a confidential New Jersey report was preliminary and that further testimony revealed no organized crime involvement by Wynn. The judge did not permit defendants to introduce the deposition testimony of the two investigators who wrote the New Jersey report. Both the Scotland yard Supervisor and the New Jersey attorney testified that the confidential reports did not represent the official position of the agency, that the publication of the report was not authorized, and that they were not contacted by Mr. Stuart or the book's author. Plaintiff presented the testimony of the Mayor of Las Vegas and the Governor of Nevada. Each testified that they had known the plaintiff for many years and knew that his reputation in the community was that he did not associate with organized crime. Both testified that his or her opinion of Wynn did not change after viewing the catalog page (both viewed the advertisement for the first time one week before testifying and three weeks after being listed as a witness). The Governor testified that he spent the Fourth of July weekend with Wynn and convicted felon Michael Milken (casino licensees are supposed to refrain from associating with felons) and that he had also been accused of being associated with organized crime, but was still twice elected as Governor. One of Wynn's attorneys testified about a meeting at the local newspaper, where the book's author is employed as a columnist, and the paper's decision not to publish an article about the Scotland Yard Report. the newspaper's editor testified that the article was not published because the paper feared the cost of litigation and because the report was too old to be of interest for a daily newspaper. The attorney also testified about his own investigation of Wynn while the attorney worked for the U.S. Attorney's Organized Crime Strike Force. Defendants established that Fat Tony Salerno discussed Wynn and those conversations were recorded on FBI audio surveillance tapes; that Wynn's top-ranking employee met with Salerno on at least two occasions; that Wynn lied about the details concerning his move to Las Vegas; that several of Wynn's employees were believed to be associated with organized crime; that Wynn's very close friend and top-ranking employee walked daily and was caught hosting five members of the Genovese crime family at the Mirage.

g. Trial dynamics:

i. Plaintiff's counsel:

Plaintiff's lead counsel is an experienced plaintiff's defamation attorney and performed well. Although plaintiff engaged at least eight attorneys to work on this case, only two were present for trial.

ii. Defendant's trial demeanor:

Defendant Stuart was present for the entire trial. He is 75 years old and walks with a cane because of a recent hip surgery. Defendants elected to have Stuart's wife -- a co-owner of the company-- present for the trial. This was a good decision.

iii. Length of trial:

The jury seemed bored with the nine days of testimony. Defendants presented most of their case through cross-examination of plaintiff's witnesses (including defendant Stuart and the book's author). Defendants wanted to introduce about two days' worth of additional evidence, but the judge found it to be irrelevant.

iv. Judge:

The judge is an elected politician who had accepted campaign contributions from the plaintiff both before and after the filing of this case. She dismissed the local defendant, but ruled against defendants on virtually every other significant issue. She adopted most of plaintiff's requested jury instructions and told the jury that she slept during defendants' cross-examination of a witness.

h. Other factors:

The local media attention was favorable to defendants most of the time. The $2 million that was awarded in compensatory damages appears to be directly related to plaintiff's argument that damages should be awarded in the millions to teach Stuart a lesson that he did not learn in his two prior defamation cases.

i. Lessons:

We should have prepared our document production requests earlier, and should have filed a pretrial writ of mandamus with the Nevada Supreme Court to compel production.

Plaintiff had essentially unlimited resources. He engaged at least eight attorneys and several full-time investigators. Defendants engaged only two attorneys and could not afford to pay an investigator. It would have been easier to defend this case with sufficient resources.

We elected to try for a jury that was "anti-establishment" rather than a jury that was committed to free speech. This may have been a mistake.

We permitted the defendants to have another attorney attend several depositions for us on the East Coast. We should have attended the depositions ourselves.

We should have more fully developed our theory of defense and theme prior to depositions.

We should have attempted to dismiss the local defendant from the action immediately and then removed the action to federal court.

18. Results of Jury Interviews, if any:

None.

19. Assessment of Jury:

Given the court's legal rulings and prohibitions on evidence admission and argument, the jury's finding of liability for the statement concerning the Genovese family is understandable. The jury's decision that Wynn deserved $2.1 million in compensatory damages is unsupportable. The imposition of an additional $1 million in punitive damages against Mr. Stuart reflects a disregard for the instruction that the award not financially devastate the defendant. Comments in the newspaper from several jurors following the verdict suggested a misunderstanding of the actual malice standard.

20. Post-Trial Disposition:

Post-judgment motions filed and currently pending are: motion to alter and amend the judgment; motion for j.n.o.v.; motion for a new trial; and motion for a new trial on the issue of damages, or in the alternative, for remittitur damna. A motion for stay of execution of judgment pending appeal without posting of a supersedeas bond was denied, but the judge reduced the bond amount from $3.1 million to $1 million, if defendants would agree to certain restrictions and financial monitoring. Defendants anticipate that each of the above motions will be denied by the end of September 1997, and that an appeal will be filed to the Nevada Supreme Court.

Plaintiff's Attorneys:

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Jim Pisanelli
Schreck Morris
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Defendant's Attorneys:

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DNVR1:60030784.01

CC. SUMMARY REVIEWS

1. **Case Name:** Bueno v. Denver Publishing Co.
Denver District Court, CO
Hon. Jeffrey Bayless
May 13, 1997

a. **Date of Publication:** August 28, 1994

b. **Case Summary:**

The article reported on a family with eighteen children, sixteen of which had criminal records. The article at times referred to the persistent criminals in the family as the "older brothers" (all in prison, three serving life sentences). The article also reported that the plaintiff did not have a criminal record.

