



LIBELLETTER

Reporting Developments Through April 20, 2000

In This Issue . . .

LIBEL

Isuzu Jury Finds Malice But Awards No Damages, p.2
 Truth Wins in PA: *Wagstaff v. The Morning Call, p.8*
 Ramsey's \$25 Million Libel Suit Against *Star Magazine* Settled, *p.8*
 The Falling Bar for Personal Jurisdiction, *p.9*
 Student Wins \$6 Million Award in Libel Suit, *p.12*
 Jurisdiction Win in D.C. Federal Court, *p.13*
 No Personal Jurisdiction in Internet Libel Suit, *p.15*
 CDA Applies Yet Again, *p.17*
 NY Court Holds Net Publications to Single Publication Rule, *p.19*
 Leveraging Common Law 12(b)(6) Motions, *p.20*
 PA Considers Libel of the Dead Bill, *p.23*
 FL Court Dismisses False Light Claim, *p.26*

NEWSGATHERING

Ohio Jury Hands Down Mixed Verdict, *p.7*
 CA Supreme Court to Review Eavesdropping Statute, *p.27*
 CA Court Rejects Work-Related Intrusion Claim, *p.29*
 NY Court Closer to Re-authorizing Courtroom TV Coverage, *p.34*
 MA Court Enjoins Denial of Access, *p.35*
 3rd Circuit Denies Further Review in *Bartnicki*, *p.34*

NEWS & UPDATES

Updates:

SPJ Develops "Victim Cards", *p.12*
 Reconsideration of Tasini Denied, *p.18*
 MI Court Gives Reporter Subpoena Victory, *p.37*
 NYC and Brooklyn Museum Settle Case Over Art Exhibit, *p.42*
 Football Web Site Sufficient for Jurisdiction in NY, *p.15*
 Artist Wins Summary Judgment in Tiger Woods Poster Suit, *p.30*
 Consumer Privacy Legislation Alert, *p.31*
 Reporters Subpoena Reporter, *p.39*
 Reporter Sues Complaining Official for Tortious Interference, *p.39*
 Attempt to Hold Media Liable for Shootings Rejected, *p.43*
Terry Anderson v. Iran, p.45
 Washington News Council Attacks Editorial, *p.47*
 NY Affirms Narrow Reading of "Son of Sam" Law, *p.49*

INTERNATIONAL

Author Wins Libel Case Against UK Paper, *p.52*
 British Reporters Win Libel Case v. Marxist Magazine, *p.52*
 Two American Newspapers in London, *p.53*
 British ISP's Settlement of Libel Suit Raises Censorship Fears, *p.55*
 British Historian David Irving Loses UK Libel Suit, *p. 57*

LDRC NEWS & EVENTS

LDRC's 20th Anniversary Celebration, *p.2*
 LDRC Committee Reports, *p.59*
 LDRC London Conference, *p.62*

**3 JURIES:
 A WINNING
 MONTH FOR
 MEDIA
 PP. 1-7**

**JURISDICTION:
 A KEY ISSUE
 PP. 9-16**

**MEDIA NOT
 RESPONSIBLE
 FOR HIGH
 SCHOOL
 SHOOTINGS
 P.43**

*Don't forget to sign up for the
 LDRC LONDON CONFERENCE 2000
 P. 62*

Pennsylvania Jury Finds Newspaper Did Not Abuse Neutral Reporting Privilege

By Samuel E. Klein and
 Michael E. Baughman

On March 30, 2000, a Chester County, Pennsylvania jury returned a verdict in favor of Chester County's *Daily Local News*, finding that the paper had not abused the "Neutral Reporting Privilege" in reporting defamatory comments one public official leveled against two other public officials. The case, *Wolfe, et al. v. Troy Publishing Co., et al.*, is believed to be the first time the issue of neutral reporting has been presented to a Pennsylvania jury.

A Disruptive Councilman's Statement

The case arose out of a dispute between public officials in Parkesburg, Pennsylvania. In late 1994 and early 1995, William T. Glenn, Sr., a member of Parkesburg's Borough Council, became dissatisfied with the manner in which the Borough's government was being run. Instead of presenting his grievances in a professional manner, however, Glenn disrupted meetings by calling his fellow council members names such as "draft dodgers," "liars,"

(Continued on page 2)

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PA Jury Finds Paper Did Not Abuse Privilege

(Continued from page 1)

and “criminals.” Several Borough Council meetings had to be adjourned early because of Mr. Glenn’s disruptions.

Borough Council President James B. Norton, III, called a special meeting of the Council for April 19, 1995 to address Mr. Glenn’s unruly behavior. During the meeting, President Norton read a short statement making clear that further disruption of Borough business would not be tolerated. Before Mr. Glenn had a chance to respond, the meeting was abruptly adjourned.

Mr. Glenn brought with him to the meeting a written statement, which he provided to a reporter for the *Daily Local News*. The statement indicated Mr. Glenn’s belief that Norton and Parkesburg’s Mayor, Alan M. Wolfe,

were homosexuals conspiring to remove him from office. It read, in part, “Mr. Norton has been making homosexual proposals to me for some time. I detest queers and child molesters. Since he and his friend, the mayor, are in positions that give them the opportunity to have access to children, I now feel that it my duty to report what has been happening.” Mr. Norton was a high school teacher.

Paper Reports Public Slurs

In an April 20, 1995 article entitled “Slurs, Insults Drag Town Into Controversy,” the *Daily Local News* reported Mr. Glenn’s charges, along with Mr. Norton’s statement that “If Mr. Glenn has made comments as bizarre as that, then I feel very sad for him, and I hope he can get the help he needs,” and Mr. Wolfe’s comment that “As he has done in the past, he is creating stories.” The article went on to provide Glenn’s basis for the charges, obtained by the reporter during an interview with Glenn after the Borough Council meeting had ended. Among other things, Glenn described how he had caught the Mayor and Mr. Norton “in the act” in 1983, and also observed them holding hands while walking around the Borough.

Shortly after the April 20, 1995 article appeared, Glenn stood for reelection in a primary. He was defeated, receiving less than 10% of the vote. Norton and Wolfe were later reelected to their positions.

Councilmen Sue

Norton and Wolfe brought defamation and false light invasion of privacy actions against Glenn and the *Daily Local News*. At the close of discovery, the *Daily Local News* moved for summary judgment on the grounds that the republication of Glenn’s remarks was privileged under the fair report privilege and/or the neutral reporting privilege. In ruling on summary judgment, Judge Paula Francisco Ott found that the statements, if made by Mr. Glenn, were privileged under the fair report privilege or neutral reporting privilege as set out by the Pennsylvania Superior Court (in dicta) in *DiSalle v. P.G. Publishing Co.*, 544 A.2d 1345 (Pa. Super. 1998). Judge Ott reasoned that “[t]he facts of this case cry out to allow the opportunity for the press to repeat what a defaming public official says about his fellow public officials, all of whom are eventual candidates for reelection, and to republish the defamation while overtly stating in the headline that the statements are slurs and insults.” Nevertheless, Judge Ott denied summary judgment on

(Continued on page 3)

LDRC’s 20th Anniversary Celebration LDRC Annual Dinner Thursday, November 9, 2000

It has been twenty years since the founding of the Libel Defense Resource Center. To celebrate this anniversary LDRC has invited three of the country’s most prominent journalists to discuss the influence of law and litigation on their journalism and that of their colleagues and institutions. In a conversation moderated by last year’s dinner honoree, Floyd Abrams, Mike Wallace of CBS News, Diane Sawyer of ABC News and *The Washington Post’s* Benjamin Bradlee will join us to explore the changes in law and practice over the last two decades. The discussion will include questions as to how the experience of being libel and/or newsgathering litigants and changes in the legal landscape of libel, privacy and related media First Amendment issues have affected journalistic practices and the relationships between journalists and lawyers.

As always, we truly hope that all of you will join us at the Sheraton on Thursday, November 9, 2000. A celebration of the past twenty years is in truth also a celebration of our dedicated membership. The past twenty years would not have been possible without the endless work and contributions of our members whose daily work serves to safeguard the rights and privileges upon which LDRC was founded.

PA Jury Finds Paper Did Not Abuse Privilege

(Continued from page 2)

the grounds that an issue of fact remained as to whether or not Mr. Glenn had made the statements — Glenn denied making certain of the statements in his deposition testimony, and the written statement no longer exists.

Jury Issues Narrow

The case was reassigned to Judge Thomas G. Gavin for trial. In a series of evidentiary rulings, Judge Gavin held that, under *DiSalle*, the only question for the jury was whether or not the *Daily Local News* had espoused or concurred in Mr. Glenn's charges, or had failed to accurately convey the gist or sting of charges Mr. Glenn made. Judge Gavin ruled that the question of whether or not the *Daily Local News* acted with constitutional malice was not an issue in the case, because the neutral reporting privilege applies *even if* the media defendant knows the defaming public official's statements are false, or subjectively entertains serious doubts as to the truth of the public official's statements.

Plaintiffs attempted to introduce evidence and argument that the *Daily Local News* abused the neutral reporting privilege by failing to include in the article additional information that the paper knew or should have known would make clear that Mr. Glenn was not a "credible source." The reporter did testify that he had serious doubts as to the truthfulness of the charges.

Beyond this testimony, however, the judge excluded all evidence of the reporter's pre-publication knowledge, and reasons he had to disbelieve the charges or find them improbable, on the grounds that the court in *DiSalle* expressly stated that the credibility of the defaming party is "totally irrelevant." For example, the court excluded evidence that the reporter had allegedly questioned the mental stability of Glenn, and allegedly had information that Glenn leveled charges of homosexuality against many he disagreed with. The court also rebuffed plaintiffs' attempts to introduce the testimony of one of the editors of the *Daily Local News* who offered to testify that he was unhappy with the content of the article after he read it, and that he disagreed with some of the language that was included in the story.

Reporting a Response Not Required

The court also rebuffed plaintiffs' arguments that the

failure to get adequate comment from the defamed was evidence of a lack of balance and an "adoption of the charges." The court ruled that under the neutral reporting privilege, the press had no obligation to confront the defamed official with the charge. The only relevant inquiry, the court ruled, was whether the charge was made and accurately reported without an indication that the media became a proponent of the charge.

The *Daily Local News* offered evidence and argument showing that Mr. Glenn had, in fact, made the statements attributed to him in the article, that the reporter accurately conveyed the gist or sting of his remarks, and that the public was entitled to know the fact that a public official is disrupting public meetings with graphic name calling. The

Daily Local News argued that the public interest was vindicated during the succeeding primary in which Mr. Glenn received only 68 votes.

"[t]he facts of this case cry out to allow the opportunity for the press to repeat what a defaming public official says about his fellow public officials . . ."

Jury Charge on Neutral Reportage

At the close of evidence and argument, the jury was charged on the neutral reporting privilege, in part, as follows:

PA Jury Finds Paper Did Not Abuse Privilege

[A] reporter is privileged to publish the serious charges of a public official involved in an ongoing controversy and concerning other public officials irrespective of the publisher's belief as to the falsity of the charges provided the reporter does not espouse or concur in the charges and in good faith believes the report accurately conveys the charges made. . . . The protection afforded by the "Neutral Reportage Doctrine" affords the media defendants *greater protection* than that given under *New York Times v. Sullivan* . . . [even if] that is, they published the article with knowledge that it was false or reckless disregard of whether it was false or not. The "Neutral Reportage Doctrine" anticipates a broader protection than that given under the *New York Times* standard in the belief that, "the press may not be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth." . . . [U]nder this privilege, what is protected is not the defamatory statement itself, but rather the speech required to convey the information that a certain individual involved in the controversy made a particular charge. Accordingly, the newsworthiness of the statement stems from the importance of the speaker to the controversy at issue and the fact that anything he says has value within the context of that controversy. . . . Again, where the person making the false statement is a public official, it is essential for the public to be informed of an even arguably false statement made by a public official upon whom it has bestowed its trust thereby to better supervise that official's charges. . . . If you have found the statements were made by a public official embroiled in a public controversy against a public official and the media defendants have not adopted or championed those charges and in good faith [believed they had] accurately convey[ed] the substance of the charges leveled, then the media defendants are not liable to the plaintiffs even if the statements are false.

Verdict for Paper

Prior to sending the case to the jury, the court dismissed the false light invasion of privacy claims on the grounds that the subject matter of the article was one of public concern, and therefore not actionable under the Pennsylvania Superior Court's decision in *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648 (Pa. Super. 1999).

The issue of defamation was submitted to the jury by special interrogatories. The jury found in favor of plaintiffs Norton and Wolfe, and against defendant Glenn for defamation, and awarded compensatory damages of \$10,000, and punitive damages of \$7,500, in favor of each plaintiff. With respect to the *Daily Local News*, the jury found that the paper had accurately conveyed Mr. Glenn's remarks in the article, and that it had neither adopted nor concurred in his charges, and thus had not abused the neutral reporting privilege.

An appeal is expected as to the viability of the neutral

reporting privilege under the First Amendment and/or Pennsylvania law. Mr. Glenn has also indicated that he will appeal on the grounds that he was entitled to absolute immunity as an elected official commenting on other elected officials.

Samuel E. Klein is a partner, and Michael E. Baughman is an associate, with Dechert Price & Rhoads, Philadelphia, PA and represented the Daily Local News at the trial of this matter.

Jury Finds Actual Malice But Awards No Damages in *Isuzu v. Consumer Reports* Suit

With a verdict that has allowed both sides to claim victory, a California federal court jury in Los Angeles found that while Consumers Union (“CU”) made several false statements about the Isuzu Trooper, only one was made with actual malice, and that no damages should be awarded against the publisher. *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, Case No. CV 97-5685 RAP (RNBx) (C.D. Cal. April 6, 2000).

Fractured Findings on Falsity, Disparagement and Actual Malice

Following the two-month trial, 16 statements made in connection with an October 1996 *Consumer Reports* article, focusing on the magazine’s safety concerns with Isuzu’s 1995 and 1996 Trooper models, were submitted to the jury. Of the 16, 15 statements were submitted on Isuzu’s claim for product disparagement. Two statements, one of which was also alleged to be product disparagement, were submitted on Isuzu’s defamation claim.

With respect to the product disparagement statements, the jury found that 7 of the 15 statements were false. Among the statements that the jury found false were CU’s assertions that the Trooper had a “unique and extremely dangerous propensity to roll-over in a real-world emergency avoidance maneuver,” and that the vehicle suffered from a “design flaw.” The jury also appeared to agree with Isuzu that CU’s test drivers drove the Trooper differently than other vehicles during the emergency avoidance test, finding the statement, “Our test data for numerous test runs clearly show that all four of the tested vehicles were driven with essentially the same steering input, but in the case of the Trooper, with dramatically different results,” to be false.

Of the 7 statements found to be false, the jury found that 5 statements constituted product disparagement. The only statement the jury found to have been made with actual malice, however, “Careful driving, however, is ultimately not the answer to the problem. Isuzu . . . should never have allowed these vehicles on the road,” was one it found *not* to be disparaging.

While jury foreman Don Sylvia was quoted by the Associated Press as stating that eight of the ten jurors wanted to award Isuzu as much as \$25 million, the jury ultimately concluded, in Sylvia’s words, that “it couldn’t find clear and convincing evidence that Consumers Union intentionally set out to trash the Trooper.” Consequently, the jury found that none of the statements gave rise to special damages and awarded Isuzu no damages.

Of the two statements submitted on Isuzu’s defamation claim, the jury found that while one was false, it was not made with actual malice.

Isuzu Challenges Testing

Isuzu brought its \$242 million suit for defamation, product disparagement, and unfair business practices following the publication of the October 1996 *Consumer Reports* article which reported on the Trooper’s alleged tendency to “tip-up” during lane-change maneuvers. At trial, Isuzu argued that CU’s tests, which the automaker pointed out have been criticized by the National Highway Traffic Safety Administration (“NHTSA”) as unscientific, were faulty because CU’s test drivers caused the Trooper to tip by turning the steering wheel faster and farther than drivers in “real world” situations would. The automaker also alleged that CU officials decided to “trash” the Trooper as part of a calculated publicity stunt to boost magazine sales and to force the NHTSA to adopt roll-over standards for SUVs. Attorneys for Isuzu also told the jury that the company suffered \$244 million in lost sales and damage to its reputation after the report was published.

Consumers Union denied the allegations, arguing that no evidence existed to show that the publisher was out to get Isuzu. Rather, the magazine claimed that Isuzu was trying to silence its voice as an honest and independent critic. CU also maintained its disagreement with the NHTSA over testing was no secret in that the publisher often challenged “government agencies for the citizens of this country.” Additionally, CU argued that the criticism of its testing methods was unjustified as many auto manufacturers, including Isuzu, had used the same kind of test. CU also contended that Isuzu’s

Following the two-month trial, 16 statements . . . focusing on the magazine’s safety concerns with Isuzu’s 1995 and 1996 Trooper models, were submitted to the jury.

(Continued on page 6)

Jury Finds Actual Malice But Awards No Damages

(Continued from page 5)

loss of sales had been caused not by the report, but mostly by other factors including stiffer competition, cutbacks in advertising expenditures, large inventories and aggressive leasing programs.