Plaintiff alleged that the article's headline "Denver's Biggest Crime Family" and statements and a picture showing plaintiff to be the oldest brother of the family placed him in a false light and defamed him.

c. **Experts:**

Plaintiff's:
Michael Mead, Ph.D. (emotional injuries)

Defendant's:
Dan Davis, Ph.D. (emotional injuries)
Jerry Kennedy (retired Denver police commander, concerning organized crime in Denver, that the Bueno family was Denver's largest organized crime family, and that the plaintiff was a part of that family).

d. **Verdict:** For plaintiff (on invasion of privacy/false light claim only)
Compensatory: $53,000
Punitive: $53,000

e. **Length of Trial:** 5.5 days
Length of Deliberation: 6-7 hours

f. **Size of Jury:** Four women, two men. Two marketing employees, one computer technician, one highway worker, one retired homemaker.

g. Issues Tried:

Whether the article, with the headline "Denver's Biggest Crime Family," and statement that "older brothers" engaged in crime, placed the oldest brother in a false light.

Whether an exonerating statement that plaintiff "had stayed out of trouble" sufficiently negated any negative implications about the plaintiff.

Whether defendants published with constitutional malice.

Whether plaintiff himself had engaged in criminal activity.

h. Notes:

The plaintiff's trial theme was that the article portrayed plaintiff as part of the crime family, lumped him in with all the bad things attributed to some members of the family, and created the impression that he was one of the "older brothers" who had become hardened criminals. The defendant urged that the article did not portray the plaintiff as one of the family members involved, and that in fact specifically stated that notwithstanding the problems of other family members, plaintiff had stayed out of trouble for some period of time. Defendant contended alternatively that even if the article could be taken as portraying the plaintiff in a bad light, there was no knowing or reckless falsity since the defendant had information concerning the plaintiff's involvement in crime which it elected not to publish because the events occurred in the distant past.

There was no evidence of economic loss, but some evidence of reputation injury among co-workers. Psychological testimony as to emotional injuries was presented, but the more effective testimony was from the plaintiff's daughter.

The plaintiff asked for one dollar for each newspaper circulated by the defendant, approximately 470,000. The defendant believes the verdict was based upon an award of one dime for each newspaper circulated, plus $6,000 for psychological expenses.

The trial court dismissed the libel claim on the grounds that the article contained no statement of fact, among other grounds. One of the issues on appeal will be whether the false light claim should have been dismissed for the same reason.

i. Post-Trial Disposition:

The motion for judgment n.o.v. or for new trial was denied, and an appeal of the verdict is pending.

Plaintiff's Attorneys:

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2. **Case Name:** Greg Copeland and Betty Copeland v. Hubbard Broadcasting
Ramsey County District Court, St. Paul, MN
Hon. James H. Clark
July 17, 1996

a. **Date of Publication**:

Alleged trespass, April 15 & 16, 1993, no publication in issue.

b. **Case Summary:**

This case arose out of the hidden-camera reporting by an employee at KSTP-TV. The reporter, Patty Johnson, was a part-time student at the University of Minnesota. She arranged to accompany veterinarian Dr. Sam Ulland on his rounds based on the understanding that she was interested in a career in veterinary medicine. Dr. Ulland was not aware that Johnson was videotaping his practice methods.

Before an April 1993 visit to the home of Greg and Betty Copeland to treat their cat, Dr. Ulland asked if he could bring Johnson. The Copelands agreed. Subsequently, two brief portions of video taken by Johnson in the Copeland home were broadcast by KSTP as part of a report on the practices of Dr. Ulland and another veterinarian.

The Copelands sued for intentional misrepresentation and trespass.

The trial court dismissed the intentional misrepresentation claim, and granted summary judgment in favor of KSTP on the trespass claim. The court also denied the Copelands leave to amend the complaint to add an invasion of privacy claim.

The Minnesota Court of Appeals reversed the summary judgment on the trespass claim and remanded the case for trial. See Copeland v. Hubbard Broadcasting, 526 N.W.2d 402, 23 Media L. Rep. 1441 (Minn. Ct. App. 1995). The dismissal of the misrepresentation claim was not appealed, and the court of appeals affirmed the denial of the motion to amend.

Following the remand, the trespass claim was on stipulated facts tried to the bench, and the court found for the plaintiffs. Because of the absence of proof of actual damages, the court awarded only nominal damages.

c. **Experts:** None.

d. **Verdict:** For plaintiff (bench trial).
Compensatory: $1
Punitive: $0

e. **Issues Tried:**

Did the undercover reporter exceed the scope of her permission when she entered the plaintiffs' home, ostensibly to observe Dr. Ulland for her personal interest in veterinary medicine?

f. **Notes:**

After the remand from the Court of Appeals, the trial court granted partial summary judgment to KSTP on the grounds that the Copeland could not recover emotional distress damages because they could not prove any emotional distress. The court subsequently denied a motion to seek mesne profits.

From the beginning of the case, the plaintiffs' theory of recovery had been based solely on claims for emotional distress damages and punitive damages. The plaintiffs never alleged any actual damages to their real property, personal property, to their title, or to any other interest protected by the tort of trespass. When the court ruled that there was insufficient evidence for the claim of emotional distress damages, the plaintiffs were left without a viable theory of money damages.

g. **Post-Trial Disposition:**

Plaintiffs have appealed the trial court's grant of partial summary judgment on the question of emotional distress damages. Oral arguments are scheduled before the Minnesota Court of Appeal on August 27, 1997.

Plaintiff's Attorneys:

Patrick T. Tierney
Bonnie J. Bennett
Collins, Buckley, Sauntry & Haugh
St. Paul, MN

Defendant's Attorneys:

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Leonard, Street and Deinard
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3. **Case Name:** Englezas v. St. Joseph News Press & Gazette and Terry Raffensperger
Circuit Court, Buchanan County, Missouri
November 1996
Hon. Randall R. Jackson

a. **Date of Publication:** February 9, 1994

b. **Case Summary:**

The defendant newspaper published an article concerning the closing of the plaintiff's popular restaurant, in which plaintiff's former landlord was quoted as accusing the plaintiff of "robbing us blind, in broad daylight." The landlord said a large urn had been thrown through the window of another restaurant he owned, that he called the plaintiff and told him to "come and get his urn," and that he knew the urn had been thrown by plaintiff because it had plaintiff's "fingerprints on it."

c. **Verdict:** For plaintiff
Compensatory: $20,000
Punitive: In the first phase of the bifurcated trial, the jury determined that the corporate publisher but not the reporter was liable for punitive damages. Based upon

this apparently inconsistent finding, the court directed a verdict on punitive damages in favor of the corporate defendant.

d. **Length of Trial:** 4 days
Length of Deliberation: 4 hours

e. **Size of Jury:** 12

f. **Notes:**

The trial court excluded from evidence subsequent publications which contained even more severe defamatory allegations from the plaintiff, because claims based upon them were not joined in the action within the statute of limitations. Cross appeals pending.

g. **Factors:**

The jury was displeased with the executive editor's decision to carry this story.

Plaintiff's Attorneys:

James Yretska
Kansas City, MO

Defendant's Attorneys:

Wendell Koerner, Jr.
Brown, Douglas & Brown
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St. Joseph, MO 64501
(816) 232-7748

4. **Case Name:** MMAR Group v. Dow Jones & Co., Inc. and Laura Jereski
Cause No. 95-1262
S.D. Texas, Houston Division
March 20, 1997

a. **Date of Publication:** October 21, 1993

b. **Case Summary:**

The plaintiff, Money Market Analytical Research Group, Inc. ("MMAR") sued over a Wall Street Journal article entitled "Regulators Study Texas Securities Firm and its Louisiana

Pension Fund Trades." The article described at length MMAR's "fast and furious" trading activity, which featured a risky species of mortgage-backed bonds known as "inverse floaters," and problems with its disgruntled former customer, Louisiana State Employees Retirement System. The article described a broad range of questionable practices including commission overcharges, excessive limousine expenditures, extraordinarily large distributions of money to firm principals, and an investigation into MMAR's activities by the NASD. After the publication, the Louisiana Pension Fund sued MMAR, and MMAR closed its doors shortly thereafter.

The plaintiff challenged nineteen statements in the article, but the court ruled it proved sufficient only as to eight of them and submitted these to the jury.

c. Experts:

Plaintiff: Don Tomlinson, journalism professor, Texas A&M University.

Defendant: Scott Armstrong, freelance writer and consultant, former reporter with Washington Post, co-wrote The Brethren with Bob Woodward.

Both sides called damage experts.

d. Verdict: For plaintiff.

Compensatory: $22.7 million

Punitive: Dow Jones - $200 million
Laura Jereski - $20,000

The plaintiff found five of the eight statements submitted to be false and defamatory and published with negligence (for purposes of liability for compensatory damages) and constitutional malice (for purposes of the punitive damage award).

e. Length of Trial: 2½ weeks
Length of Deliberation: 1¾ days

f. Size of Jury: 7

g. Notes:

Composition of the jury was as follows:

AGE/SEX	OCCUPATION	SPOUSE'S OCCUPATION
36/F	clerical/sales	lineman
70/F	retired homemaker	merchant seaman (retired)
50/M	litigation support	administrator

36/F	legal assistant	machinist/owner
52/F	school administrator	funeral pre-arrangement
37/F	administrative assistant	purchasing agent
47/M	car mechanic	store manager

A report of the trial was published in The American Lawyer. See "Trial and Errors," The American Lawyer, June 1997.

The trial court granted the defendant's judgment n.o.v. with respect to punitive damages against Dow Jones (but not Jereski), because the plaintiff failed to establish, as required for a corporation to be liable for punitive damages, aggravated conduct by Dow Jones management, or authorization or ratification of such conduct by its employee. The court otherwise denied the motion for judgment n.o.v.

The article had a number of damaging statements that were true or privileged but arguably as damaging as those which the jury found false, defamatory, and published with requisite fault. The defendant sought a directed verdict and a judgment n.o.v. on the grounds that the evidence was insufficient to establish causal relationship between the actionable statements and the losses claimed, and it appeared that they were just as likely caused by truthful statements in the article and factors over which the defendant had no control. The trial court denied the motion for judgment n.o.v. as to compensatory damages.

h. Factors:

Some of the defendant's sources testified at trial that they did not tell the reporter matters attributed to them in the article.

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Mark C. Harwell
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5. **Case Name:** Danielle Munoz v. University Reporter
DeKalb County District Court, Georgia
C. David Wood, judge
August 15, 1996

a. **Date of Publication:** January 1995

b. **Case Summary:**

Danielle Munoz patronized Brian Skellie's business "Piercing Experience" for a nipple piercing session. Skellie photographed his work on Munoz. Skellie then took the semi-nude photos to the University Reporter newspaper, and asked whether they could be used in an advertisement if Skellie obtained the permission of Munoz.

The University Reporter subsequently published one of these photos without the knowledge or permission from either Skellie or Munoz.

Munoz sued the University Reporter for libel, false light privacy, and public disclosure, and Skellie for illegal use (???) of the photos. Skellie cross-claimed against the University Reporter for publishing the photo without permission.

c. **Verdict:** For plaintiff and cross-complainant
Compensatory: Plaintiff - $200,000; cross-complainant - $50,000.
Punitive: 0

d. **Length of Trial:** 2 days
Length of Deliberation: 2 hours

e. **Size of Jury:** 12

f. Experts:

None.

g. Notes:

Of Munoz' original claims, the court submitted only the claim for false light privacy, because of the court's view that it was unreasonably offensive to juxtapose the photo with tawdry advertisements.

Plaintiff's Attorneys:

S. Robert Hahn, Jr.

Defendant's Attorneys:

Richard Gerakitas
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6. Case Name: Marino Valdez v. Champion Broadcasting
Mass. Super. Ct., Middlesex County
May, 1997

a. Date of Publication: March 4, 1994

b. Case Summary:

Plaintiffs alleged that Marino Valdez was defamed by statements made by lessees of Champion during a Spanish-language radio talk show. Valdez was an advertising salesman for a company that competed with the radio hosts through a Spanish-language newspaper and radio station. The alleged defamation included statements that plaintiff Marion Valdez was making comments about the talk show and acted unethically and unprofessionally in his business activities.