While CU found documents in discovery in which Isuzu personnel referred to the "lawsuit as a PR tool," and stated that, "when attacked, CU will probably shut up," these documents were not admitted at trial.

Both Sides Claim Vindication

With the mixed verdict, both sides were quick to claim victory. Isuzu issued a statement saying, "The jury's finding on falsity today clearly provides clear vindication for the Trooper, which has an excellent safety record in the real world."

CU president Rhoda Karpatkin stated, "While we regret that the jurors did not find every one of the published statements under consideration to be accurate, their verdict generally acknowledges the honesty of our testing and reporting staff and our belief in our procedures. Moreover, the jury upheld our right to criticize a product that we believe represents a safety risk to consumers."

Consumers Union faces a similar suit brought by Suzuki over a 1996 *Consumer Reports* republication of allegations that the Suzuki Samurai was found to be rollover-prone in 1988. In that case, *Suzuki Motor Corp. v. Consumers Union*, CU is currently awaiting a decision from the U.S. District Court for the Central District of California on its motion for summary judgment.

Consumers Union was represented at trial by Joseph Cotchett of Cotchett, Pitre & Simon of Burlingame, California. Isuzu was represented at trial by Andrew White of White, O'Connor, Curry, Gatti & Avanzado of Los Angeles, California.

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Ohio Jury Hands Down Mixed Verdict *Attempts at Newsgathering Found Reasonable, but Telemarketing Held to Be Harassment*

In a mixed verdict, an Ohio state court jury has awarded \$206,500 to Akron police chief Edward Irvine and his wife Geneva, in a suit against the *Akron Beacon Journal* for allegedly harassing the couple by repeated phone calls trying to get the Irvines to subscribe to the paper. The jury also found, however, that reporters for the paper acted reasonably when they attempted to contact Ms. Irvine about allegations that her husband was abusive.

Reporting Abuse Allegations

The chain of events giving rise to the invasion of privacy claim began in October 1998, when Geneva Irvine was hospitalized for injuries she reportedly blamed on her husband. Mrs. Irvine later dropped the allegations and no charges were ever filed. For his part, Mr. Irvine claimed his wife sustained the injuries when she fell after mixing vodka and blood-pressure medication.

Following the incident, Mrs. Irvine went to stay with relatives in Louisiana. While Mrs. Irvine was in Louisiana, the *Akron Beacon Journal* ran a series of stories reporting on her allegations and the subsequent internal police investigation. After publishing the series, the newspaper sent a reporter and a photographer to interview Mrs. Irvine. The newspaper claimed this was the third time they attempted to contact her in five months. After Mrs. Irvine refused to be interviewed, the reporter left a copy of the series, his business card and a note on Mrs. Irvine's car windshield.

The Irvines initially filed suit for invasion of privacy, trespass, and stalking against the paper, followed by a letter from their attorney stating that the Irvines are entitled to use "any force necessary," including "deadly force," should the newspaper continue its "illegal and criminal conduct."

An ADAD Claim

The original complaint was subsequently voluntarily withdrawn only to be refiled naming additional defendants and a new claim — that the newspaper deliberately used its automatic telephone dialing system to harass the Irvines.

The incidents triggering this new claim were, despite plaintiffs' contentions, unrelated to the newspaper's newsgathering efforts. Rather, the telemarketing department of the newspaper called the Irvines to try to get them to subscribe to the *Beacon Journal*. The Irvines had

previously discontinued their subscription and obtained a new telephone number.

While the newspaper admitted that due to computer and operator error the telemarketing department called the Irvines 18 times, the plaintiffs alleged they received hundreds of calls and would sometimes receive as many as ten calls a day. A police investigation showed that the automated telemarketing device was mistakenly allowed to run unattended all night on two occasions and sometimes ran unattended for a few hours during the weekend. Since early 2000, the autodialer is no longer allowed to run unattended at all.

A Mixed Verdict

After deliberation lasting seven hours over two days, the jury returned its verdict finding that newspaper personnel acted reasonably when they attempted to interview Mrs. Irvine, but that the attempts to get the Irvines to subscribe to the paper constituted telephone harassment. While the jury believed that the paper placed only 18 calls to the Irvines, they found that the paper should be held accountable for 3 "middle of the night" calls, which the paper admitted should never have happened.

The jury awarded the plaintiffs \$206,500 for the alleged harassment. One juror told the Associated Press that they were influenced by the law prohibiting solicitation by telephone after 9:00 p.m. and felt the newspaper "had to be told not to do that." Counsel for the *Akron Beacon Journal* has stated that the paper intends to file post-trial motions.

U P D A T E

Pennsylvania Court Affirms Summary Judgment on Truth *Wagstaff v. The Morning Call*

Finding that the plaintiff failed to meet his burden of proof with respect to the issue of falsity, the Superior Court of Pennsylvania has affirmed a grant of summary judgment in favor of *The Morning Call* newspaper. *Wagstaff v. The Morning Call, Inc.*, No. 1437 EDA 1999 (Pa. Super. Ct. March 22, 2000). See *LDRC LibelLetter*, May 1999 at 9.

The suit arose out of a January 8, 1994 *Morning Call* article which recounted the police pursuit and ultimate arrest of two men accused of robbing a bank. The article also described the subsequent search of a garage believed to be used by the bank robbers. According to the article, police believed the pair had been using "Wagstaff's Auto Repair . . . as their base of operations." The plaintiff, William Wagstaff, who owned the building and whose auto repair shop was, in fact, housed there, contended that the garage portion of the building that was searched was a "portion of property separate from Wagstaff's Auto Repair," and that "the article falsely connected him to the crime by naming his business as the robber's base of operation." Slip op. at 5-6.

On appeal, the Superior Court noted that if, upon review, the court determines that the result reached by the trial court is correct, "we may affirm on any basis and need not rely on the grounds upon which the trial court relied." Slip op. at 2. The court ultimately did just that, affirming not on the basis of the trial court's determination of Wagstaff's public figure status, but rather on the issue of truth. According to the court, "Wagstaff's admissions, conduct and business activities, coupled with evidence about the building's appearance, its history and the public records regarding it, all militate in favor of concluding that the garage was part of Wagstaff's Auto Repair." Slip op. at 9.

Finding that Wagstaff failed to meet his burden of proof with regard to falsity, the court did not reach the issue which was the focus of the trial court's grant — Wagstaff's status as an limited purpose public figure.

Ramsey's \$25 Million Libel Suit Against *Star* Magazine Settled *Suits Against Other Tabloids Still to Come*

The *Star* has settled the \$25 million libel suit filed against it by John and Patsy Ramsey on behalf of their son, JonBenet's brother Burke, for an undisclosed amount. The parents of JonBenet Ramsey filed suit against the tabloid over two May 1999 articles suggesting that their now 13-year-old son was a suspect in his sister's murder. *Ramsey v. American Media Inc.*, No. 1:99-cv-3087 (N.D. Ga. March 17, 2000).

Despite a June 1999 retraction published by *Star* stating that ". . .The DA's office has unequivocally stated that Burke was not a suspect in the murder," the Ramseys filed a complaint against the magazine calling the retraction insufficient. In their complaint, the Ramseys contended that the retraction did not address all allegedly libelous statements and was not displayed as conspicuously as the May 1999 articles.

Ramsey attorney L. Lin Wood announced plans to file similar libel suits against the *Globe*, the *National Examiner* and *The New York Post* stating that "anyone floating accusations against [JonBenet's] brother can expect to be sued." Since publication of the Burke Ramsey stories the *Globe* and the *Examiner* have been purchased by *Star* parent company American Media Inc. from *Globe International*. However, because both publications were under *Globe* ownership when the allegedly defamatory material was published, American Media claims no responsibility.

Lin Wood is also the lawyer for Richard Jewell.

The Falling Bar For Personal Jurisdiction *Two Newspapers in Plaintiff's State*

By Slade R. Metcalf

Did you ever think that only *two* copies of a local newspaper sold in a distant state could provide the predicate for personal jurisdiction? Well, a federal judge in Hawaii recently found that two copies were sufficient and that the publisher of the *New York Post* must defend a libel suit brought by an Hawaiian resident in Hawaii, which is more than 6,000 miles from the *Post's* editorial offices.

In *Miracle v. NYP Holdings, Inc.*, Civ. No. 99-00535-HG-FIY (March 14, 2000), a United States District Court in Hawaii denied both a motion to dismiss the complaint on the grounds of lack of personal jurisdiction and an alternative motion to transfer the venue of the case to the United States District Court for the Southern District of New York. The plaintiff Nancy Miracle, who has also gone by the names of Nancy Greene and Nancy Green, sued NYP Holdings, Inc., the publisher of the *New York Post* (the "*Post*"), and one of its most well known columnists Cindy Adams, based on a column that appeared in the November 10, 1997 issue of the *Post*.

If the reasoning in the District Court opinion in Miracle is widely adopted, the Post and other local newspapers can anticipate being sued in any state where a hard copy of their publication is delivered.

Who Gets Marilyn Monroe's Social Security?

The column, under the headline "A Social Security Mystery Over Marilyn's 'Daughters,'" discussed the background of a woman identified as Nancy Greene. Ms. Adams recounted that she had hosted a television segment on an "unmanicured looking blonde" who had lived in Hawaii and said that she was born in September 1946 and was Marilyn Monroe's daughter. Ms. Greene stated in the television broadcast that she is the daughter of a member of the Genovese crime family and that she had once been introduced to Frank Sinatra. The column quoted a Marilyn Monroe historian who doubted the authenticity of Ms. Greene's story, stating that it was highly unlikely that Twentieth Century Fox Film Corporation would have signed Marilyn Monroe to a contract in July of 1946 when she was pregnant with an illegitimate child.

Ms. Adams went on to recount a telephone conver-

sation that a woman in Florida, who also claimed to be Marilyn Monroe's daughter, had with the Social Security Administration to inquire about receiving benefits that would have been owed to Marilyn Monroe. When asked about whether the Florida woman might be entitled to benefits because of her supposed relationship to Monroe, the employee of the Social Security Administration reportedly stated that "Nancy Greene has collected benefits as Marilyn Monroe's daughter."

Although Ms. Adams did not express an opinion whether either of these women was actually a daughter of Marilyn Monroe, she did express frustration at how the Social Security Administration administers its benefits. As quoted in the decision:

So, we're saying here that some blonde from Hawaii who claims she's the love-child of Monroe's youth — whether yes or no — whether so or not — somehow proved it sufficiently to have collected Marilyn's Social Security benefits for years?

Hellooooo-oo is anyone out there? Any wonder Social Security is in such a mess?

Suit Filed in Hawaii

Nancy Miracle commenced an action for libel and related torts in state court in Hawaii on May 18, 1999. The complaint was filed within the two year statute of limitations under Hawaiian law but outside the one year statute of limitations under the law of the State of New York where the *Post* is published. The complaint named both NYP Holdings, Inc. and Cindy Adams as defendants.

The defendants removed the case to the United States District Court for the District of Hawaii on July 26, 1999. Shortly thereafter, defendants moved to dismiss the complaint on the basis of lack of jurisdiction over either of the defendants and, in the alternative, requested that the court transfer venue of the case to the United States District Court for the Southern District of New York.

(Continued on page 10)

The Falling Bar For Personal Jurisdiction

(Continued from page 9)

Minimal Contacts With Forum

In its opinion denying both motions in full, the court recounted the evidence submitted by the defendants in support of the motion to dismiss:

1. Only two copies of the *Post* were sold by subscription in the State of Hawaii;
2. No copies of the *Post* were sold on newsstands in Hawaii; [Cindy Adams' column does not appear on an Internet site.]
3. NYP Holdings neither solicits subscriptions in the State of Hawaii nor derives income from the State of Hawaii;
4. Cindy Adams resides in New York;
5. In connection with preparing the column, Adams did not contact any person in Hawaii or go to Hawaii for any purpose;
6. All of the editors who might be witnesses in the case are residents of New York.

In response, the plaintiff alleged that she had resided in Hawaii for almost 13 years and that her reputation was primarily damaged in Hawaii.

Despite the extremely minimal contact between the defendants and the State of Hawaii, the district court determined that it had personal jurisdiction over them. Although the court conceded that there was no general jurisdiction over the defendants, the court did analyze the jurisdictional issue under Hawaii's long-arm statute, which is similar to California's statute in that it extends the jurisdiction of Hawaiian courts to the limits of the due process clause of the Fourteenth Amendment. Thus jurisdiction under Hawaiian law is co-extensive with the jurisdictional limits of the United States Constitution.

The court acknowledged that specific jurisdiction would require a showing that: (1) the defendants had purposefully availed themselves of the privilege of conducting activities in the forum; (2) the claim had arisen or resulted from the defendants' forum-related activities; and (3) exercise of jurisdiction would be reasonable.

Purposeful Availment: Relies on Gordy

In reviewing the element of purposeful availment, the court referred to the Ninth Circuit's 1996 opinion in

Gordy v. Daily News, L.P. There, the Ninth Circuit found that a California federal court had jurisdiction over the publisher of the New York *Daily News* which circulated more than 99% of the copies of its newspaper within 300 miles of the New York metropolitan area. As in the *Miracle* case, the publisher of the *Daily News* had limited contact with California: it circulated only 13 copies of its daily edition and 18 copies of its Sunday edition to subscribers in California.

However, unlike the *Post* in Hawaii, the *Daily News* sent reporters into California to cover stories. In that case, the plaintiff, Berry Gordy, the founder of Motown Records, lived in California, and the Ninth Circuit found that the primary injury to his reputation would occur in California. The Ninth Circuit, in turn, relying on the Supreme Court's 1984 decision in *Calder v. Jones*, found that the defendant publisher purposefully availed itself of the jurisdiction of the California court.

Here, the district court in Hawaii likewise found that there was purposeful availment even though only two copies of the *New York Post* were sent into Hawaii. The court avoided an extensive discussion of the *de minimus* circulation of the *Post* in Hawaii but focused on the fact that the plaintiff was a resident of Hawaii (allegedly for almost 13 years), as set forth in Cindy Adams' column, and that Ms. Adams and the *Post* were aware that at least at some time Nancy Greene (a/k/a Nancy Miracle) had resided in Hawaii. The court emphasized that the awareness on the defendants' part of the plaintiff's residence was a critical factor in satisfying the purposeful availment prong.

Forum Related

As to the second element, the *Miracle* court quickly found that the claim had arisen or resulted from the plaintiff's forum related activities. The court simply noted that since the libel claim arose out of the publication of the article which made its way via two copies into Hawaii, this second element of the test was satisfied.

Reasonable

With respect to the third prong (the requirement that the "exercise of jurisdiction be reasonable") the court engaged in a balancing test of seven factors:

- 1) the extent of a defendant's purposeful interjection;
- 2) the burden on the defendant in defending in the forum;
- 3) the extent of conflict with the sovereignty of the defendant's state;

(Continued on page 11)

The Falling Bar For Personal Jurisdiction

(Continued from page 10)

- 4) the forum state's interest in adjudicating the dispute;
- 5) the most efficient judicial resolution of the controversy;
- 6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
- 7) the existence of an alternative forum.

Surprisingly in view of the court's ultimate decision, after examination of the seven factors, it concluded that four of the seven factors weighed in defendants' favor. The court acknowledged that there was a minimal degree of interjection into Hawaii on the defendants' part and that the defendants had a greater burden to litigate a case in Hawaii. The fact that New York state law provided greater protection to the media than did Hawaiian law favored defendants. Also the factor of efficient resolution focusing on the location of evidence and witnesses, favored the defendants.

However, the court found that the factors favoring the plaintiff — the forum state's interest in adjudicating the dispute, the convenient and effective relief for the plaintiff, and the existence of an alternative forum — all collectively weighed much heavier in favor of the plaintiff. In particular, the court found that, were the case to be dismissed in Hawaii, plaintiff would be barred from reinstating the case in New York because of New York's one year statute of limitations for libel claims. Accordingly, the court found that, after considering all relevant factors, personal jurisdiction was proper over both defendants and denied the motion to dismiss.

Venue

In considering the motion to transfer venue, the court first found that venue was appropriate under 28 U.S.C. Section 1391 (a) (2). The court then declined to transfer the case to the Southern District of New York on the basis that it was less inconvenient for the *Post* "as a large corporation" to travel to Hawaii than for the plaintiff to travel to New York, even though the publisher had several employees and third party witnesses who were essential witnesses to the case (all of whom reside on the east coast).

The court was apparently influenced by the plaintiff's statement that she had five witnesses other than herself who were residents of Hawaii who would apparently be reputational witnesses. Plaintiff stated that all of her witnesses would need to travel to New York for the trial. The court relied upon the Ninth Circuit's statement that "in this era of fax machines and discount air travel, it is not unreasonable to require a party to litigate in a distant

forum." The court stated, "The *Post* is a large corporation that could more easily travel to Hawaii to litigate than could Plaintiff travel to New York." The court therefore denied the motion to transfer venue.