Valdez and his wife sued the station and the talk show hosts for libel, intentional infliction of emotional distress, and tortious interference with a contractual relationship.

The trial court granted summary judgment to the station but not the talk show hosts on the emotional distress claim and for all defendants on the tortious interference claim. The court ruled that the plaintiff must prove the statements defamatory and negligently uttered, but that the defendants had the burden of proving falsity of statements. The court allowed an expert to testify that the radio station acted in conformity with industry standards in not censoring broadcast.

c. Experts:

Plaintiff: Malcomb Blank, M.D., Brigham & Women's Hospital, Boston, Massachusetts (psychiatrist). This witness testified, credibly, that the broadcast caused the plaintiff to suffer clinical depression.

Defendant: Harry Waxman, Ph.D. (psychologist). Nancy Shack, Producer, WRKO, Boston (also an attorney) (broadcast standards).

d. Verdict: For plaintiffs.

Compensatory: $70,000 Marino Valdez -
$30,000 Lisa Valdez (loss of consortium)

Punitive: $0 (punitive damages not recoverable in Massachusetts)

e. Length of Trial: 7 days (from jury selection through verdict)
Length of Deliberation: Slightly more than 1 day

f. Size of Jury: 13, but one was dismissed shortly after trial began for personal reasons. Mixed men and women, mostly in the 30-50 range.

g. Notes:

Plaintiff's only proof of injury was damage to his marriage and all of his damages were premised on emotional harm. His wife sued for loss of consortium. The injury alleged was that embarrassment of being called unethical and unprofessional caused impotence for two-and-a-half years until drug therapy cured the problem, and the resulting harm to the marriage.

The defendants were hoping for a jury of young heterosexual males, but the jury consisted of a balance of men and women, middle-aged.

During trial the court ruled sua sponte that the defense psychological expert could not testify that no one could conclude with psychological probability that the broadcast caused the plaintiff's depression; the expert was allowed only to say that he could not reach such a conclusion.

The jury appeared most moved by the testimony of plaintiff's psychiatrist.

The defendant radio station filed a motion for judgment n.o.v. challenging the finding that the station was negligent in not using the delay switch to prevent the broadcast under a Massachusetts statute which appears to provide for a near-absolute immunity for broadcasters for statements by persons who the station is not under an obligation to control by virtue of federal law. This motion remains pending.

Plaintiff's Attorneys:

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Defendant's Attorneys:

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7. **Case Name:** Dennis Young v. The Arkansas Democrat-Gazette
Ark. Cir. Ct., Pulaski County, Little Rock
June, 1997

a. **Date of Publication:** October, 1996

b. **Case Summary:**

The Arkansas Legislature voted on a bill rider that would extend state retirement and medical benefits to former members of the Legislature. The rider was defeated. The Democrat ran an editorial that referred to those members who voted for it as the "Grabby Nineteen" and listed each of them. The newspaper ran the editorial again just before the election of November 1996, and urged that the nineteen legislators not be reelected.

Plaintiff claimed he was in the hallway when the vote occurred, and that someone else had voted his machine without his authorization.

c. **Experts:**

None on liability issues.

d. **Verdict:** For defendant

e. **Length of Trial:** 2 days
Length of Deliberation: 1½ hours

f. **Size of Jury:** 12 (unanimous verdict)

g. **Notes:**

Plaintiff was reelected despite the publicity. Jurors in a mock trial thought that the practice of leaving voting machines turned on while members were not in attendance was irresponsible.

h. **Factors:**

Plaintiff's Attorneys:

Grady Paddock
Texarkana, TX

Defendant's Attorneys:

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Little Rock, AR 72201
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8. **Case Name:** Barbara Yow v. Journal Newspapers
VA Cir. Ct., Prince William County, Hon. Frank Hoss
March 13, 1997

a. **Date of Publication:** Articles, a column, and an editorial, March 19 through April 2, 1996.

b. **Case Summary:**

The Prince William Journal published news articles, an editorial, and a religious column that questioned whether Barbara Yow, a public health nurse assigned to provide

nursing services at a public high school, had violated a local county school regulation that prohibited public school nurses from counseling students about abortion on school grounds.

Yow sued for libel, and the trial court found that she was not a public official for purposes of the suit, and the publications did not involve a matter of public concern for purposes of the common law fair comment privilege. The jury returned an award of $150,000. The court also rejected a demurrer based on the opinion privilege and on the lack of defamatory comment.

c. **Experts:**

None.

d. **Verdict:** For plaintiff
Compensatory: $150,000
Punitive: Punitive damages not submitted because the plaintiff failed to prove actual malice.

On a post-trial motion, the award was reduced to $75,000.

e. **Length of Trial:** 3½ days
Length of Deliberation: 5 hours (including lunch)

f. **Size of Jury:** 7 + 1 alternate

g. **Notes:**

The court refused a defense request for a ruling that the plaintiff was a public official for purposes of the suit or that the publications at issue involved matters of public concern for purposes of a fair comment defense. The jury determined that the article was defamatory, false, and that the defendants were negligent. A general verdict was rendered without special interrogatories.

h. **Factors:** Unknown.