Jurisdictional Free-for-All

The district court opinion is unsettling in several ways. What if two people bought copies of the *Post* in Los Angeles International Airport and then carried the two copies with them when they traveled by plane to Honolulu? Would the fact that those two copies made their way into Hawaii be a basis for finding personal jurisdiction because the publisher could envision that this would be a possible occurrence? What if Cindy Adams had *not* stated in her story that she understood that the plaintiff had at some time resided in the State of Hawaii? Would the plaintiff still have a basis for jurisdiction even though Cindy Adams and the *Post* would not have anticipated specifically that the article could have any impact on the plaintiff's reputation in Hawaii? The *Post* is a local, metropolitan newspaper.

If the reasoning in the District Court opinion in *Miracle* is widely adopted, the *Post* and other local newspapers can anticipate being sued in any state where a hard copy of their publication is delivered, despite the *de minimus* amount of newsstand or subscription sales. The global world, even for local newspapers, is rapidly shrinking.

The defendants are asking the court to certify the issue to the United States Court of Appeals for the Ninth Circuit.

Slade R. Metcalf and Trina R. Hunn of Squadron, Ellenoff, Pleasant & Sheinfeld, LLP of New York City and Jeffrey Portnoy and Peter Olson of Cades Schutte Fleming & Wright of Honolulu represented the defendants in this case.

The Falling Bar For Personal Jurisdiction

It Isn't Just The Media They Don't Like . . .

If you think that the media are the only ones subject to large damage awards in libel suits, let us point out to you a \$6 million award against a law student in favor of a former University of Florida student who was falsely accused of being a child molester during a campaign for campus president. (And you thought only the big guys got down and dirty in politics.) Press reports indicate that the plaintiff, now a political science doctoral student in London, also collected a settlement in the amount of \$85,000 from a prestigious honor society at the university that was accused with two of its agents of posting dozens of fliers with the false accusation.

The defendant in the current action was not represented at trial, but is expected to appeal. Another defendant is appealing an \$80,000 judgment against him.

U P D A T E

Society of Professional Journalists Develops "Victim Cards"

In January 2000, the Fairfax County Police Department began distributing cards to crime victims advising them to talk to the police before talking to the press. *See LDRC LibelLetter* January 2000 at 37. In response, the Society of Professional Journalists has developed an informational card telling victims and witnesses it is the reporter's "job to inform the members of the public about crimes" and reassuring them about the newsgathering process. For those not willing to talk to the press, the card adds, "if you do not wish to talk with me now you may call later at the number below." The cards may be ordered from the D.C. Society of Professional Journalists Chapter at P.O. Box 19555, Washington, D.C. 20036-0555.

Defamation Claim Dismissed in D.C. Federal District Court on Jurisdiction and Statute of Limitations

By Ashley I. Kissinger

After working through an interesting mix of jurisdictional issues — including the scope of the D.C. long arm statute, the impact of a passive website and the effect of republication by third parties — the United States District Court for the District of Columbia dismissed a defamation complaint for lack of personal jurisdiction over two media defendants. The court also ruled that the statute of limitations had run with respect to a source whose statements were made to the reporter long before actual media publication. *Emerson v. Sugg, The Weekly Planet, Inc., and Richard Cole*, Case No. 1:99 CV-01219 (ESH) (D.D.C. March 23, 2000).

D.C. Plaintiff/Florida Paper

Plaintiff Steven Emerson's complaint alleged that he is an investigative journalist who lives in Washington, D.C. and that he regularly reports on issues concerning international terrorism and national security. In 1996, Emerson spoke at various forums in Florida, alleging that a group of Muslim professors at the University of South Florida supported terrorist activities.

Thereafter, John Sugg, a senior editor for *Weekly Planet*, a community newspaper in Tampa, published several articles critical of Emerson and his accusations about the professors. Emerson sued Sugg, the newspaper, and Sugg's source, former Associated Press reporter Richard Cole, for defamation.

In Personam Jurisdiction: Agency and Effects

Emerson alleged that two activities of a third party, the D.C.-based Council on American-Islamic Relations (CAIR), subjected Sugg and *Weekly Planet* to personal jurisdiction:

- (1) CAIR's posting on its web site of two of Sugg's articles; and
- (2) CAIR's issuance and circulation to members of Congress of a press release that excerpted Sugg's articles and called for an investigation into Emerson's veracity in testimony given to Congress.

Emerson alleged that CAIR and the two defendants "shared a commonality of purpose, actions, and objectives with respect to discrediting Emerson" and "acted

in concert" to attempt to do so. Arguing that CAIR's "affinity and relationship" with the defendants made CAIR their "agent," Emerson contended that these activities by CAIR brought the two defendants within the D.C. long-arm statute provision extending jurisdiction to those "causing tortious injury in the District of Columbia by an act or omission in the District of Columbia," D.C. Code § 13-423(a)(3).

Emerson also argued that the defendants' own activities in Florida subjected them to personal jurisdiction under the "effects test" announced in *Calder v. Jones*, 465 U.S. 783 (1983), because the "effects" of their allegedly tortious activities were felt by Emerson in the District of Columbia and were reasonably foreseeable to Sugg and *Weekly Planet*.

Both Arguments Rejected

Federal District Court Judge Ellen Segal Huvelle rejected both of these arguments. First, the court held, D.C.'s long-arm statute, unlike that of California (the statute at issue in *Calder*) and many other jurisdictions, does not extend to the limits of constitutional due process and requires the plaintiff, in a case such as this, to show not only injury in the District but also a tortious act in the District. Because Sugg and the newspaper made the allegedly defamatory statements in Florida, the court held that it did not have jurisdiction over them even if the injury allegedly caused by those statements was foreseeable and felt by Emerson in D.C.

The court also rejected Emerson's agency theory, stating that "[i]t would be a terribly dangerous precedent for the Court to find that the mere fact that two entities share a similar political agenda and use each other's materials make them agents for one another." The court further held that, even if CAIR were the agent of Sugg and *Weekly Planet*, Emerson would still have to demonstrate sufficient conduct by those defendants individually in the district, which he could not do. See *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir. 1996).

In this regard, the court noted that CAIR's web site was "passive" rather than "interactive" — *i.e.*, residents in the District (and elsewhere) could view Sugg's articles on the site but could not interact with Sugg or *Weekly Planet* through the site. Moreover, the court held, the mere foreseeability of the republication of Sugg's articles on CAIR's web site was not enough to confer jurisdiction

(Continued on page 14)

Defamation Claim Dismissed in D.C.

(Continued from page 13)

under the D.C. long-arm statute.

Finally, with respect to the press release, the court also held that the “government contacts principle precludes basing jurisdiction upon contacts with a governmental instrumentality.” To allow jurisdiction to be based on a citizen’s exercise of his or her right to petition the government, the court explained, “would make [the] Court open to jurisdiction for anybody and everybody who has ever petitioned their government.”

Statute of Limitations for a Source

Judge Huvelle also dismissed the complaint against defendant Richard Cole, one of Sugg’s sources, for failure to file the complaint against Cole within the one-year period prescribed by the District’s applicable statute of limitations. Emerson filed his complaint one day shy of one year after Sugg’s first article appeared in *Weekly Planet* and on CAIR’s website. It was undisputed that Cole made the allegedly defamatory remarks about Emerson to Sugg substantially before this time, and therefore outside the limitations period.

The court rejected Emerson’s argument that, under the “original publication” rule, the defamation claim against Cole did not accrue until Sugg published his article. *Summers v. Washington Times*, 21 Media L. Rep. 2127 (D.D.C. 1993). The court held that the rule did not apply because, unlike in *Washington Times*, Cole did not submit an “integrated whole article” to another media entity for publication. The court distinguished that situation from one in which a source is interviewed for an article, as Cole was, noting that “to toll the statute of limitations until the author got around to publishing basically an article or a book that contained an allegedly slanderous statement by a source would essentially expose the source to liability for years.”

David M. Snyder of David M. Snyder, P.A., Tampa, Florida, and Lee Levine and Ashley I. Kissinger of Levine Sullivan & Koch, L.L.P. represented John Sugg and Weekly Planet, Inc. in this matter. Stuart F. Pierson of Troutman Sanders, LLP represented Richard Cole.

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Internet Defamation Suit Dismissed for Lack of Personal Jurisdiction

Effects Test Not Satisfied

In early February, the U.S. District Court for the Western District of Tennessee dismissed a lawsuit between two competing aircraft conversion companies, finding that a defamatory statement about the plaintiff on a passive Internet site could not establish personal jurisdiction against a foreign corporation. *Bailey v. Turbine Design, Inc.*, 2000 U.S. Dist. LEXIS (W.D. Tenn.). The court held that in making an allegedly defamatory statement about a corporation that happened to be based in Tennessee, the defendant had not deliberately targeted its tortious content toward the forum state, as required for constitutional due process.

A Soured Business Deal

The plaintiff, William Bailey, partially owned Phoenix Corporation, a Tennessee corporation which converts aircraft by installing new engines. Phoenix had made arrangements to sell one of its Federal Aviation Administration certifications to another company, Mega Flight. In his lawsuit, Bailey claims that before the sale went through, Mega Flight used information obtained through its dealings with Phoenix to enter a relationship with the defendant, Turbine Design, Inc., another conversion company that was in competition with Phoenix. Mega Flight was therefore able to avoid its arrangement with Phoenix, while still acquiring a certificate to perform a certain type of conversion.

Bailey sued Turbine Design and its president for tortious interference with contractual relations, conspiracy, interference with prospective business advantage, libel, and slander. A libel claim derived from Turbine Design's promotional web site, which allegedly referred to Phoenix as "some con artists in Tennessee" and alluded to Bailey's criminal background.

Passive Web Site

Turbine Design, a Florida-based company, moved to dismiss Bailey's suit for lack of personal jurisdiction (Tennessee's long arm statute has been construed to reach the limits of constitutional due process). The court first found that the Turbine Design web site, which simply advertises the defendant's services, constituted nothing more than a passive site within the sliding scale of interactivity established in *Zippo Mfg. Co. v. Zippo*

Passive Football Web Site Found Sufficient for Personal Jurisdiction in New York

Sale of Advertising is Key

In another recent Internet jurisdiction case, the Southern District of New York denied a defendant web site operator's motion to dismiss the National Football League's trademark and copyright claims for lack of personal jurisdiction. *National Football League v. Miller*, 2000 U.S. Dist. LEXIS 3929 (S.D.N.Y.). Federal District Judge John S. Martin ruled that personal jurisdiction existed under the New York Long Arm statute because the defendant's operation of the web site nfltoday.com garnered substantial revenue from advertisers, and the defendant could have expected the site to have "consequences" in the state of New York.

Ken Miller, a California resident, operates a web site containing information about NFL sporting events. Before the litigation began, it was located at the URL www.nfltoday.com. (Since, it has moved to the address www.badbet.com. When a web user types in the old address, the screen states that the web site has been moved "as a courtesy to the NFL.") Like most commercial web sites, Miller's site earns revenue through the placement of advertisements, some of which contain links to the advertisers' own sites. Some of the advertisers are bookmaking entities.

The NFL sued Miller in Southern District of New York on federal trademark and copyright infringement claims. Miller filed a motion to dismiss for lack of personal jurisdiction.

Revenue from Advertising

First, the court acknowledged the difference, for personal jurisdictional purposes, between a passive web site and one used to actually make sales to customers in the forum state. Under *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997) personal jurisdiction over a foreign defendant would not lie simply by virtue of the fact that his web site could be visited by New York residents. Though Miller's site does not itself do more than provide information, the court distinguished it from the site at issue in *Bensusan* because Miller derived substantial revenue from the sale of advertising space.

Under the New York long arm statute, a foreign defendant will be subject to personal jurisdiction if he

commits a tortious act within the state causing injury to person or property within the state, ex-

(Continued on page 17)

(Continued on page 16)

Internet Defamation Suit Dismissed

(Continued from page 15)

Dot Com, Inc., 952 F. Supp. 1119 (W.D. Pa. 1997). It further noted that there was no evidence of any effort on the defendant's part to reach out to Tennessee residents, or even that any Tennessee resident other than the plaintiff had ever visited the site. Therefore, Bailey had failed to show that the defendants had "purposely availed themselves of the benefits of Tennessee," and jurisdiction could not lie on that basis.

Effects Test

The court then turned to the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1984), which "focuses on the extent to which a defendant's tortious conduct is directed toward or has an effect in the forum state." It distinguished *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316 (9th Cir.), a cybersquatting case in which personal jurisdiction was exercised against a defendant who registered as a domain name the trademark of a California corporation, and then attempted to extort a fee from the trademark owner for its use. Here, the court noted, "the defendants attacked the plaintiff in their website as a business competitor who Bailey has conceded 'solicits conversions nationwide and worldwide'" (emphasis added); he was attacked neither personally, nor specifically as a Tennessee resident.

The court found the facts in this case to closely resemble those in *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717 (E.D. Pa. 1999), in which personal jurisdiction did not lie against a foreign defendant who had published material on the Internet about the plaintiff, a Pennsylvania resident. The *Bailey* court quoted *Barrett* to the effect that

[w]hile we agree that [forum] residents are among the recipients or viewers of such defamatory statements, they are but a fraction of other worldwide Internet users who have received or viewed such statements. The mere allegations that the Plaintiff feels the effect of the Defendant's tortious conduct in the forum because the Plaintiff is located there is insufficient to satisfy *Calder*.

Contrast to Amway

In this sense, *Bailey* contrasts favorably with *Amway Corp. v. Procter & Gamble Co. et al*, 2000 U.S. Dist. LEXIS (W.D. Mich.), a diversity case where one of the defendants was an independent Internet publisher based in

Oregon. See *LDRC LibelLetter* February 2000 at 17. The defendant contested the assertion of personal jurisdiction in Michigan, as it was solely on the basis of statements he had published on a passive web site regarding Amway, a national corporation with its main headquarters in Michigan. There, the court found the statements sufficient to establish jurisdiction under the effects test, relying on *Panavision*.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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Football Web Site Found Sufficient for Jurisdiction in NY

(Continued from page 15)

cept as a cause of action for defamation of character arising from the act, if he . . . expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

The court found that the plaintiff had alleged facts sufficient to show that Miller's Internet activity met this standard.

Meeting NY Test

First, the NFL alleged that "by linking the NFL's trademarks to gambling activity the defendant causes damage to the NFL in New York." For purposes of a motion to dismiss on the pleadings, the court considered the allegation as true. Second, at least according to affidavits submitted by the plaintiff, Miller derived substantial revenue from interstate commerce through selling advertising space on his web site. Again, the court accepted the content of the affidavits as true for purposes of ruling on the motion. It is not clear from the opinion whether the "interstate commerce" involved was simply the operation of a widely accessible web site, which drew advertisers, or the sale of advertising space to interstate entities.

The court's third determination, as to whether Miller could expect his web site to have consequences in New York, required a bit more speculation. In holding that Miller should have expected such consequences, the court looked toward the potential audience for the web site. Judge Martin found that "[i]n establishing a web site targeting NFL fans, Defendant had to recognize that, since there are two major NFL teams that some people still refer to as the New York Giants and New York Jets even though they play in New Jersey, it was likely that his site would ultimately appear on thousands of computer screens in New York."

Notably, though the potential consequences of Miller's web site within the forum state formed one determinative issue in this motion, the court did not employ a bald "effects" test, such as that found to satisfy due process considerations in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1984). Here, the court applied a provision of the New York long arm statute which combines potential effects with the nature of the defendant's commercial activities. It is far from clear that the alleged effects of the nfltoday.com site in New York State would satisfy those required by constitutional due process requirements to haul a foreign defendant into court. Instead,

one factor which distinguished this case from other passive-web site cases, where jurisdiction did not lie, was the income Miller allegedly derived from interstate commerce through his advertisers.

CDA Applied Yet Again AOL Wins Two Suits Based on § 230 Immunity

America Online ("AOL") continues to prove that the immunities from liability in the Communications Decency Act are truly effective in insulating the service provider from various claims based upon third party content. AOL has won two suits in recent months based upon the protection that 47 U.S.C. § 230 affords.

Ben Ezra

The U.S. Court of Appeals for the Tenth Circuit affirmed a grant for summary judgment in a case where

(Continued on page 18)

CDA Applied Yet Again

(Continued from page 17)

AOL was sued for defamation and negligence by Ben Ezra, Weinstein, and Company (“BEW”) for inaccurately quoting plaintiff’s stocks on its Internet service. *Ben Ezra, Weinstein, and Company v. America Online, Inc.* No. 99-2068 (10th Cir. Mar. 14, 2000). AOL had received the stock quotes from its vendors, ComStock and Townsend.

The court rejected the plaintiff’s contention that AOL “worked so closely with ComStock and Townsend in the creation and development of the stock quotation information that it also operated as an ‘information content provider,’” and therefore was not protected by § 230. Slip op. at 8. Rather, the court found that the plaintiff failed to show that AOL had a hand in creating or developing the stock information at issue. Noting that “Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions,” that court found that by deleting some stock symbols or other information in an effort to correct errors, AOL was “simply engaging in the editorial functions Congress sought to protect.” Slip op. at 9.

Doe v. Oliver

Similarly, in Connecticut, a Superior Court, holding that the plain language of the CDA precludes courts from treating Internet service providers as publishers, has granted a motion to strike six counts against AOL in a libel lawsuit. *Doe v. Oliver*, 2000 Conn. Super. LEXIS 570 (March 7, 2000). The lawsuit arose out of an e-mail sent by Lisa Oliver to approximately 31 addresses, one of which was the plaintiff’s employer’s address. Oliver admitted the e-mail was an act of revenge after plaintiff purportedly “stole her man.”