Plaintiff's Attorneys:

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1997 LDRC/ANPA/NAB LIBEL DEFENSE SYMPOSIUM
SURVEY OF RECENT LIBEL CASES

By Thomas B. Kelley

September 12, 1997

PART II

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

This is the fourth 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 trials concluded from September 15, 1995 through September 5, 1997. During the nearly two-year period covered by this survey, 31 jury verdicts and two bench judgments were discovered. The results were as follows:

	CASE	VERDICT
1.	Bandido's, Inc. v. Fort Wayne Journal-Gazette IN Dist. Ct., Albion March 30, 1994	$985,000 (compensatory damages only)
2. ✓	Beal v. Bangor Daily News ME Sup. Ct., May 15, 1997	$125,000 (compensatory damages only)
3. ✓	Bueno v. Denver Publishing Company CO Dist. Ct., Denver May 13, 1997	$106,000 ($53,000 compensatory, $53,000 punitive)
4. ✓	Copeland v. Hubbard Broadcasting U.S.D.C., D. MN, St. Paul July 17, 1996	$1 (bench trial)
5. ✓	da Silva v. Time U.S.D.C., S.D. NY January 17, 1997	For defendant
6. ✓	Dumond v. Diversified Communications (WABI-TV) ME Sup. Ct., Bangor March 21, 1997	For defendant

	CASE	VERDICT
7.	Eastwood v. National Enquirer U.S.D.C., C.D. CA, Los Angeles October 1995	$150,000 (compensatory damages only)
8.	Elder v. Gafney Ledger SC Ct. of C.P., Gafney May 30, 1997	$310,000 (compensatory $10,000, punitive $300,000)
9.	Elshafei v. WCSH ME Sup. Ct., Portland June, 1997	For defendant
10.	Englezas v. St. Joseph News & Press Gazette MO Cir. Ct., St. Joseph November, 1996	$20,000 (compensatory damages only)
11.	Fitzgerald v. Macon Telegraph GA Sup. Ct., Macon 1996	$125,000 (compensatory damages only)
12.	Fitzhugh v. Little Rock Newspapers, Inc. AR Cir. Ct., Little Rock February 1996	$50,000 (compensatory damages only)
13.	Food Lion v. ABC U.S.D.C., M.D. NC January 1997	$5,547,152 ($1,402 compensatory, $5,545,750 punitive)
14.	Debra & William Kastrin v. CBS Inc. U.S.D.C., W.D. TX, El Paso August 13, 1997	For defendant
15.	Levan v. ABC U.S.D.C., S.D. FL, Miami December 18, 1996	$10,000,000 (compensatory damages only)
16.	Marsico v. The Patriot News PA Ct. of C.P., Harrisburg May 6, 1997	For defendant
17.	Merco Joint Venture v. TriStar Television, Inc. W.D. TX, Pecos March 28, 1996	$5,000,001 ($1 compensatory, $5,000,000 punitive)
18.	Michael v. The Dominion Post WV Ct. C.P., Marion County May 10, 1995	For defendant
19.	MMAR Group, Inc. v. Dow Jones, Inc. S.D. TX, Houston March 20, 1997	$222,720,000 (compensatory $22.7 million, punitive $200,020,000)

	CASE	VERDICT
20.	Munoz v. University Reporter GA Sup. Ct., Atlanta August 15, 1996	$250,000 (compensatory damages only)
21.	Parra v. King Broadcasting Co. (KGW-TV) OR Dist. Ct., Portland November 2, 1996	$450,000 (compensatory damages only)
22.	Pollution Control Industries v. Howard Publications, Inc. (The TIMES) IN Dist. Ct., East Chicago September 1996	For defendant
23.	Q-Tone Broadcasting v. Musicradio of Maryland DE Sup. Ct., New Castle County February 1996	$57,000 ($5,000 compensatory, $52,000 punitive)
24.	Rumpf v. The Post & Courier SC Ct. of C.P., Dorchester County April 30, 1997	For defendant
25.	Sales v Atlanta Constitution GA State Court, Atlanta December ____, 1996	For defendant
26.	Schafer v. Time N.D. GA April 12, 1996	For defendant
27.	Schlegel v. Ottumwa Courier Iowa State Court; Ottumwa February, 1996	$2,380,000 (compensatory $380,000, $2 million punitive)
28.	Seale v. Gramercy Pictures U.S.D.C., E.D. PA May 15, 1996	For defendant (bench trial)
29.	Turner v. Dolcefino TX Dist. Ct., Houston October 22, 1996	$5,550,000 (compensatory $550,000, punitive $5 million)
30.	Valdez v. Champion Broadcasting MA Sup. Ct., Middlesex County May 1997	$100,000 (compensatory damages only)
31.	Steve Wynn v. Barricade Books, Inc. (Lyle Stewart) NV Dist. Ct., Las Vegas August 6, 1997	$3,100,000
32.	Young v. Arkansas Democrat-Gazette AR Cir. Ct., Pulaski County, Little Rock June 1997	For defendant

	CASE	VERDICT
33.	Yow v. Journal Newspapers VA Cir. Ct., Prince William County March 13, 1997	$150,000 (compensatory damages only)

I have given up trying to identify trends in jury verdicts over time and suggest that they are not dissimilar to the stock market. The statistics on wins, losses, and amounts of the verdicts are volatile, unpredictable, and do not assume any meaningful pattern except for one: overall, the value of the verdicts is moving steadily upward. The only thing likely to bring them down on a long-term basis is a depression.

That being said, here are some statistics. All of the stats which follow omit the two bench trials. The defense won eleven of thirty-one, for 35.5%. This is about the same as my last survey where the defense rate was 35.7% and considerably better than our average over the past twenty years.

The average of the plaintiffs' results was $12,858,758.00, but this was skewed by the huge verdict in MMAR v. Dow Jones. The mean verdict was $280,000, which is lower than the $300,000 mean of my 1995 survey.

The television media continued to be at greater risk than print. Telecasters won three out of ten cases or 30%, while the print media won twelve out of twenty-one or 42.85%. The average TV verdict was $3,814,879.00, and the mean was $5,000,001.00. The average print verdict was $17,728,500.40, but this again was skewed by MMAR v. Dow Jones. The mean was $150,000. However, as MMAR illustrates, the disparity probably has more to do with the size and prominence of the organization and the pervasiveness of medium than broadcast versus print per se. The bigger you are, the higher the jury's expectations of you.

In the past, most of the non-public official plaintiffs have been lawyers and other mainstream professionals. This year, the plaintiffs' backgrounds have included a number of esoteric businesses and profession, and the plaintiffs include some oddballs, village coots, and picturesque characters. The following is a graph of winners and losers, showing the background of each plaintiff (giving the plaintiff the benefit of doubt), and the standard of liability.

Case	Plaintiff's Background	Fault Standard
Winning Plaintiffs		
Bandidos	restaurant	mal.*
Beal	town selectman	mal.
Bueno	businessman	mal.*
Copeland	veterinarian	int.**
Eastwood	actor	mal.
Elder	police chief	mal.
Englezas	restaurateur	neg.
Fitzgerald	Afro/Am hair style promoter	neg.
Fitzhugh	lawyer	neg.
Food Lion	food retailer	int.**
Levan	real estate syndicator	mal.
Merco	waste recycler	mal.
MMAR	junk bond broker	neg.
Munoz	body piercer/piercee	neg.
Parra	state senate candidate	neg.
Q-Tone	broadcaster	neg.
Schlegel	lawyer	neg.
Valdez	ad rep.	neg.
Wynn	casino owner	mal.
Yow	public health nurse	neg.
Losing Plaintiffs		
da Silva	reformed prostitute	mal.*
Dumond	bldg. contractor	neg.
Eshafei	foreign national/father	neg.
Kastrin	state official/low income subd. owner	neg./mal.
Marsico	businessman/father	neg.
Michael	lawyer	mal.*
Pollution Control	waste recylcer	mal.*
Rumpf	former deputy sheriff	mal.
Sales	bond counsel/fin. advisor	neg.
Schafer	night floor cleaner/adventurer	neg.
Seale	former Black Panter leader	mal.
Turner	mayoral candidate	mal.
Young	state legislator	mal.

* Malice standard required under local law regardless of plaintiff's status

** Newsgathering cases that involved common law intentional torts

In the cases in which negligence was the standard of liability the defendants won six of sixteen, approximately 37.5%. In cases in which the standard of liability was actual malice, the defendants were four for fifteen, or 26.66%. For purposes of these numbers, I placed the adverse verdict against Food Lion on intentional torts committee while newsgathering in the malice category.

There should be no wringing of hands over the large number of cases submitted to juries in the last two years (31) over the preceding two (plus 2 I missed and reported in this survey). After all, the latter number was extraordinarily low. The 1996 LDRC Damage Study (LDRC Bulletin No. 1, Jan. 31, 1997) shows that there were an average of 25.8 trials per year in the 1980's and 17.4 per year in the 1990's. The LDRC Summary Judgment Study to be released this year should be consulted to see if there has been a further drop in our success rate at the summary judgment stage.

B. SUMMARY AND ANALYSIS

1. Introduction

Each time (now the fourth) I complete this survey, I find it increasingly difficult to derive any lessons that I have not expressed in earlier versions of this Part II. What I have said previously on topics such as dangerous fact situations, selection of trial themes, attacks on the plaintiff, preparation of defense witnesses, preferred types of jurors, expert witnesses, etc. have been reinforced by our collective experience of the last two years. For anyone who desires to reflect on these topics, I commend the Part II's prepared for the 1991, 1993, and 1995 surveys, which highlight the collective wisdom of lawyers who have tried media tort cases in the '80s and '90s. Call me and I will send you copies (303-820-0631). I will not repeat those observations here, but will note some of the generalizations to be gleaned from the trials for the last two years.

2. Overview

There is agreement that the following factors, probably in descending order, affect the outcome of a case: (1) which party the jury likes best (or least); (2) which party the jury feels is being most honest and direct; (3) which party is the most competent and conscientious at his or her endeavor in life; (4) whether the plaintiff's proof on liability and damages meets the requirements of the charge to the jury. Few of the losers would acknowledge that the latter factor had much to do to with the result, while few of the winners are willing to admit that it was lacking altogether. However, all agree that there is too much play in the jury instructions for the factor (4) to be dominant, and agree that the others are more important.

These reports show, once again, that it is all too easy to estimate the amount of anti-media bias "out there." In rural areas, the resentment is directed primarily toward wealth and

power, while in urban areas it is driven mostly by the perceived arrogance and excesses of the media. Some combination of both resentments is present almost everywhere. On every jury panel, there are one or two or more individuals with strong anti-media biases. In some cases, they dominate; in others they are dominated by the majority of a contrary view. All too often they bring about a compromise verdict. The account of the Food Lion deliberations gives us about the best window on these dynamics as I have seen. See also Schafer and Dumond.

3. Winning Despite Falsity

The biggest riddle continues to be how to get a jury to understand and correctly apply the applicable fault standard. The trick is to find a way to overcome the intuitive predisposition of jurors that when a mistake is made, the defendant should pay.

In 1996, the exception that proved the rule was Peter Canfield, who procured two defense verdicts. One was in Schafer v. Time, a suit by an individual whose photograph was miscaptioned as that of a suspect in the bombing of Pan Am flight 103 (Lockerbie). Negligence was the only liability issue.

Peter's victory underscores one of the ironies of the results of this survey and others that statistically the defendants fare as well if not better when the liability standard is mere negligence rather than constitutional malice. (The same observation was made in the LDRC Damage Study, released January 31, 1977). In this survey, it would appear that the jury found constitutional malice when it did not seem warranted in the following cases: Bandido's, Beal, Bueno, Eastwood, Elder, Levan, Merco, MMAR, Peeler, Schlegel, Turner, and Wynn.

What most of the mentioned cases have in common is that the defenses were based on both truth and absence of constitutional malice. The defense "we got it right, but even if we did not, we had no reason to disbelieve it" seems forceful to lawyers who understand the inter-relatedness of the two elements. However, the most common reaction of jurors is, "if you made a mistake you should pay; if you claim you made no mistake, why are you trying to hide behind a technical defense?"

The key, as always, is to select a trial theme that is simple, forthright, durable, and easy for defense witnesses to handle on cross-examination. This means it must be simple and single-faceted. When there are tensions within the theme it is difficult for the reporter and editor/producer witnesses to come across as "straight shooters". It is perhaps because the defense is aware of the need for greater focus in cases in which negligence is the standard that more defense verdicts are obtained in those cases. Counsel agree it is easier to try a case on the applicable fault issue when an error is clear, because you can freely admit it and from the beginning convey to the jury that they are not there to try falsity.