AOL was named as defendant on causes of action based on negligence, intentional infliction of emotional distress, and breach of contract. The trial court, however, quoting § 230, held that an Internet service provider shall not “be treated as the publisher or speaker of any information provided by another information content provider.”

U P D A T E

Reconsideration of *Tasini* Denied

The Second Circuit recently denied the defendant news organizations’ motion for reconsideration of its ruling last September in *Tasini v. New York Times et al.*, U.S. App. LEXIS 36241. See *LDRC LibelLetter*, October 1999 at 47. There, the Court of Appeals reinstated copyright infringement claims brought by freelance journalists against several large media companies in whose publications their articles had appeared. When the journalists filed a claim based on the inclusion of their individually copyrighted articles in an online electronic database and on CD ROM, the Southern District of New York initially granted summary judgment to the defendant.

The lower court found that the databases constituted “revisions” of “collective works,” to which the compiler holds the copyright under the default rules of the Copyright Act, in particular 17 U.S.C. §201(c). See *Tasini v. New York Times et al.*, 972 F. Supp. 804 (S.D.N.Y. 1997); *LDRC LibelLetter*, August 1997 at 27. Therefore, the inclusion of the plaintiffs’ works was not infringement. On appeal, the Second Circuit reversed, holding that the database and the CD ROMs did not fit into the revision exception, and remanding the case to the district court for a determination of liability.

Attorneys for the defendants are strongly considering appealing the decision to the U.S. Supreme Court.

New York Court Holds Internet Publications Subject to Single Publication Rule

In an opinion welcomed by media organizations, New York's Court of Claims has held that Internet publications are subject to the single publication rule preventing plaintiffs from circumventing the statute of limitations on republication theories. *Firth v. State*, 2000 N.Y. Misc. LEXIS 73 (N.Y. Ct. Claims Mar. 17, 2000).

Internet Publication of Report Leads to Lawsuit

Claimant George Firth, former director of the Division of Law Enforcement (DLE) of the Department of Environmental Conservation (DEC), was the subject of a state investigation into the department's weapon-exchange program. The report suggested that Firth had engineered weapon-replacement deals so that he and others in the DLE could cheaply obtain the old guns and then sell them at a profit. The report, issued on December 16, 1996, was posted on the Internet by the state Inspector General.

Approximately three months after the initial release of the report, Firth sent out a notice of intention to file a claim. According to Court of Claims Act §10(3-b), the notice of intention enables a complaining party to file a claim within one year after the accrual of such claim but the complaint was received by the Attorney General on March 16, 1998, well more than a year after the December 16, 1996, initial publication date.

Continuing Wrong Theory Rejected

The court found that Firth's defamation claims were precluded by New York's one-year statute of limitations. First, the court rejected Firth's argument that the report's availability on the Internet constituted a continuous wrong for which an action would only accrue after the State ceases to publish the report.

Citing decisions from New York's Appellate Division, the court found that "the publication of the final report of the investigation signaled the point in time at which the claim accrued," and that the continuing wrong doctrine "may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct."

Thus, the Court of Claims held "unless each daily appearance of the report upon the Internet constitutes a republication . . . defendant's allegedly wrongful acts consisted of the issuance of the report on December 16, 1996 and its initial publication upon the Internet on the same date

Single Publication Rule Applied

Second, the court held that the single publication rule applied to defamatory publications on the Internet. The

court rejected Firth's argument to the contrary based on an unreported Tennessee opinion, *Swafford v. Memphis Individual Practice Assn.*, 1998 WL 281935, which held that a new cause of action arose against a confidential data base each time defamatory information provided by a third party but maintained by the database was accessed.

Rather, the court invoked the recent New York Court of Appeals' decision in *Lunney v. Prodigy Services Co.*, 1999 WL 1082126. See *LDRC LibelLetter*, December 1999 at 7. It found *Lunney*, while dealing with a question of qualified privilege, was "an important guide in establishing the intellectual framework with which the law will be applied to the unique and rapidly evolving technological advancements centered around the dissemination of information via the Internet." That framework was the application of traditional and established tort principles through analogy of old media to newer ones. The court concluded that it found:

no rational basis upon which to distinguish between publication of a book or a report through traditional printed media and publication through electronic means by making a copy of the text of the Report available via the Internet. While the act of making the document available constitutes a publication, in the absence of some alteration or change in form its continued availability on the Internet does not constitute a republication acting to begin the Statute of Limitations anew each day.

A Case Study in Leveraging the Common Law in 12(b)(6) Motions

By Mark J. Prak and David Kushner

Despite the understandable fears of educating one's opponent, we have enjoyed considerable success in recent years with 12(b)(6) and 12(c) motions in libel cases in North Carolina. In addition to the fact that defamation actions are disfavored for their potentially chilling effects on speech, judges, both state and federal, appear disposed to be convinced that many defamation cases require not jury trials but only an application of the law to the publication at issue.

In particular, we have found that the arcana of the common law are not just traps for unwary plaintiffs' counsel but, on occasion, may provide safe harbors for reporting that is less than sterling. Moreover, we have found that judges, once educated themselves, will apply the common law principles without too many qualms.

A recent case, in which a federal magistrate judge held that allegedly defamatory material contained in an article and its correction could not be libelous *per se*, illustrates these lessons nicely.

A Septic Situation

The Wilmington *Morning Star* was sued by a manufacturer of septic systems for reporting that residents in two coastal area subdivisions were experiencing raw sewage leaks from the plaintiff's septic systems. The newspaper colorfully reported that if one took a "deep breath," one would experience the "nightmare" that differentiated these subdivisions from others and that the "residents say they can put a name to their nightmare: the EEE ZZZ Lay septic system under most of their lawns." The article also contained a number of significant — a plaintiff's lawyer would call them "serious" — factual errors that were subsequently corrected.

Dissatisfied with the correction, EEE ZZZ Lay Drain Company filed suit in federal court in the Western District of North Carolina, alleging claims of libel *per se*, negligence, gross negligence, and unfair trade practices. *EEE ZZZ Lay Drain Co. v. Lakeland Ledger Publishing Corp.*, No. 1:99-CV-145-T (W.D.N.C. July 22, 1999).

Forum/Venue Questions

An initial question concerned the plaintiff's choice of

forum, but the decision was made to remain in federal court because of the state law unfair trade practices claim and the confusing decision in *Ellis v. Northern Star Co.*, 388 S.E.2d 127 (N.C. 1990) (suggesting that an unfair trade practices claim might also be proper as an adjunct to a libel claim). The decision to remain in federal court was subsequently borne out by the Fourth Circuit's decision in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (rejecting, under North Carolina law, a state unfair trade practices claim against the news media based on news content).

There was also an interesting venue decision to be made. The newspaper was situated on the coast in North Carolina's Eastern District. The complaint was filed in the Western District in the mountains where the plaintiff's plant was located. The decision was made to remain in the Western District vis-à-vis the Eastern District both because the reporter, who was actually a young intern, was from western North Carolina and, it was believed, would be received well by a mountain jury and because the client may not have been favorably received in the Eastern District due to currently existing findings of contempt which remain on review in the Fourth Circuit. *See Ashcraft v. Conoco, Inc.*, 26 Media L. Rep. 1620 (E.D.N.C. 1998).

A Strategy Develops

Having decided to litigate the case where it was filed, we and in-house counsel prepared to dig in for a protracted battle, as there were numerous difficulties with the case that did not appear to submit to easy resolution without extensive discovery and a careful formulation of legal strategy. As we were beginning to map out our plan of attack, our first conversations with in-house counsel were tentative, for the reporting mistakes appeared to create a potential jury issue. But then we remembered the common law and that the common law had been our friend in the past.

North Carolina's Supreme Court has yet to have occasion to develop fully a post-*New York Times v. Sullivan* jurisprudence. In the Fourth Circuit, a corporate plaintiff is unlikely to be deemed a public figure, and, therefore, precisely what the standard of proof should be fol-

(Continued on page 21)

Moreover, we have found that judges, once educated themselves, will apply the common law principles without too many qualms.

Leveraging Common Law in 12(b)(6) Motions

(Continued from page 20)

lowing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), remains uncertain in North Carolina.

Interestingly, we were able to show our client and, subsequently, the district court and plaintiff's counsel that, throughout its long common law history of defamation jurisprudence, North Carolina's appellate courts had never held a newspaper liable for publishing a statement libelous *per se* of a *business's* reputation. Whether this argument had any impact is unclear. Ultimately, the case was decided through application of North Carolina's common law treatment of libel *per se*.

Libel Per Se Must Be Clear

North Carolina actually recognizes three classes of libel:

- (1) "libel *per se*," when a statement is obviously defamatory on its face;
- (2) "libel *per quod*," when a statement is not obviously defamatory but, when considered with inducement, innuendo, and colloquium, becomes libelous; and
- (3) "secondary libel," when a statement is susceptible of two interpretations, one of which is defamatory and the other is not. North Carolina is somewhat unusual, although not entirely alone, in recognizing this third class. Only a claim for libel *per se* clearly does not require that special damages be alleged and proved.

In this case, the septic system manufacturing company had alleged that the entire article, numerous statements within the article separately, and the entire correction were libelous *per se*. It is doubtful, but uncertain, whether the company could have proven special damages. This was the principal risk in proceeding with a motion to dismiss, as the plaintiff may have been permitted to amend its complaint.

In North Carolina, in reviewing a claim for libel *per se*, it is an initial question for the court to determine whether the publication is subject to *only one interpretation*. If the court determines that the publication is subject to only one interpretation, it then is for the court to say whether that meaning is defamatory. If the worst that can be said of allegedly defamatory material is that it is reasonably susceptible of a defamatory meaning, but the material is also susceptible of a nondefamatory interpretation, then the material cannot be libelous *per se*.

Based on long-standing common law interpretations, the publication "must be defamatory on its face

within the four corners thereof," and it is proper to consider the correction in tandem with the original publication. In other words, courts will refuse to take statements out of their entire context.

This Wasn't Libel Per Se

Using this well-established common law tradition as a backdrop, we argued that, when read in its entirety, the article posited numerous reasons why the subdivisions were experiencing septic system failures: soggy soils, the inappropriate selection of the type of septic system by the developer, improper installation of the chosen septic system by the installer, inspection failures, imperfect governmental regulations, and misunderstandings of the residents. Indeed, the article itself encapsulated the idea that no one thing was to blame when it quoted the county environmental health supervisor as saying that one of the most vociferous residents "wants a full warranty, and that's not possible with sewage systems because so much can go wrong."

We therefore argued that, of all the things that can go wrong, the article, when read carefully, never stated that the thing that went wrong was the fault of the septic system manufacturer itself. Consequently, the publication could not be libelous *per se* as a matter of law since it was clearly susceptible of nondefamatory interpretations.

The magistrate judge agreed with this argument *in toto*. After reciting the list of alternative sources of blame, and noting that two factual errors were subsequently corrected, the magistrate judge concluded as follows:

The court assumes that an ordinary person who reads the paper would have read the corrections. Reading the disputed articles within their "four corners," one *could* conclude that plaintiff manufactured a perfectly fine, state-approved system that was on the cutting edge of technology and had been field-proven in the local area, but that in this particular tale of woe, the system had been improperly installed or chosen by the developer for an ill-suited location.

Slip op. at 6 (emphasis in original). Applying the common law framework for libel *per se*, the magistrate judge recommended that the claim(s) of libel *per se* be dismissed with prejudice, and, because the claims for negligence, gross negligence, and unfair trade practices were based on the same nucleus of operative facts, that they be summarily dismissed as well.

(Continued on page 22)

Leveraging Common Law in 12(b)(6) Motions

(Continued from page 21)

The magistrate judge's decision, then, turned on both the special meaning given to libel *per se* in North Carolina and the court's willingness to construe the "four corners" broadly. Although it may appear that the result is akin to an application of the innocent construction rule, recognized in jurisdictions such as Illinois, *see, e.g., Chicago City Day School v. Wade*, 697 N.E.2d 389 (Ill. App. Ct. 1998), North Carolina courts have never adopted such a rule nor, apparently, even considered its applicability. In this case, the plaintiff singled out certain words as libelous *per se*, and it may very well have been the case that those words in themselves were not capable of an innocent construction. However, the article contained plenty of other words, and, when those words were read together with the words alleged to be libelous *per se*, the overall context of the publication was capable of more than one meaning, not all of which were defamatory.

Common Law Principles Work

We are unaware of another case in which the court so rigidly applied the *broadest* interpretations of common law principles protecting the speaker on a motion to dismiss. Nevertheless, we have found that the nuances of common law principles, about which defense counsel are much more likely to have a firm grasp — or even a light one — than are plaintiffs' attorneys, when aggressively advocated can produce remarkably salutary benefits in terms of the early dismissal of defamation cases.

The magistrate judge's Memorandum and Recommendation has been submitted to Media Law Reporter for publication; it is also available on the website of the United States District Court for the Western District of North Carolina at <http://208.141.47.221>.

Mark J. Prak and David Kushner practice with Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P. in Raleigh, North Carolina, which represented the defendant newspaper in this matter with Adam Liptak of The New York Times Company.

Libel of the Dead Bill Considered in Pennsylvania

By Malcolm Gross

Pennsylvania's Senate is considering a bill to permit a survivors' action by the estate or other relatives of a deceased person who is defamed within one year from the date of the person's death. A one year statute of limitations would apply to the defamation action, running from the date of publication. Libel claims would, therefore, be possible for publications after the subject's death.

Senate Bill 1246 — Session 1999, sponsored by Senator Vincent Fumo of Philadelphia, has been referred to the Judiciary Committee. All 50 of the State's senators have signed as co-sponsors of the legislation. No hearings have as yet been scheduled by the committee.

No Survival at Common Law

At common law, all rights of action ended with the death of either party. The apparent injustice of this rule resulted in legislative action in the 19th century gradually abolishing the common law in every state.

However, libel was treated gently by the new survivorship actions and for reasons now obscured by time was typically excluded from the causes of action permitted by the statutes which abrogated the common law.

Pennsylvania followed suit. 20 Pa.C.S.A. § 320.601 provided:

All causes of action or proceedings, real or personal, except actions for slander or libel, shall survive the death [of one of the parties].

As a result, the death of either plaintiff or defendant, even after the cause of action was started, ended a claim for defamation.

PA Court Struggles With Result

The Pennsylvania Supreme Court, however, struggled with the apparent unfairness of the situation where plaintiff is defamed, filed suit and then dies. In *Menefee v. CBS*, 329 A.2d 216 (Pa. 1974), the facts were particularly difficult on that score because the plaintiff had died, after all discovery was complete, one day before trial against a defendant radio station. Nevertheless, the court upheld the statute based on its understanding that the policy behind the law was the distinction that in a defamation action a "windfall" to a deceased person's heirs would result if they were allowed to recover for his lost reputation.

Further, since the truth was the critical pivot of a defamation case, the court saw that a jury would be confronted with a situation where a dead party was pitted against an

interested party on that issue — hardly a situation likely to yield a fair result. As a result, the court implicitly upheld the statute.

Nevertheless, the *Menefee* court salvaged the plaintiff's action by interpreting his complaint as being actually for product disparagement (since he himself was a radio broadcaster). Given his professional position, the court found he had an intangible interest in his successful radio personality. It, therefore, allowed *Menefee's* case to proceed based on a product disparagement theory.

Three of the court's seven justices disagreed with that distinction and the court addressed the statute, again in 1975. It was then faced with a direct constitutional challenge based on the equal protection clause. See *Moyer v. Phillips*, 341 A.2d 441 (Pa. 1975). This time defendant had died before the trial, as a result of which the trial court dismissed the case. Once again § 3371 was at issue. However, in *Moyer*, the court examined that section from a 14th Amendment perspective as well as the perspective of Pennsylvania's own equal protection constitutional provisions.

Since the legislative basis for a distinction between defamation and all other causes of action is critical for a 14th Amendment analysis, the court attempted to find some rationale for the distinction. The court first divided the classes under the statute into those who suffer harm to reputation and those who suffer some other form of harm. Unfortunately, it could then find no rational basis for a distinction between the two classes. It specifically rejected the "windfall" policy mentioned earlier in *Menefee* as the basis of the distinction and otherwise could find nothing in modern law to constitutionally support the distinction, at least, where the defendant died after the cause of action was filed.

As a result, the court found § 3371 unconstitutional when it was applied to a deceased defendant. It pointedly distinguished and did not overrule *Menefee*, although one justice would have done so. Two other justices, out of the six sitting, found the statute unconstitutional as to deceased defendants only, because of the constitutional shift in a burden of proof to the plaintiff after the statute passed. They relied on *Gertz v. Welch*, 418 U.S. 323 (1974). They reasoned that this shift eliminated the policy reasons behind those protecting a dead defendant in the statute. However, they reserved judgment on whether the same reasoning would apply where a plaintiff died.

(Continued on page 24)

Libel of the Dead Bill Considered in PA

(Continued from page 23)

Other Jurisdictions

Several other jurisdictions including New Jersey, New York and Texas followed suit either by a statutory change or case law. For instance, a New York statute apparently now allows survivors to bring defamation claims but excludes punitive damages. N.Y. ESTATES, POWERS & TRUSTS LAW § 11-3.2(a)(1).

At least one federal Court of Appeals has, however, bucked this trend. In *Innes v. Howell Corp.*, 76 F.3d 702 (6th Cir. 1996) the Sixth Circuit held that such a statute did not violate the equal protection clause because of the First Amendment. It found the "special solicitude for freedom of expression" in the First Amendment sufficient to uphold the statute. Nevertheless, the court called its rationale a slender "reed" and held that although a state could carve out defamation, as Kentucky had, such a carve out was not constitutionally required.

In short, then, neither the constitutional nor the policy arguments have been held unequivocally to support a distinction between defamation and other torts in the context of survival actions. Still, the distinction has history on its side even if its origins are unclear. In fact, it can be argued that the Pennsylvania Supreme Court has never unequivocally held that the death of a plaintiff in a straightforward defamation case after the action is filed does not end the action.

Bill Creates a Claim

Senate Bill 1246 goes well beyond this history. It proposes to create a new defamation claim in the reputation of a dead person. As a result it creates a whole new cause of action whereby survivors can vindicate a deceased person's name.

The definition of libel contemplates the defamation of a living person. *Hautrer v. Cowles Pub. Co.*, 811 P.2d 231, 19 M.L.R. 2107 (Wash. 1991). The analysis of the Pennsylvania Supreme Court in *Menefee* makes the same assumption. That assumption is, however, based on the common law, and any legislation presumably can abrogate the common law.

The difficulties which such legislation would create are, however, significant. Defamation after death means that the action would have as plaintiffs both a nominal plaintiff (the deceased) and his survivors. Wisely, the common law recognized that the dead have no reputation which the law can protect.

A Personal Not a Family Reputation

The whole thrust of current and past defamation law is to compensate for present injury to reputation and punish that injury. In fact, without proof of some loss in the form of economic damages a number of courts have recently held that there is no harm to reputation. See *Richie v. Paramount Pictures Corp.*, 24 M.L.R. 1897 (Minn. 1996); *Special Force Ministries v. WCCO Television*, 26 M.L.R. 2490 (Minn. App. 1998). There can be no such harm where the person harmed is dead before the libel.

This is not a situation like the developing law in appropriation/privacy cases. (See, e.g., *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) (recognizing Elvis Presley's right of publicity and holding that the right was descendible upon Presley's death); see also *Tennessee ex rel. Presley v. Crowell*, 14 M.L.R. 1043 (Tenn. App. 1987) (discussing developing aspects of appropriation law). There, the estate still has an economic interest in the name of the deceased, analogous to the interest being protected by the Menefee estate in the disparagement claim. It is that interest which appropriation cases seek to protect in those situations.

The survivors of a dead person have no right in his reputation. It is this last point which is critical. Harm to the reputation of a deceased person is really only harm to his family name. Claims in that direction have been repeatedly rejected by the courts because they are not of and concerning the survivors.

LA Court Identifies Policy Issues

For instance, in *Gugliuzza v. KCMC Inc.*, 20 M.L.R. 1866 (1992), the Supreme Court of Louisiana rejected such a claim. The *Gugliuzza* court identified six policy reasons why a dead person's action for libel cannot proceed. They are:

- (1) the cause of action for defamation is a personal one;
- (2) permitting the cause of action would hamper historical research and writing;
- (3) the difficulty in drawing temporal and plaintiff boundaries;
- (4) a logical extension of such a cause of action would require permitting a cause of action for defamation of another living person;
- (5) the cause of action is inconsistent with traditional notions of success on one's own merits; and
- (6) the cause of action is fraught with practical

(Continued on page 25)

Libel of the Dead Bill Considered in PA

(Continued from page 24)

and procedural problems such as the inability to cross-examine the decedent to establish a defense, reconciling a plaintiff's memory with the decedent's actual reputation and reconciling the varying memories of multiple plaintiffs.

After setting forth these policy reasons why such an action cannot be permitted to proceed, the court also noted a "constitutional dimension" in not permitting the action. It reasoned that adding a new cause of action expanded the class of potential defamation claimants and the type of injuries historically redressed by a defamation action. It quoted *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), in raising to constitutional dimensions a policy against adding to libel claims. *Id.* 272.

A Litigation Nightmare

The *Gugliuzza* court's policy reasons make a forceful argument against the proposed Pennsylvania statute. Each might be expanded upon by any lawyer who has tried defamation cases. Both the discovery phase and trial phase of an action under the statute would present a nightmare of hearsay regarding the decedent's actual reputation, an opportunity for exaggeration or outright falsification as to the truth or falsity of the post death publication, and an invitation for juries to punish the press with damages unrelated to any economic standard. Those problems, as the *Gugliuzza* court pointed out, might reach constitutional dimension especially because *New York Times v. Sullivan* specifically noted that, at least where the publication concerns governmental affairs, the "of and concerning" branch of defamation law has constitutional ramifications.

Whether any of these policy or constitutional arguments will affect the Pennsylvania Senate's consideration of Senate Bill 1246 is difficult to know. The Pennsylvania Newspaper Association has taken a strong position against the bill. If Pennsylvania were to enact such legislation it would apparently join only the Commonwealth of Puerto Rico, which permits such actions. See *Rodriguez v. El Vocero De Puerto Rico, Inc.*, 22 MLE 1495 (1994) n.6.

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Florida Court Dismisses False Light Claim on Defamation Grounds

By Ashley I. Kissinger

A Florida court has dismissed a plaintiff's false light invasion of privacy claim, in part because the plaintiff failed to meet the requirements for a defamation cause of action. In *Heekin v. CBS Broadcasting Inc.*, Case No. 99-5478-CA (Mar. 6, 2000), the Sarasota County Circuit Court dismissed the plaintiff's false light claim because

- (1) it was filed after the statute of limitations for defamation had expired;
- (2) the plaintiff failed to plead actual malice; and
- (3) the broadcast information about which the plaintiff complained was contained in public records.

In April 1995, CBS aired a broadcast on "60 Minutes" about the justice system's response to domestic violence. Plaintiff Charles Heekin's former spouse, Judy Dickinson, was interviewed for the broadcast and stated that she feared for her life and the lives of her children. Correspondent Leslie Stahl reported that a restraining order had issued against Mr. Heekin, who was identified by name in the broadcast. A letter that he wrote, declining to be interviewed, was read on the air.

Mr. Heekin, a lawyer practicing in and around Sarasota County, sued CBS for false light invasion of privacy, complaining not about any statements made in the broadcast,

but about the "juxtaposition" in the broadcast of his ex-wife and their children "to pictures and stories covering women who had been abused, battered, and in at least one case, killed." He alleged that CBS "intended to and did in fact create in the viewing public the impression that the Plaintiff had battered, abused and injured his then-wife and children." Mr. Heekin further alleged that CBS disseminated the broadcast with "actual knowledge or with reckless disregard of the effect that the broadcast would have" and had "no legitimate public interest in broadcasting Plaintiff's private dissolution of marriage on public television."

CBS moved to dismiss or, in the alternative, for summary judgment on several grounds.

First, CBS argued, the plaintiff had failed to file his complaint within the two-year period prescribed by the statute of limitations for defamation claims, Fla. Stat. § 95.11(4)(g). CBS contended that whether plaintiff styled his claim as one for defamation or one for false light, he was obliged to comply with the two-year limitations period for defamation claims, rather than the four-year "catch-all" limitations statute for non-enumerated causes of action, Fla. Stat. § 95.11(3)(p).

Second, CBS contended, the plaintiff did not properly state a cause of action for false light because he did not allege that the broadcast was disseminated with the requisite knowledge

or reckless disregard of the alleged *falsity* of the broadcast. Rather, the plaintiff alleged that CBS had the requisite intent with respect to "the *effect* that broadcast would have," which, CBS pointed out, is not the appropriate inquiry.

Finally, CBS contended that because the information broadcast about Mr. Heekin was contained in public records, CBS could not be held liable for its publication. The plaintiff's petition for dissolution of marriage, and the resulting court order that dissolved the marriage, changed Mrs. Heekin's name back to her maiden name, and granted her custody of the children, were matters of public record. Moreover, at the time of the broadcast, it was a matter of public record that Mrs. Heekin had sought and received three restraining orders to protect her from Mr. Heekin. CBS also noted that Ms. Dickinson sought yet another restraining order two years after the broadcast and was successful in obtaining an injunction for protection against domestic violence.

The court agreed on all points, holding that the "gravamen of [a false light] claim would be the same as one for defamation," and that "CBS cannot be held liable under the First Amendment or at common law for false light invasion of privacy, for publication of information contained in public records."

The court agreed on all points, holding that the "gravamen of [a false light] claim would be the same as one for defamation."

CBS Broadcasting Inc. was represented in this matter by Susanna M. Lowy of CBS, Lee Levine, Jacqueline J. Orr and Ashley I. Kissinger of Levine Sullivan & Koch, L.L.P., and David M. Snyder of David M. Snyder, P.A., Tampa, Florida.

California Supreme Court to Review Eavesdropping Statute Nonmedia Case May Lead to Broader Definition of “Confidential Communication”

At the end of last year, a California appellate court issued an opinion in an intrafamily suit brought under the California eavesdropping statute, California Penal Code section 632. *Flanagan v. Flanagan*, 77 Cal. App. 4th 122 (Ct. App. Cal. 1999). The court adopted the Ninth Circuit’s relatively narrow construction of the term “confidential communication” as articulated in *Deteresa v. American Broadcasting Companies, Inc.*, 121 F.3d 460 (9th Cir. 1997). See *LDRC LibelLetter*, August 1997 at 21.

Last month the California Supreme Court granted review. *Flanagan v. Flanagan*, 2000 Cal. LEXIS 1863 (March 22, 2000). While the published grant of review does not discard the questions presented, the California Daily Reporter indicates that the case has been appealed on the issue of whether telephone conversations were properly found not confidential, where the parties reasonably expected the conversations would not be recorded but did not reasonably expect that the contents of the conversations would not be communicated to third parties.

The unsettled state of California law on this issue, along with the unsympathetic facts in the case, might reasonably raise concerns among media defense counsel that the California Supreme Court will issue a broader construction of “confidential communication.”

Thoroughly Unsavory Facts

The sordid facts, as recited by the court, are as follows. Defendant Honorine Flanagan attempted to hasten her husband, John Flanagan’s, death by replacing his prostate cancer medication with water. Her apparent motive was for him to die before he had the opportunity to add his son Michael as a beneficiary to his will. Meanwhile, fearful that her scheme would be uncovered or that it would fail, she started secretly recording John’s telephone conversations, including those he had with Michael. The plot was ultimately uncovered, because Honorine had revealed her scheme to one Dale Denels. Denels secretly recorded these conversations and alerted father and son to the scheme. The father’s proper medication was restored, and he lived another year until succumbing to a heart attack – but he never changed his will. Honorine inherited his entire multi-million dollar estate.

Honorine thereafter sued Denels and Michael for slander, invasion of privacy, and intentional and negligent infliction of emotional distress. Michael filed a cross-claim for violations of section 632, under California

Penal Code section 637.2, which provides for a private right of action and statutory penalties. A jury found for Michael on all claims, and awarded him a statutory amount of \$120,000 (\$5,000 for each recording), as well as \$1.2 million in punitive damages. The trial court reduced the award to \$5,000 total. Of the 24 conversations recorded, the content of 17 of them was not raised at court, and five concerned mundane issues such as the scheduling of medical appointments. The two remaining conversations were more intriguing, as they involved the engagement of a divorce lawyer and an investigation into Honorine’s suspected misappropriation of community property assets.

This nonmedia case raises very important issues for newsgathering in California. LDRC members should give serious consideration to an amicus effort.

Statutory “Confidentiality”

On appeal, a panel of judges in California’s Second Appellate District were charged with interpreting the language of section 632 to determine whether substantial evidence justified the jury’s findings. The statute holds criminally liable any person who “intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication.” It further states:

The term “confidential communication” includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto but excludes a communication made in a public gathering . . . or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

The court’s decision turned on a construction of this language. First, it set out a generic definition derived from the inclusion and exclusion in the statute:

(Continued on page 28)

CA Supreme Ct. to Review Eavesdropping Statute

(Continued from page 27)

A communication is confidential if (1) it reasonably appears that at least one of the parties desires it to be exclusive to the parties; and (2) the desire for exclusivity is objectively reasonable under the circumstances.

It began by noting a clear conflict in the California appellate courts' treatment of the first prong, as to what precisely a party must reasonably expect, a conflict which has also been observed by the California Supreme Court and the Ninth Circuit.

Two Interpretations

Principally there exist two different formulations. The first, articulated in *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 250 Cal. Rptr. 819 (1988), requires only a reasonable expectation that no one will overhear the conversation. The second, derived from *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 273 Cal. Rptr. 674 (1990), construes confidentiality more narrowly, to include only conversations a party does not expect to be divulged to anyone else.

In *Deteresa*, the Ninth Circuit observed that under the *Frio* definition, recording almost any conversation held out of earshot of others could incur liability under section 632. The federal court predicted that the California Supreme Court would apply the *O'Laskey* definition, which more closely follows the literal wording of the statute.

In the present case, the appellate court adopted the reasoning of the Ninth Circuit in *Deteresa*. It concluded that the *Frio* interpretation effectively read out of the statute the first sentence in the definition of "confidential communication." It then looked to the facts of the case, to determine whether Michael Flanagan had a reasonable expectation that each of the recorded conversations would not be divulged to others. This required analysis of the context and content of each communication.

Here, no evidence was presented regarding the content of 17 of the father-son conversations; thus the court could infer no reasonable expectation of confidentiality. As to the five conversations about logistics, the court found "no evidence that either Michael or John [his father] desired these conversations to be kept between themselves." However, the remaining two conversations had been provided to the jury in transcript form, showing that they involved more private matters. The court found that "[t]he content of these conversations

together with the relationship of the parties and other surrounding circumstances clearly support a finding of confidentiality."

The court agreed with Michael Flanagan that he was entitled to the statutory \$5,000 amount for each violation, now only two rather than 24 (the punitive damage award was preempted by the statute, which does not provide for exemplary damages). He appealed the decision, and the California Supreme Court granted review. Although it has noted the confusion apparent at the Court of Appeal level (see *Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 235, fn. 15 (Cal. Sup. Ct. 1998)), the high court has yet to offer a definitive reading of the statute.

Court Dismisses Intrusion Claim Arising Out of Work-Related Investigation

Stating that a court must “make[] the preliminary determination whether there is ‘offensive’ conduct in discerning the existence of a cause of action for intrusion,” the U.S. District Court for the Northern District of California has dismissed an intrusion claim filed by a former employee of the NBA Golden State Warriors.

[P]laintiff presented “no authority that distinguishes a public from a private place based upon the amount of traffic or light.”

Salazar v. Golden State Warriors, 2000 U.S. Dist. LEXIS 2366 (N.D. Cal. Feb. 29, 2000). The plaintiff, Shane Salazar, the team’s former equipment manager, alleged that the team invaded his privacy by hiring a private investigation firm to investigate allegations of drug use. Salazar was subsequently fired after video surveillance showed him allegedly snorting cocaine in a sports utility vehicle in a parking lot while attending a wedding.

Following his termination, Salazar brought suit against the Warriors alleging, among other things, intrusion, wrongful termination, intentional infliction of emotional distress, and negligence. While indicating that a motion to dismiss “is viewed with disfavor and is rarely granted,” the court ultimately dismissed Salazar’s intrusion claim on the grounds that Salazar failed to show that the defendant intruded into a private place, and that video surveillance of a subject in public view was, at most, a de minimis intrusion into privacy. *Id.* at *4.

With regard to the “intrusion into a private place” element of the tort, the court found that the plaintiff failed to show that a parking lot could be considered a private place despite plaintiff’s allegation that the lot was not “highly traveled but rather dark and isolated.” *Id.* at *7. Noting that plaintiff presented “no authority that distinguishes a public from a private place based upon the amount of traffic or light,” the court found that the plaintiff “was in public view while inside of a car parked in a parking lot.” *Id.* The court also concluded that “if the California Supreme Court were to decide the issue as a matter of first impression, it would hold that a parking lot would be considered a public place, as it is under the Fourth Amendment.” *Id.* at *8.

Turning to the issue of offensiveness, the court

stated that while “determining what is ‘highly offensive to a reasonable person’ suggests a standard for the jury to decide, the court makes the preliminary determination whether there is ‘offensive’ conduct in discerning the existence of a cause of action for intrusion.” *Id.* at *9. The court continued to state that “[v]ideo surveillance does not in itself violate a reasonable expectation of privacy.” *Id.* Rather, “the intrusiveness of videotaping depends on the circumstances.” *Id.*

In the instant case, the court found that because 1) the “private investigator merely videotaped plaintiff from a distance in his car and in places where plaintiff was in public view;” 2) the plaintiff failed to assert that the video had audio capabilities or that any communications were taped; and 3) the “defendant’s work-related reason [the plaintiff’s close relationship with players] for the surveillance is a legitimate motive,” the degree of defendant’s intrusion was de minimis. *Id.* at *10-11.