A candid omission of falsity is not always enough. In Eastwood, an actual malice case, the defense was focused. The Enquirer admitted falsity and made a gallant effort to focus the jury on constitutional malice. After all, in that case the defendants published an interview with Eastwood that was entirely benign and unsurprising, from a writer whose credentials "checked out." The only claimed evidence of malice was that the defendant did not call Eastwood to verify that he had given the interview. A correct application of the actual malice standard may be too much to ask of a jury deciding Clint Eastwood versus The Enquirer. Still, as the verdict shows, the jury was willing to listen to the defendant's damage case and reject outlandish claims by Eastwood's experts.

Not all cases lend themselves to such focused treatment. Take, for example, the Bandido's case, in which an article concerning health inspection records which showed that inspectors found "evidence of rodents" at plaintiff's restaurant was placed under a headline that used the words, "inspectors find rats." Defendant admitted that the use of the word "rats" in a headline for an article that did not use that word violated the newspaper's policy; but it contended that the term "rats" means essentially the same thing as "evidence of rodents", and that even if the term "rats" was in error, the copy editor who created the headline and subsequent editors were not guilty of constitutional malice. Although these arguments resulted in reversal of the verdict on appeal, they were lost upon the jury who returned a verdict of $985,000. In post-trial interviews, the jurors said they had decided that the plaintiff should win during the opening statements, when the defendant appeared to admit that a mistake was made. It was clear that this relatively unsophisticated jury had no idea what the standard of constitutional malice required them to find, i.e., that the copy editor knowingly chose a word that conveyed a different and more damaging impression than the words used in the article. With a more sophisticated jury, the defense theme might well have worked. In hindsight, however, counsel for the defense says it would spend more time focusing upon and explicating the element of constitutional malice. The defense would show, through its experts, the predicate for the New York Times rule, that in a business in which a publisher clears a new and complete inventory of news product every day, mistakes are inevitable.

Verdict forms do not always permit us to determine whether a case tried on a negligence standard was won by the defendant on the basis of truth, or absence of negligence with respect to a statement that the jury finds false. In Schafer v. Time, however, one of several wrong photograph cases, the defendant admitted falsity and was exonerated for lack of negligence. Peter Canfield says that one of the keys to his success was complete and thorough candor with the jury, from the very beginning, about the mistake and how it was made. There is general agreement that when a mistake is apparent, defendant should fully admit it at the outset, and never take a position that is inconsistent with that admission.

Just as critical as the trial theme is the manner in which the defendant news people present themselves at trial, on the witness stand, at counsel table, and during recesses. This was the key to the defendant's success in several cases that could have gone either way. I do not think Peter Canfield will deny that the most important factor in Schafer was the presence

at counsel table of award winning career (semi-retired) journalist Roy Rowan, who has what Peter calls an "avuncular" personality. Peter built his trial theme around the competent, accomplished, but lovable Rowan who was about to retire at age 76. In opening, Peter outlined the evidence of Schafer's poor reputation, and told the jury that Schafer had no reputation to ruin, that "he had destroyed that long before Time published [the article]. The reputation at issue in this case is Roy Rowan's." In closing, he told the jury that Rowan's reputation was in their hands. Time's success in da Silva was due in large part to personification of the defense with witnesses that the jury found to be fair, honest, and likable. In Dumond, it appears that the defendant prevailed even though that there was at least a significant issue over falsity, as a result of the jury's conviction that the defendants were conscientious and "straight shooters." The reporters' deportment appeared to be a negative factor in Turner and MMAR.

There are times when the ability of the newsperson to make the jury like him or her is not enough to outstrip the jury's antipathy for what the defendant did. In those cases, effort by the defendant to present himself or herself as likable, conscientious, and there to serve the public good strike the jury as patronizing or insulting. The jury interviews conducted by The American Lawyer suggest that this was the case in Food Lion.

These and similar cases arguably support the observation that a libel trial is a cross between a beauty contest and a morality play, in which the defendant wins when the jury's perception of its honesty and decency prevails over its impression of plaintiff.

Some responding attorneys for large media organizations would disagree, in part. They believe that it does not really matter how little the jury likes the plaintiff, that the case is won or lost based on how the media defendant lives up to the jury's expectations, good or bad. It is clear that the juries impose extraordinarily high standards on the media, which are rarely met. Moreover, most jurors are ready to see "tabloid journalism" in even mildly aggressive reporting, and plaintiff's counsel who emphasize and "hype" those aspects of the defendant's conduct usually succeed in inflaming the jury. Levan is a good example of this result, so are MMAR and Turner. Much the same thing happened to a smaller organization in Peeler.

Most agree that defendants lose ground when they drape themselves in the American flag, or speak in high tones of the First Amendment and their right to publish. Instead, the theme should picture defendant newspeople doing their best to do their job of bringing information to the public. One notable exception to this was Rumph, in which the defendants frequently spoke of the defendants' right and duty under the First Amendment, emphasizing that the newspaper's role under the Constitution. This is more likely to work in a small community where everyone knows the publisher.

4. Attacking the Plaintiff

Most of our colleagues appreciate that this can be dangerous and in cases of doubt opt against it. In Schafer v. Time, the defendant attacked the plaintiff, explaining to the jury that evidence was presented to show that the plaintiff was not damaged by the article. The judge was at odds with the defense on this issue throughout the trial, and significantly limited the evidence. The post-verdict interviews indicated that some but not all jurors thought the attacks went too far, so the judge's iron hand may have had velvet glove on it.

In Michael, defendant's decision to "pull punches" on "bad stuff" regarding the plaintiff proved to be the right thing to do, but an aggressive attack on the plaintiff resulted in a defense verdict in Marsico.