The court also dismissed the plaintiff’s claims for wrongful termination, intentional infliction of emotional distress, and negligence.

“Video surveillance does not in itself violate a reasonable expectation of privacy.”

Sports Artist Wins Summary Judgment in Tiger Woods' Trademark/Publicity Suit Poster Protected by First Amendment

Federal Judge Patricia Gaughan in the Northern District of Ohio recently granted summary judgment to the defendant painter in a trademark and right of publicity action brought by golf star Tiger Woods' licensing agent. *ETW Corp. v. Jireh Publishing, Inc.*, No. 1:98 CV 1485 (N.D. Ohio Mar. 25, 2000). The suit involved a limited edition poster reproduction of a painting featuring Woods by artist Rick Rush.

Judge Gaughan, who issued a similar ruling in the Rock and Roll Hall of Fame case in 1998, (*Rock & Roll Hall of Fame & Museum v. Gentile Productions*, 71 F.Supp. 2d 755 (N.D. Ohio 1999); see *LDRC LibelLetter*, September 1999 at 8.), found that use of Woods' image could not create a likelihood of consumer confusion as required by the Lanham Act and Ohio trademark law. Furthermore, she held that the poster was protected as artistic expression by the First Amendment, and could not constitutionally be subject to a right of publicity claim.

Limited Edition Repros

Jireh Publishing Company, which publishes poster reproductions of Rick Rush's paintings, printed a limited edition of a work entitled "Masters of Augusta." The work depicts the famed golf prodigy Tiger Woods in three different positions, surrounded by images of past Masters champions. His name and the title of the painting are printed at the lower edge of the poster. ETW Corporation, a subsidiary of Cleveland-based International Management Group which was formed to manage Woods' licensing arrangements, sued Jireh on grounds of federal Lanham Act trademark violations, violations of state trademark law, and violation of Woods' common-law right of publicity. Jireh moved for summary judgment.

Use of Woods' Image

In her opinion, Judge Gaughan first examined the plaintiff's federal trademark claims. ETW has registered the mark "TIGER WOODS" with the Patent and Trademark Office, but holds no registered mark bearing a particular image of the golfer. Quoting the Sixth Circuit's recent opinion in *Marketing Displays, Inc. v. Traffic Devices, Inc.*, 200 F. 3d 929 (6th Cir. 1999), the court observed that "to prevail on a motion for summary judgment in its Lanham Act trademark infringement claim, [plaintiff] must prove that the purportedly infringing mark is 'likely to cause confusion' in prospec-

tive purchasers' minds" regarding the origin of goods.

Rock 'n Roll Precedent

In this case, the Sixth Circuit's decision denying a preliminary injunction in *Rock & Roll Hall of Fame & Museum v. Gentile Productions*, 134 F. 3d 749 (6th Cir. 1998), provided clear precedent to the contrary of plaintiff's allegations. There, the defendant published a poster featuring a photograph of the Rock and Roll Hall of Fame Museum. The plaintiff had a trademark in the museum's design; however, the Sixth Circuit had "grave doubts" about its likelihood of success on the merits of its Lanham Act claim because different images of the building could fit under the guise of a single trademark. As Judge Gaughan noted in *ETW*,

The court stated that consumer recognition of the various depictions of the Museum 'is not the equivalent of the recognition that these various drawings or photographs indicate a single source of the goods on which they appear. Consistent and repetitive use of a designation as an indicator of source is the hallmark of a trademark.'

Likewise, here ETW had not demonstrated that it used a consistent image of Tiger Woods as an identification of the source of goods. Though the plaintiff submitted licensed posters bearing pictures of Woods, all of them used different images.

The court also looked to the Second Circuit case *Pirone v. MacMillan, Inc.*, 894 F. 2d 579 (2nd Cir. 1990), which the Sixth Circuit endorsed in *Rock & Roll*. There, Babe Ruth's heirs sued the publisher of a baseball-themed engagement calendar which included three photographs of Ruth. The court held that unlike a fixed photograph, an individual's image is inconsistent, and a photograph of a person could constitute a trademark only if a particular one were used repeatedly on specific goods.

Use of Woods' Name

ETW also claimed a trademark violation based on the poster's caption, which included Woods' name. The court held that the use of the name to describe the noninfringing image fit into the statutory defense of fair use, which protects the good-faith use of a mark for descriptive purposes. As Ohio trademark law follows the same analysis as federal law, summary judgment

(Continued on page 31)

Sports Artist Wins on Posters

(Continued from page 30)

was granted on those claims as well.

Right of Publicity Rejected

With regard to the claim based under right of publicity recognized in Ohio common law, Jireh raised a First Amendment defense, characterizing the posters as works of art. The plaintiff argued that they were mere sports merchandise, or alternatively commercial speech entitled to less First Amendment protection. Agreeing with the defendant, the court distinguished these limited edition reproductions from “posters which merely reproduce an existing photograph.” Here, the posters constituted the unique expression of an idea and not mere merchandise copying an idea, as the artist of the original work chose the posters as a medium.

In arguing that the use of Woods’ name and likeness was commercial speech, which did no more than propose a commercial transaction, the plaintiff pointed to the inclusion of the poster in a newsletter promoting Jireh’s publications. The court refused to shift the focus of the suit, stating simply, “the newsletter is not the poster which is at issue in this case.”

Instead, the actual item at issue was described by the court as “a print of a painting” by Rick Rush, who identifies himself in promotional literature as a serious artist with an expressive agenda. Finding that drawings and paintings, of which “Masters of Augusta” is an example, are clearly protected by the First Amendment, the court held that the assertion of Woods’ right of publicity could not act to prevent the prints’ publication.

Government Foxes and Privacy Henhouses: “Consumer” Legislation with Troubling Implications for Free Expression

By Bruce E. H. Johnson and Anuj Desai

The advent of new technologies with the ability to track and compile information about individuals is leading to increased public concerns about privacy. A recent poll found that 87% of likely voters said it was important to investigate Internet businesses that sell private information about consumers. Responding to these concerns and

The authors note that more than a dozen states have begun considering information privacy legislation such as that from Washington state. Watch out for it in your jurisdiction. These states are contemplating new laws, enacting a broad new “right to privacy” and imposing it across all channels of commerce, including media.

attracted by the politics of attacking Internet abuses, governments at all levels are now considering new ways to address the issue of privacy. Michigan Attorney General Jennifer Granholm, for example, has announced that she intends to do a “Smith & Wesson-like thing” against Doubleclick, a Web firm facing charges of privacy violations.

(Continued on page 32)

Government Foxes and Privacy Henhouses

(Continued from page 31)

Rather than looking simply at solutions to narrowly-targeted problems such as identity theft on the Internet, however, some state governments are contemplating comprehensive laws that would enact a broad new “right to privacy” and impose it across all channels of commerce. More than a dozen state legislatures now have bills of this kind before them.

Washington State is on the leading edge of this movement. During its most recent legislative session, the Washington State Senate passed a bill, ESSB 6513, which would create a broad right to privacy, including the right to halt the dissemination of non-confidential “personal information” about oneself.

Attorney General Christine Gregoire, a Democrat known nationally for leading the states’ fight against the tobacco industry, initiated the legislation. She began by putting together a task force known as the Commercial Privacy Work Group during the summer of 1999. The Work Group was chaired by a friend of the Attorney General’s, Seattle lawyer Jenny Durkan, and it had representatives from both consumer and industry groups, though none from any media organizations.

An Unvetted Bill

By the fall of 1999, it became clear that the Work Group was not going to come to a consensus before the legislative session (which in Washington State is in January and February), and so in November 1999 Durkan presented the Work Group with a proposed report, one that had been written by the Attorney General’s office. This report then formed the basis of the privacy bill, despite the fact that the Work Group never adopted the report and the fact that the business interests in the Work Group specifically drafted an addendum that stated their opposition to it. During this entire period, the issue was nowhere on the radar screen of news organizations.

Late in the legislative session, sponsors suddenly unveiled the proposed bill, which was drafted by the Attorney General’s office based on a report that was itself drafted by the Attorney General’s office. As drafted, the bill had thus had virtually no discussion prior to its introduction in the legislature. The effect of this lack of input became clear as more people began to understand the bill’s impact.

As originally introduced, the bill effectively proscribed all transfers of “personal information” (which was broadly defined to include virtually all information provided in a commercial context) without consent. So, if for example Washington’s Governor Gary Locke were a *New*

York Times subscriber (and had thus given some information about himself to *The Times* in that context), the bill as originally introduced would have precluded *The Times* from ever printing his name in a news article without his permission.

As more industry groups became aware of the potential impact, the number of exceptions grew from a half-dozen or so to nearly twenty. Among those exceptions was one that grudgingly allowed news dissemination “to the public” without criminal or civil liability — an exception that was sought by Rowland Thompson, the executive director of Allied Daily Newspapers of Washington, a newspaper trade group.

Nonetheless, the bill that eventually passed the state Senate (after only one hour of hearings) was still deeply flawed. The basic problem with the proposed legislation was that in theory the right to privacy sounds great, but in practice it can often clash directly with the First Amendment.

A Right to Control Speech

As Professor Eugene Volokh, a First Amendment scholar at UCLA Law School, has put it, this newly-minted “right to information privacy — the right to control other people’s communication of personally identifiable information about you — is a right to have the government stop people from speaking about you.” Eugene Volokh, *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People From Speaking About You*, 52 *Stan. L. Rev.* __, __ (forthcoming 2000).

Furthermore, the Washington bill — and others that will soon surface in state capitals across the nation — represent a radical change from existing privacy regulations. The United States has never had a comprehensive privacy law. Traditionally, legislation in the United States addressing privacy issues has always been limited in its application. For example, we have privacy laws that apply to video rentals, children’s online activities, educational records, one-party tape recording, and certain financial transactions.

Where comprehensive regulation has been involved, however, such as the common law actions for invasion of privacy, the common law tradition has also cushioned the impact of the law’s broad sweep by recognizing significant privileges to disclose facts, both absolute and conditional, in order to avoid chilling the transfer of useful information. The proposed privacy bill in Washington, in contrast, contained no significant mitigating principles.

Broad Ban on Info Use

(Continued on page 33)

Government Foxes and Privacy Henhouses

(Continued from page 32)

Given these basic principles, the bill passed by the Washington State Senate (even with the exception for news dissemination) presented major First Amendment problems. A careful look at the bill's provisions illustrated the defects.

One section of the bill gives a "consumer" (broadly

*Even with the news exemption,
there is no end to the potential havoc
caused by such a prohibition.*

defined to include anybody) the right to prohibit others from "sharing, selling, or otherwise transferring the consumer's personal information." "Personal information" is in turn defined broadly to include a whole host of truthful, innocuous, non-misleading information about the consumer — indeed, it includes almost any information provided by the consumer in any commercial context.

Even with the news exemption, there is no end to the potential havoc caused by such a prohibition. Indeed, even if the information is publicly known — such as names and addresses available in the White Pages, the contents of public records, or even former President Bush's well-known dislike of broccoli — the discussion or disclosure of any such facts by any "information custodian" for a "consumer" would be a crime and would result in class action liability, with awards of compensatory and punitive damages and attorneys' fees.

For example, imagine a friend visiting the local Safeway wanting to buy a birthday present for you. Under Washington's bill, your neighborhood grocer could be sent to jail merely for telling your friend that you like flowers, or commenting that you enjoy oranges or ice cream, or suggesting your favorite wine. Similarly, clerks from Nordstrom's could be jailed for offering helpful hints about shirt or blouse size or commenting about appropriate colors or fabrics.

Core News Issues Touched

Yet, the transmitting of all such information, whether by "sharing, selling or otherwise transferring," is core First Amendment activity. In fact, this is precisely what every news organization does as the core of its business: share, sell and transfer information about people (to their readership), often unbeknownst to those

about whom they are writing.

Even with the news exemption, the bill would still radically interfere with newsgathering, because sources working for private employers would become subject to the state's version of Britain's Official Secrets Act. The proposed bill would thus have penalized and silenced these potential sources because of the absolute veto — enforced by both civil and criminal liability — granted to the "consumer."

The bill's opponents, organized as the Privacy-Plus Coalition, pointed out these concerns in a March 12 letter and helped to bring the bill to a halt just as it was about to be passed by the Washington State House of Representatives, which was equally divided between Democrats and Republicans. These opposition groups reminded legislators that government intervention in this area was affirmatively dangerous to privacy rights, particularly since the bill specifically exempted government agencies from its purview. Because government is recognized as the principal danger to individual rights, opponents of the legislation also attacked the proposed bill for permitting a government fox into the privacy henhouse — even as a champion of privacy rights of the chickens.

The Attorney General immediately called a press conference and attacked the bill's opponents as "special in-

For more on Federal and State attempts to regulate information privacy see the LDRC Legislative Affairs Committee report on page

terests" and — worse — as "out-of-state special interests." Several legislators, mostly Democrats, also demanded the drafting of an initiative that would create the same "root and branch" privacy regulations as were contained in ESSB 6513.

Although the Washington House never voted on this bill, and it is thus on hold for now, the activists and would-be regulators are continuing their efforts to enlist public support for privacy legislation. Three separate initiative campaigns for privacy legislation are currently collecting signatures in Washington State, and these issues could well be before the voters this November. Moreover, as noted above, more than a dozen other states have begun considering similar, if not identical, legislation. Media clients should pay close attention to these bills, which may raise the same First Amendment problems posed by the aborted Washington bill.

Bruce E. H. Johnson is a partner and Anuj Desai is an associate, at Davis Wright Tremaine LLP, Seattle, Washington.

Government Foxes and Privacy Henhouses

U P D A T E

**Third Circuit Denies
Further Review in *Bartnicki***

The Third Circuit has denied the plaintiffs' petition for rehearing en banc in *Bartnicki v. Vopper*, a suit brought under the federal Electronic Communications Privacy Act and the Pennsylvania Wiretapping and Electronic Surveillance Control Act. Late last year, a panel held two to one that publishing the contents of a mobile phone conversation, illegally intercepted by a third party, could not be grounds for civil liability under the First Amendment. *Bartnicki v. Vopper*, 200 F. 3d 109 (3rd Cir. 1999); see *LDRC LibelLetter*, January 2000 at 7.

The statutes provided rights of action against persons who disclose or use intercepted communications, if they have reason to know that those communications were illegally intercepted. Here, one defendant received from an anonymous source an audio tape of a phone call between two teachers' union officials. He released the recording to two radio stations, which broadcasted it.

The panel decision was issued on interlocutory appeal from a district court holding that the First Amendment would preclude civil liability under the statutes for neither the broadcasters themselves nor their immediate source. Applying an intermediate scrutiny standard because the laws were content neutral, the Court of Appeals held that the statutes deterred more speech than necessary to achieve the avowed governmental interest of preventing wiretapping. They thus were unconstitutional as applied to defendants who did not take part in or encourage an illegal interception.

Massachusetts Court Enjoins Denial of Access Web Site Permitted to Cover High School Basketball Tournament

In the continuing struggle to establish the rights of members of web media, a Massachusetts judge has granted a web site a preliminary injunction to allow the site's reporters to cover the state high school basketball finals. *MassLive.com v. Massachusetts Interscholastic Athletic Ass'n* (March 17, 2000).

Bulletin Board Threat Causes Denial of Access

On March 14, a reporter from MassLive.com, a web site that reports on news and sporting events and provides a multitude of discussion fora for Massachusetts residents, was denied press credentials to cover the state's week-long high school basketball tournament. The reporter was told that the Massachusetts Interscholastic Athletic Association ("MIAA"), the sponsor and organizer of the tournament, did not want MassLive to cover the games. The reporter was also informed that he would not be allowed to use any computers or recording devices, and he was not permitted the pre- or post-game access to players and coaches to which all other members of the media were allowed.

While the MIAA had taken a number of steps against MassLive during the course of the season due to its dislike for the content posted on the web site — including prohibiting the webcasting of games and allegedly pressuring third parties not to accept advertising from MassLive — it was not until its reporter arrived at the arena that MassLive learned that it would not have access to the tournament.

To justify its retaliatory action, MIAA pointed to a posting on MassLive's Boys High School Basketball forum that had appeared on the web site months earlier. The posting, "yeah come up here and see what's gonna happen!! We got shotguns and stuff hhaahhahah yeah hhahahaha," which was immediately removed once MassLive became aware of its contents, was directed toward Westfield-Vocational Tech high school by a fan of rival McCann high school. Relations between the schools had become tense after a McCann player allegedly used a racial epithet to describe a Westfield player. The game between the teams was postponed and eventually held without spectators.

According to the Associated Press, MIAA's executive director stated that, "MassLive is providing a forum for high school students to make threatening comments about students and fans for other rival schools. For MassLive to permit these kinds of threats to public safety is reprehensible and sends the wrong message to our

school children."

MassLive Moves for Injunction

In response to the denial of access, MassLive filed a complaint and request for injunctive relief on March 16, seeking access to cover the final games of the tournament.

In its request for injunctive relief, MassLive argued that the MIAA violated the site's First and Fourteenth Amendment rights, as well as its rights under the Massachusetts Civil Rights Act. MassLive noted that members of the media under the First Amendment and the Equal Protection Clause. MIAA, MassLive argued, should be treated as a state actor because its authority was delegated by local school committees under a Massachusetts statute.

Absent a compelling state interest in discriminating, plaintiff continued, the only reason for exclusion visible in the record is content-based. Content-based reasons, however, do not entitle the state actor to proscribe speech or expressive conduct. Such proscription, plaintiff concluded, would subject it to irreparable harm, inasmuch as denial of access for even a single day may constitute irreparable harm under law. Granting the temporary injunction, on the other hand, would not harm the defendant because MIAA will still be able to contest the injunction at trial.

In a two-page order the Massachusetts Superior Court rules that MIAA had to give MassLive the Same access to the tournament that it granted to other media entities.

A Call for Common Sense

Following the ruling, the MIAA said it would comply with the order, but according to the AP, was still calling for MassLive to shut down its sports fora and to cooperate with school officials to trace the origin of the threats "so that schools can take appropriate disciplinary or remedial action."

For its part, MassLive noted that it has taken reasonable steps to keep its web site free of offensive messages. For example, MassLive requires its users to abide by its User Agreement prohibiting users from using "any obscene, indecent, or offensive language or to place on the Service any material that is defamatory, abusive, harassing or hateful." Additionally, MassLive regularly monitors postings for offensive material, and maintains a hyperlink making it easy for users to call the webmaster's attention to offensive postings as soon as they come up.

According to the AP, MassLive's publisher, Frederick Tuccillo, stated that the web site was only the medium for

(Continued on page 36)

Massachusetts Court Enjoins Denial of Access

(Continued from page 35)

the inappropriate message. Likening the posting to the vandalism of a business, Mr. Tuccillo noted, “the violator is the vandal, not the business. The Internet is not some upside-down universe where common sense no longer applies.”

ruary 2000 at 33.

New York has not allowed televised coverage of trials since 1997, when a law allowing them expired. (The law was one of a series of such laws enacted as “experiments” since 1987.) Since the last one expired, the negative public reaction to the O.J. Simpson trial coverage — and simple New York State politics — made many lawmakers hesitant to repeat the experiment. Now, citing the “undeniable benefits” of television coverage “as demonstrated by the recent Diallo trial,” New York State Governor George Pataki has proposed legislation re-authorizing such coverage.

The governor’s bill would restrict camera access further than the earlier experiments, by requiring, in certain types of cases, a judicial determination that the benefits of such coverage would substantially outweigh the risks presented to the trial participants. The protected categories of proceedings would include proceedings in Family Court; proceedings involving allegations of domestic abuse, child abuse, or neglect; criminal proceedings in which the victim objects to coverage; and civil proceedings where coverage is likely to have a substantial adverse effect on the welfare of a child. Furthermore, all non-party witnesses in criminal cases and in Family Court proceedings would have the right to exclude themselves from courtroom photography or to have their voices or images distorted. In other cases, the presiding judge would have discretion to allow cameras, after consideration of the potential effects on the trial participants.

If enacted, the law would go into effect immediately and then expire after two years. It would include provisions establishing a review committee to study and report on the effects of televised coverage.

New York Closer to Re-authorizing Courtroom Television Coverage

Success of Diallo Coverage Overshadows Fears Wrought By O.J.

In late January, New York trial judge Joseph P. Teresi granted the Courtroom Television Network’s request to televise the criminal trial of four police officers then charged with the murder of Amadou Diallo. In doing so, Judge Teresi found unconstitutional a New York State statute forbidding televised coverage of any trial in New York State courts. *See LDRC LibelLetter*, Feb-

U P D A T E

Michigan Appellate Court Gives Journalists Significant Subpoena Victory

By Herschel P. Fink

The Michigan Court of Appeals has handed that state's journalists a major subpoena victory in a March 28 decision. *In re Investigation of March 1999 Riots*, 200 Mich. App. LEXIS 72 (Ct. App. Mich. Mar. 28, 2000). The case arose from rioting that broke out last year on the campus of Michigan State University following that school's defeat in the NCAA Final Four basketball tournament.

In what the three judge panel branded as a "fishing expedition" and an effort to make news organizations an "indentured servant," the local prosecutor had subpoenaed unpublished news photos and television outtakes from a dozen news organizations, seeking to identify potential criminal defendants.

The hard-fought case had already been once to the Michigan Supreme Court and back, including an earlier adverse ruling by a different Court of Appeals panel which was reversed and remanded for further consideration by the state Supreme Court.

The new Court of Appeals ruling came in response to the prosecutor's appeal of a circuit court ruling on remand that found the news media to be basically exempt from a new type of investigative subpoena that Michigan prosecutors are empowered to issue with court approval.

Statutory Analysis

Dealing first with a media exception found in the statute authorizing investigative subpoenas, the Court of Appeals said:

We agree with the trial court's finding in regard to the near absolute media exemption clearly provided by the second sentence of this subsection. As the media argue, the second sentence of subsection (6) provides a threshold test that must be satisfied before a reporter will be compelled to respond to an investigative subpoena. Pursuant to this test, a reporter, pursuing the reporter's profession, is subject to an inquiry by use of investigative subpoena *only* if the prosecutor seeks to obtain previously published information or if the reporter is the subject of the prosecutor's inves-

tigation. The plain language of this sentence can be interpreted in no other fashion.

• • •

Applying the statute to this case, it is undisputed that the photographs and videotapes sought by the prosecutor were obtained by the media as they gathered and prepared news in performance of their profession, that the items have not been previously disseminated to the public, and that the media are not the subject of the investigation of the March disturbance in East Lansing. Therefore, the circuit court did not err in quashing the investigative subpoenas issued to the media under MCL 767A.6(6); MSA 28.1023A(6)(6) because the media are exempt from the statute.

First Amendment Sensibility, if Not Privilege

Notwithstanding that the Court of Appeals said it need not deal with the media's First Amendment privilege argument, because it found the statutory exception for the media to be dispositive of the appeal, the Court of Appeals nevertheless went on to basically adopt the First Amendment argument, even approvingly quoting from the recent Second Circuit decision in *Gonzales v. NBC*.

The decision is particularly significant because Michigan news organizations have long been plagued by a 1990 Court of Appeals decision that rejected a privilege for unpublished news photos. The media petitioners in the MSU case urged the Court of Appeals to reconsider that precedent. They did so in ringing language:

That the media enjoys a special position in our society is most evident on consideration of our constitutions, which provide for the freedom of the press. US Const., Am. I; Const. 1963, art. 1, § 5. To interpret the statute at issue in the manner advocated by the prosecutor would unquestionably infringe on the autonomy of the press and could have a chilling effect on the constitutional protections afforded the media.

(Continued on page 38)

MI Court Gives Journalists Subpoena Victory

(Continued from page 37)

Such a concern has similarly been indicated in other jurisdictions, where the qualified media privilege, traditionally protecting confidential sources, has enjoyed an identical expansion when analyzed in the context of compelled disclosure of information pursuant to subpoena. In *Gonzales v Nat'l Broadcasting Co.*, 194 F.3d 29, 35 (CA 2, 1999), the Second Circuit stated:

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through the press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties — particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

As noted by the Second Circuit, these concerns have been recognized elsewhere. *Id.* n. 5; see also *O'Neill v Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 526-527; 523 N.E.2d (N.Y. 1988). We agree with the concerns voiced by these other courts and today decline to interpret the statutory provision at issue in a manner that could allow a prosecutor's office to, in effect, conduct a fishing expedition utilizing the media as its indentured servant.

Ironically, the decision came on the eve of Michigan State University's return to the Final Four, and ensuing victory in the championship. Although there was some violence again this year, the prosecutor made no attempt to again make the media his "indentured servant."

Herschel Fink and Cameron Evans of Honigman Miller Schwartz and Cohn, Detroit, represented four of the 12 media petitioners, including Detroit Free Press and Michigan television stations owned and operated by ABC, Fox and UPN.

LDRC would like to thank Spring Intern Serge Mezburhd — New York University School of Law, Class of 2002 — for his contributions to this month's *LDRC LibelLetter*.

Journalists Can Be Plaintiffs, Too

Subpoena of Journalism Professor's Notes Latest Example of Newsmen "On the Dark Side"

University of Washington journalism Professor Doug Underwood has appealed a state court judge's order that he turn over notes he used in preparation for an article about the influence of newspaper business departments on newsrooms. The subpoena was issued by eighteen plaintiffs in a libel suit against a managing editor quoted in the article, which appeared in a 1998 issue of the *Columbia Journalism Review*. Those plaintiffs, as it happens, are journalists themselves.

The *CJR* approached Underwood, a member of the University of Washington's Communications Department faculty, to write a piece about the growing connection between marketing interests and content in the newspaper trade. At the suggestion of an editor for the *Review*, Underwood spoke with Steve Knickmeyer, then the managing editor of the *Arizona Republic*. He also conducted interviews with reporters whose employment at the *Republic* had been terminated, along with sources from other newspapers.

Some of the former *Republic* reporters were quite critical of the relationship between the newspaper's business and editorial departments. Underwood's article quoted Knickmeyer's statement, made in response to these complaints, that "most of the laid off reporters were 'fat, lazy, incompetent and slow,'" implying that their own lack of journalistic acumen, and not sinister commercial motives, had led to their termination. Eighteen former *Republic* reporters sued Knickmeyer and the newspaper's parent company, Phoenix Newspapers, Inc., for libel in Arizona state court.

In July, 1999, the plaintiffs subpoenaed Underwood to testify at a deposition in Seattle, and demanded the production of all of his notes related to the article or to communications with current or former employees of the *Republic*. Underwood objected to the breadth of the subpoena, claiming that his unpublished notes were protected from disclosure by a common law qualified journalist's privilege recognized in Washington, and by the First Amendment. (He did agree to take part in a deposition, as long as the questions did not involve the content of his notes.) Re-

(Continued on page 40)

Reporter Sues Complaining Official for Tortious Interference

By William P. Robinson, III

Can a reporter who has lost his job sue for tortious interference a public official (or anyone) who complained to the publisher about the reporter's articles?

That is the fascinating and troubling issue raised by the case of *Wooler v. Hancock*, which has been the subject of litigation in the Rhode Island federal court (under its diversity jurisdiction) and in the First Circuit since 1996. Particularly troubling is that the federal courts that looked at this claim prior to trial did not express much concern about the First Amendment implications of punishing the defendant for expressing what appears have been nothing more than opinion.

A jury very recently found in the defendant's favor, but the real puzzlement is why the case was not dismissed on legal grounds long before it reached a jury. Newspapers are surely among the entities in society about which citizens should feel free to voice strong and even vociferous opinions. The defendant in *Hancock* prevailed in the end, but it would be fatuous to deny the probable chilling effect of the mere existence of litigation such as this.

A Clear Dispute

David Wooler was hired by the Wilson Publishing Company in 1994 to serve as a reporter for *The Narragansett Times*. Scott Hancock was at that time the Town Manager in Narragansett, Rhode Island. On two occasions in 1994, Mr. Hancock met with Frederick Wilson III, the owner and publisher of Wilson Publishing, to complain about both the method and the substance of Wooler's reporting.

In essence, Hancock stated that he disliked the methods used by Mr. Wooler as well as the substance of some of his articles. It appears that Wooler had aspired to be an investigative reporter in the small town context, and that some of his stories annoyed various local officials.

According to the federal court decisions, Hancock complained that Wooler's coverage of the town was "too negative," that he and Wooler had a personality conflict,

(Continued on page 41)

Subpoena of Journalism Professor's Notes

(Continued from page 39)

sponding to the plaintiffs' motion to compel compliance, filed in Washington state court, Underwood's counsel asserted in response to the subpoena that all of his notes could not possibly carry clear relevance to the case, as required to defeat the privilege, considering that the plaintiffs' libel claims rested on a single statement.

No Confidential Source, Limited Privilege

The plaintiffs' attorneys argued that neither privilege applied because Underwood's sources, from whose interviews the notes derived, were not confidential. Judge Sharon Armstrong in Washington's King County Superior Court agreed.

She determined that Underwood did enjoy a limited privilege under the First Amendment, but that the plaintiffs had met their burden of proving relevance as to notes of Underwood's interview with Knickmayer. Notably, Knickmayer conceded in his own deposition that he had indeed made the statement at issue, so the notes would be used only to corroborate Underwood's deposition testimony that the statement referred to the laid off reporters.

The judge also refused to conduct an in camera review to determine which particular notes held relevance to the libel claims, instead ordering production of all of the Knickmayer interview notes on March 22.

On April 6, Judge Armstrong denied Underwood's motion for reconsideration. For the present, Underwood has avoided production by immediately filing an appeal, the resolution of which might take several months. The issue as to whether the qualified journalist's privilege extends to information provided by non-confidential sources will be one of first impression before the Washington Court of Appeals.

This case exemplifies the fact that journalists do not always consider what are arguably the best interests of their profession, let alone First Amendment jurisprudence, when handling personal disputes.

In the last two years, several other such cases involving reporters as plaintiffs have arisen. For example, former CNN producer April Oliver sued the network on multiple claims, including defamation and wrongful termination, when it fired her and retracted allegations made in the notorious "Tailwind" story which Oliver had produced. See *LDRC LibelLetter*, May 1999 at 1. Alison Krupski, a reporter who resigned from the Boulder, Colorado *Daily Camera*, taking with

her documents related to the JonBenet Ramsey murder investigation, sued the paper for libel, false light, and outrageous conduct when it reported on its suit against her to recover the materials. See *LDRC LibelLetter*, April 1999 at 18.

And in a case much like Oliver's, a former reporter for the Alameda, California *Tri-Valley Herald* sued the newspaper for wrongful termination, and for libel, based on a retraction of one of his stories, which was published pursuant to a demand by the subject of the piece. Though the trial and appellate courts granted summary judgment to the defendants, the case resulted in an appellate ruling that not all retractions would necessarily fit within the litigation privilege recognized in California libel law. See *LDRC LibelLetter*, November 1999 at 11.

Bruce Johnson and Esther Butterfield of Davis Wright Tremaine LLP, Seattle, Washington represent Mr. Underwood in this matter. David Bodney of Step-toe & Johnson LLP, Phoenix, Arizona represents the *Arizona Republic* in the libel suit brought by its former reporters.

Reporter Sues Complaining Official

(Continued from page 39)

and Hancock suggested Wooler be transferred to another beat. In various news articles about the dispute, however, Wooler is reported to have claimed that Hancock was upset about his investigative reporting, particularly on questions of nepotism in the town government.

Termination Leads to Lawsuit

Thereafter, Wooler was terminated. He then sued the Town Manager, alleging that the Town Manager's statements had caused his termination and so constituted tortious interference with advantageous relations. He did not sue Hancock for libel. Wooler did not sue either Mr. Wilson or Wilson Publishing Company.

Plaintiff did *not* allege that the Town Manager (or other town officials) threatened to use governmental resources in order to retaliate against the newspaper in some tangible way (e.g., by refusing to publish legal notices in the newspaper). Plaintiff's focus was on the irritation Hancock expressed to the publisher about plaintiff.

The publisher testified that the decision to fire Wooler was based on Wilson's dissatisfaction with Wooler's job performance and did not stem from the complaints made by the Town Manager. Notably, it seems that Wilson wanted Wooler to produce more pieces, to concentrate more on traditional small-town events and less on investigative reporting. Wooler's fellow employees at the paper testified to their own dissatisfaction with Wooler as a colleague.

Summary Judgment Reversed

The district court's initial opinion granting summary judgment to the defendant appears at 988 F. Supp. 47 and also at 25 Media L. Rep. 2357 (1997). The District Court's favorable ruling was based upon its workmanlike (but arguably somewhat myopic) analysis of the elements of "the tort of intentional and malicious interference with a contractual relationship." The district court concluded that plaintiff Wooler had failed "to produce any evidence demonstrating that Hancock played a causal role in the termination from the newspaper." The district court did not seem troubled by the fact that Hancock (for all that appears) had merely been expressing his opinion about news reporting.

The District Court's initial grant of summary judg-

ment was vacated by the United States Court of Appeals for the First Circuit, which remanded the case for further proceedings. In a per curiam opinion which the First Circuit chose not to officially publish (but which appears at 1998 WL 1085809 and at 1998 U.S. App. LEXIS 28408 and at 27 Media L. Rep. 2141), the Court of Appeals held that, even though plaintiff's "evidence may be thin," there was just enough evidence that the defendant had played a causal role in plaintiff's discharge to make summary judgment inappropriate on the tortious interference claim.

Footnote 2 in the unpublished opinion of the First Circuit contains the following pregnant observation:

We note that Hancock has never argued that his conduct was justified, or otherwise privileged, and the magistrate judge did not reach the issue. On remand, the district court is free, if it chooses, to explore these issues prior to any trial.

One can reasonably infer from that footnote that the First Circuit had serious legal and/or constitutional questions about the claims which it assessed from a Rule 56 perspective; but, in the absence of the parties' having raised such issues, the First Circuit abstained from doing more than speaking obliquely in dicta concerning a possible defense of privilege or justification.