There were cases in which the defendants clearly had made mistakes, but nonetheless achieved acceptable results the old-fashioned way. In Fitzgerald, for example, the defendant admitted mistakes, admitted the newspaper was not perfect, suggested that it was willing to pay for harm done, but urged that the plaintiff was not one deserving of recovery because his past reputation and conduct were fully consistent with the defamation. A low verdict was achieved despite a bad error using a similar but softer touch in Fitzhugh.

5. "We Said What We Meant and Meant What We Said": Dealing With Claims of Implied Libel

In past surveys, there have always been a few cases in which the defendant was in a position to justify the literal truth of its publication, but could not prove the arguably fair implications from it. This year is no exception. This predicament can make a trial comfortable at best and a loser at worst.

In this survey, however, there are good examples of successful efforts by defendants to resist the plaintiff's effort to charge the publisher with implications going beyond the literal truth of the article or broadcast. The most persistent and successful effort in this endeavor this was by Peter Canfield in Sales v. Atlanta Constitution. Peter emphasized in opening, close, and with each witness exactly what was said in the article and how it was supported by the truth. Tom Leatherbury's similar efforts in Kastrin also proved successful. See also, Rumpf. Arguably, the claims of implications in these cases were as fair as those which have resulted in plaintiffs verdicts in other cases.

6. Controlling the Judge

In past surveys, I have discussed cases presided over by judges who refuse to control the proceedings, and the added burdens which this places on defense counsel.

The problem of a weak judge is placed in perspective when the trial judge is openly hostile towards the media side of a given case, and conveys that hostility to the jury. In some kinds of cases, jurors tend to sympathize with the party or witness receiving the harsh treatment, and to resent the bureaucrat on the bench. This is not particularly common, however, and it is particularly uncommon in libel cases in which a judge conveys disfavor for a media defendant. However, the defendant did prevail notwithstanding hostility of the judge that was not concealed from the jury in da Silva, Marisco, and Sales. In each of these cases, the defendant accomplished this by personifying their case through down-to-earth, likable, endearing defense witnesses. No such luck in Las Vegas, see Wynn.

7. Bad Jurors

I discussed this topic in depth last year. This year's responses reconfirm that teachers, school administrators, and bureaucrats of any kind are usually bad jurors for the defense.

8. Causation.

The elephantine punitive damage award in MMAR v. Dow Jones overshadows what I think will prove to be the most significant issue in that case, namely, causation. The only injury for which the plaintiffs sought recovery was diminution in value of their brokerage firm based upon a decline in sales following publication of the article. The evidence that this indivisible loss was caused by the article was scant; no customers testified that they declined to do business with MMAR because of it. A representative of the firm's clearing house, which underwrites its trades, testified that the clearing house accelerated the implementation of a previous decision to cease backing the kind of junk bond trades that were the specialty of MMAR, based on concerns over "the article." The problem is that the article contained nineteen statements which were originally claimed to be false and defamatory, only eight of which were permitted to go to the jury, and only five of which were found to be false and defamatory. No evidence established a causal connection between the false and defamatory statements (as opposed to the true defamatory statements) and the loss claimed. Because it is based on a loss that just as likely would have occurred even if the truthful statements been published without the false ones, the $22.7 million award is arguably a sanction for protected speech. Relying on the doctrine of NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), the defendants urge that there was insufficient proof that the loss recovered was caused by the actionable statements to the exclusion of those which are constitutionally privileged. (This topic will be the subject of an article to appear in the Fall 1997 edition of Communications Lawyer.)

The question for trial lawyers is, when the judge submits this issue to the jury, how do you deal with it without giving up the ship on liability? This will be a topic at the 1997 Conference.

9. Managing Damages

In cases such as Food Lion and Merco, the defendant was obviously in trouble with the jury. The defendants found a way to limit compensatory damages to a level that rendered the case manageable post-trial. Dan Davison did this by focusing heavily on damages and receiving a nominal verdict of $1, which rendered the punitive damage award of $5 million highly vulnerable on appeal. As it turned out, the verdict was reversed for lack of constitutional malice. In Food Lion, although the defendants were unable to keep the newsgathering torts involved in that case from going to the jury, they were able to keep damages associated with the broadcast from being considered. Because non-publication related damages in newsgathering cases are usually minimal, this strategy will be standard in future cases and Food Lion should provide good precedent. Although the punitive damages were reduced to only $315,000 on top of the $1,400 compensatory damage verdict, this result is obviously much more palatable than the original $5.5 million. In states in which tort reform limits punitive damages to a small multiple of compensatory damages, the result would have been downright savory. Other examples of damage verdicts that were manageably low: Beal; Eastwood; Englezas; Fitzhugh; Fitzgerald.

10. Miscellaneous Observations

- Correction box. Plaintiffs will always find something wrong with a correction. A recurring problem with corrections for the print media is placement in a page 2 "correction box," a common practice purportedly based on the belief that readers grow to expect corrections at that location and thus are more likely to see them. However, this does not always play well. For example, when the item corrected is an incorrect photograph, a policy of placing a few words of correction on page 2, after the photo appeared on page 1, may seem parsimonious. The standard explanation did not appear to be well received in Fitzhugh, and counsel recommends reconsideration of the policy at least with respect to photos, and much greater attention to the explanation given the jury. See also Schafer v. Time, Inc.

- Parent companies. In Food Lion, the ABC parent companies were held in the case and assessed damages. This was due in part to the involvement of in-house legal counsel of the parent company in decisions made in planning and vetting the piece.

- The common tactic of the plaintiff's bar is to attempt to hold the parent company in on an agency theory. In Turner v. Dolfecino, on the other hand, this result was avoided because the witnesses made it clear that they were receiving legal advice from parent company attorneys and not editorial direction.

- Shadow juries. In addition to jury consultants and focus groups, some defendants have used "shadow juries" during trial to keep in touch with how things are playing.

11. Conclusion.

All in all, I think we are getting better at trying these cases. So are the plaintiffs' lawyers.

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