In spite of the quoted dicta in the First Circuit opinion, the case proceeded to trial. Wooler sought \$250,000 in compensatory damages and \$500,000 in punitives; but, in the end, the jury found for the defendant.

Contrary to Other Recent Rulings

The fact that this particular case was allowed to proceed to trial seems to be entirely inconsistent with the legal principles analyzed and adopted in such cases as *Jefferson County School District No. R-1 v. Moody's Investor's Services, Inc.*, 175 F.3d 848 (10th Cir. 1999) and the cases cited therein. There the court (and the other decisions cited) conclude that tortious interference claims should be dismissed when the allegedly tortious speech consists of statements that would be protected by the First Amendment. See also Tucker, "And the Truth Shall make you Free" *Truth as a First Amendment Defense in Tortious Interference with Contract Cases*, 24 HASTINGS CONST. L.Q. 709 (1997).

(Continued on page 42)

Reporter Sues Complaining Official

(Continued from page 41)

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New York City and Brooklyn Museum Settle Case Over Art Exhibit

The highly-publicized feud between New York City's Mayor Rudolph Giuliani and the Brooklyn Museum of Art came to an end late last month with a settlement of both sides' claims against each other. See *LibelLetter* Nov. 1999 at 37. The controversy arose from the museum's staging of an art exhibit entitled "Sensation" which included a painting of the Virgin Mary that Mayor Giuliani described as "sick" and "disgusting." The Mayor froze public funding of the museum and initiated an eviction proceeding in state court to oust the museum from its city-owned building. The Brooklyn Museum obtained a preliminary injunction against the Mayor and the City in federal court on First Amendment grounds. See *Brooklyn Institute of Arts and Sciences v. City of New York*, 1999 WL 989081 (E.D.N.Y. Nov. 1, 1999). An appeal to the Second Circuit was pending at the time of the settlement.

In the settlement, the City abandoned its attempt to punish the publicly-financed museum, specifically agreeing to restore funding, to spend additional money on a renovation project and to refrain from any retaliation against the museum. Both sides agreed to bear their own legal costs.

The Brooklyn Museum was represented by Cahill Gordon & Reindel.

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Court Rejects Case Attempting to Hold Video Games and Other Media Responsible for High School Shooting

By Paul Smith

On April 6, 2000, the U.S. District Court for the Western District of Kentucky (Johnstone, J.) dismissed all claims for failure to state a cause of action in the case of *James v. Meow Media, Inc. et al.* The plaintiffs in *James* — the estates of three high school girls killed by 14-year-old Michael Carneal in a much-publicized high school shooting in Paducah, Kentucky in 1997 — had sought to hold responsible the developers and producers of various video games that Carneal was alleged to have played, as well as the producers and distributors of the movie *Basketball Diaries* and two companies operating allegedly pornographic web sites Carneal may have visited.

The plaintiffs' claims were based on theories of negligence and strict liability, along with (in the case of the web sites) the federal RICO law. The court in its April 6 ruling analyzed state law and RICO and held that the claims were legally insupportable. It also noted, but did not rely on, the serious First Amendment concerns raised by efforts to hold the media liable for the acts of third parties. If affirmed on appeal, the ruling would send a strong message that plaintiffs will have a difficult time attempting to hold video games and other media liable for teen violence.

Issues Presented in the Case

The case arose out of the tragic events in Paducah in December 1997, when Michael Carneal brought guns to school and shot at a morning prayer group meeting in the high school lobby. Five students were wounded and three others killed. According to the plaintiffs' complaint, subsequent investigation disclosed that Carneal had once viewed the movie *Basketball Diaries*, which contains a dream sequence depicting a high school shooting. Plaintiffs also alleged that Carneal had played a number of video games, including "first person shooter" games like "Doom." Finally, plaintiffs alleged that Carneal had visited two allegedly pornographic web sites. Plaintiffs' basic claim was that these influences had caused an impressionable teenager to engage in his violent acts.

From the beginning, the case was litigated against the backdrop of an earlier case, *Watters v. TSR, Inc.*, 715 F. Supp. 819 (W.D. Ky. 1989), *aff'd*, 904 F.2d 378 (6th Cir. 1990). There, the same district judge had rejected on First Amendment grounds the claim that a teenage

suicide was caused by the game "Dungeons and Dragons." The Sixth Circuit affirmed, but on state law grounds. The court of appeals held that, under Kentucky law, the game producer had no duty to anticipate and prevent the suicide and the game was not a proximate cause of the death.

Guided by the opinions in *Watters*, the defendants in *James* sought dismissal of the complaint, citing both state law and constitutional grounds. The basic state law arguments concerning the negligence claims, as in *Watters*, were (1) that defendants had no duty to anticipate and prevent the violent acts of Carneal and (2) that defendants' conduct was not a proximate cause of the injuries because Carneal's acts were a superseding cause. Concerning the strict liability claims, defendants argued that expressive works are not "products" for products liability purposes. The web defendants pointed to various missing elements in the plaintiffs' civil RICO claims. Finally, defendants argued that holding them liable under state law for third-party violence would violate the First Amendment because it would too severely burden free expression safely received by millions of people.

The District Court's Ruling

Mindful of the Sixth Circuit's preference in *Watters* for a non-constitutional resolution of the case, the *James* court focused on the defendants' state law arguments. The basic attacks on the negligence claims — the arguments that the defendants had no duty to prevent Carneal's acts and that those acts were a superseding cause — ultimately turned on whether the injuries at issue were the *foreseeable* result of defendants' distribution of their movie, games or web sites. The court held that there was no triable issue concerning foreseeability because Carneal's violent acts were foreseeable only in the limited sense that almost any expressive work, if distributed to millions of viewers, may encounter a "mentally fragile" individual who will react to the work negatively and idiosyncratically. As the court put it, quoting *Watters*, 904 F.2d at 382, a defendant

cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally

(Continued on page 44)

Ct. Rejects Attempt to Hold Video Games Responsible for Shooting

(Continued from page 43)

fragile” individual would be to refrain from selling it at all — and we are confident that the courts of Kentucky would never permit a jury to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care.

Turning to the strict liability issue, the court noted that the physical products at issue — the videotape or the videogame — were not alleged to have caused any injury during their use. Instead, the argument was that the *content* of the products had caused later injurious behavior. The court held that “intangible thoughts, ideas, and expressive content are not ‘products’ with the realm of the strict liability doctrine.” It added that its prior ruling on the superseding cause issue would in any event preclude liability on the strict liability claims.

Finally, with respect to the civil RICO claim against the web defendants, the court held that plaintiffs had not alleged the requisite “pattern of racketeering activity” related to an “enterprise,” had not alleged sufficient injury to “business or property,” and had not alleged a basis to conclude that any injury was proximately caused by the web defendants’ conduct.

The *James* court concluded by noting that, while it had followed the doctrine of avoiding unnecessary constitutional questions, it was “clear that this case raises various constitutional concerns.” The court added that, had it confronted the constitutional issues, it would have relied on its previous analysis in *Watters*, where it stated:

The theories of liability sought to be imposed upon the manufacturer of a role-playing fantasy game would have a devastatingly broad chilling effect on expression of all forms. It cannot be justified by the benefit Plaintiff claims would result from the imposition. The libraries of the world are a great reservoir of works of fiction and nonfiction which may stir their readers to commit heinous acts of violence or evil. However, ideas expressed in one work which may drive some people to violence or ruin, may inspire others to feats of excellence or greatness. . . . Atrocities have been committed in the name of many of civilization’s great religions, intellectuals, and artists, yet the first amend-

ment does not hold those whose ideas inspired the crimes to answer for such acts. To do so would be to allow the freaks and misfits of society to declare what the rest of the country can and cannot read, watch and hear.

(Quoting 715 F. Supp. at 822).

Paul Smith is a partner at Jenner & Block, Washington, D.C. and was counsel for most of the video game defendants in James.

Terry Anderson v. Iran **Addressing Threat to Journalists and the Press From State-Sponsored Terrorism**

By Dylana L. Blum

Nearly fifteen years after his abduction in Lebanon and eight years after his release, former hostage and renowned journalist Terry Anderson had his day in court in *Anderson, et al. v. Islamic Republic of Iran, et al.*, C. A. No. 99-698. On February 15 and 16, 2000, the Honorable Thomas Penfield Jackson of the U.S. District Court for the District of Columbia presided in this case of first impression, addressing the importance of protecting U.S. overseas journalists from state-sponsored terrorism. Because the defendants failed to appear, Judge Jackson entered a default judgment. The purpose of the hearing was “to allow the Court to determine the assessment of damages. . . .” Anderson predicated his request for punitive damages largely on the chilling effect his abduction had on journalism and freedom of the press.

Damages Awarded

Judge Jackson issued his fourteen-page ruling on March 24, 2000. He awarded Anderson approximately \$24.5 million in compensatory damages based on a per diem formula reflecting each of the 2,454 days of his captivity, and further awarded his wife and daughter \$16.7 million in compensatory damages. In addition, Judge Jackson awarded \$300 million in punitive damages, reflecting the extent to which Anderson’s kidnapping “inhibit[ed] the gathering and reporting of news.”

Anderson, his wife Madeleine Bassil, and their fourteen year-old daughter, Sulome Anderson, had sought \$100 million in compensatory damages — in addition to punitive damages — for Anderson’s seven-year captivity in Lebanon at the hands of the Iranian-backed terrorist group, Hezbollah. Jurisdiction arose pursuant to a 1996 amendment to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), that allows U.S. citizens to sue foreign nations that are “state sponsors” of terrorism. Accordingly, plaintiffs sued both Iran and its intelligence service, the Iranian Ministry of Information and Security, for directly funding, training, and supporting Hezbollah’s terrorist activities in Lebanon, particularly the kidnapping of U.S. citizens throughout most of the 1980’s.

An Emotional Hearing

Anderson and his family took the witness stand the first day of the hearing. With highly emotional testimony, they recounted the events surrounding his captivity and its effects on each of them. Because his wife had been pregnant at the time of the March 1985 kidnapping, Anderson and his daughter, Sulome, did not meet until she was nearly seven years old. At the close of the first day’s testimony, Judge Jackson observed that this was the most compelling testimony he had heard in his eighteen years on the federal bench.

On the second day of the hearing, four witnesses testified regarding Iran’s role in the hostage crisis and in support of a punitive damages award based on the direct impact of Anderson’s experience on the American media.

CBS Evening News anchor and managing editor Dan Rather discussed the effect of Anderson’s abduction on broadcast journalism generally and on CBS specifically, while former *New York Times* managing editor Eugene Roberts testified regarding the effect of Anderson’s hostage experience on

print journalism. Retired U.S. Ambassador Robert Oakley, formerly chief of the Anti-Terrorism Section of the U.S. Department of State, testified about Iran’s links to Hezbollah and Anderson’s abduction. Finally, Dr. Patrick Clawson of the Washington Institute for Near East Policy provided detailed information about the Iranian government budget, including its multi-million dollar support for Hezbollah’s activities in Lebanon.

Big By-Line Reporter

Terry Anderson began his journalism career in the U.S. Marine Corps. He first worked for the Armed Forces Radio and Television Service and later reported on combat in Vietnam. After an honorable discharge from the Marines, Anderson joined the Associated Press (“A.P.”), the world’s largest news-gathering organization. For five years, he covered Japan, Korea, Taiwan, and other parts of Asia. He later worked in South Africa in the early 1980’s as Southern Africa

(Continued on page 46)

Anderson predicated his request for punitive damages largely on the chilling effect his abduction had on journalism and freedom of the press.

Terry Anderson v. Iran

(Continued from page 45)

News Editor.

In June 1982, when Israel invaded Lebanon, Anderson volunteered to cover the war and the myriad of political developments in the Middle East. He began working in West Beirut as the A.P. Middle East News Editor, was promoted to Chief Middle East Correspondent, and, ultimately, became Middle East Bureau Chief for the A.P. Anderson lived in Beirut and held this senior position until March 1985, when he was kidnapped at gunpoint. As Dan Rather testified, at the time of his abduction Anderson was a “big by-line reporter” with “a standing in the journalistic community unparalleled.”

Chief Bargaining Chip

It was this prominence in journalism that focused Hezbollah’s attention on Anderson as a hostage target. Ambassador Oakley testified that “it is quite clear why Terry was held.” Dr. Clawson agreed that Anderson’s status as a high-profile journalist played a critical role in his being targeted and held hostage, explaining that “the idea of taking the chief of American correspondents in Lebanon at the time would have been very appealing to Hezbollah.”

Dr. Clawson further testified that Anderson’s journalistic reputation contributed to his being held hostage longer than any other U.S. citizen. In Dr. Clawson’s opinion, Anderson was the “chief bargaining chip” whom Hezbollah needed to keep alive. This was important because Hezbollah killed two other high-profile “bargaining chips:” William Buckley, the Central Intelligence Agency station chief in Beirut, and U. S. Marine Corps Colonel William Higgins, a member of the UN peacekeeping forces in Lebanon. According to Dr. Clawson, Anderson was “the most valuable [hostage] to hold on to.”

A Direct Threat to Newsgathering Operations

Beyond the serious harm to himself and his family, Anderson’s abduction had far-reaching consequences for American broadcast and print media. As Dan Rather testified, the political and military situation in Lebanon throughout the 1980’s was “one of the top three or four international stories” over a period of many years. In Rather’s view, Terry Anderson was “the most knowledgeable person on that beat.” Similarly, Eugene Roberts deemed Anderson “the savviest re-

porter, day in, day out in Lebanon.” Because the major broadcast networks and national daily newspapers heavily rely on the A.P., especially for international reporting, the American public depended on Anderson for thorough, high quality coverage of the complicated web of violence in Lebanon.

Consequently, Anderson’s kidnapping rattled the U.S. journalism community and seriously compromised its coverage of one of the biggest continuing stories of the decade. Rather testified that CBS reacted with a “deep and abiding stunned disbelief,” while Roberts stated that the *Philadelphia Inquirer* (where he served as executive editor when Anderson was kidnapped) felt “great concern, and even horror because [the kidnapping] represented a direct threat to newsgathering operations.” Roberts elaborated, “Terry was known to be extremely accurate and reliable, someone who covered both sides of the story. And if a reporter like that was at risk and targeted by what we became to believe was a government, then this represented risk for everybody.”

Both Rather and Roberts went on to describe how Anderson’s kidnapping decreased the quality of both the broadcast and print media’s coverage of events in Lebanon for many years. Rather explained that the net effect of Anderson’s abduction was “to substantially reduce the number of stories [about the war] you had on the air and the amount of time those stories you did put on consumed on the air. The story had gotten bigger. Coverage got smaller and thinner.” Roberts agreed that “Terry Anderson’s kidnapping cut down considerably on the flow of news.”

Final Chapter

Armed with the large final judgment, Stuart H. Newberger, Anderson’s lead counsel, hopes to convince Congress and the President to establish a mechanism which would allow plaintiffs to collect some portion of the award. As those efforts proceed, it is important to note that this case represents the first opportunity for the U.S. court system to address one of journalism’s critical and continuing problems — the protection of overseas U.S. journalists and the public they serve.

Dylana Blum is an associate at Crowell and Moring LLP in Washington, D.C. and was a member of the Anderson trial team, along with Stuart H. Newberger and Tracy A. Roman.

Terry Anderson v. Iran

**Washington News Council Attacks
a Local Newspaper's Editorial**

By Bruce E. H. Johnson

On February 12, 2000, by a 9-6 vote, members of the Washington News Council, a self-styled watchdog group designed to evaluate and rule on complaints of media "fairness," upheld a complaint brought by an unsuccessful city council candidate about an October 1999 editorial published in *The Olympian*, a Gannett-owned daily newspaper in Olympia, Washington. This was the first proceeding conducted by the News Council, which had obtained corporate and foundation funding to conduct hearings modeled on a similar group, the Minnesota News Council. The ruling carries no sanctions — and instead resulted in controversy among Washington journalists over the propriety of attacking the newspaper's editorial viewpoints.

Claims Editorial False

The unsuccessful candidate, Bernard Friedman, complained that the editorial had falsely and unfairly criticized him for his "argumentative and divisive nature" and had wrongly characterized as "one example" a "heated exchange" between Friedman and the mayor of Olympia at an August 1999 city council meeting that "got so bad" that the mayor called the police. Friedman attacked *The Olympian* for failing to obtain his side of the story before writing its editorial and claimed that the city council fracas was the "only time that anyone could possibly say anything critical about my public demeanor" and reflected nothing more than a "misunderstanding" between him and the mayor about council procedures.

Friedman appeared at the hearing to present his case and answer questions. He also offered a written statement by Friedman's election opponent, Mark Foutch, a city council member at the time, who said that while the "exchange" between Friedman and the mayor "seemed heated," the dispute did not reflect on Friedman but rather stemmed from "a basic failure of communication between me and the mayor." Foutch said that the mayor had pushed the police call button prematurely. Unlike the mayor, he did not feel threatened by Friedman's behavior and he would not have called for the police.

Friedman also presented two character witnesses, who were not at the city council meeting. One insisted that she had never seen him lose his temper or be "impolite or a threat to public safety." The other said that Friedman was "assertive" but "ever respectful."

As additional support for his case, Friedman cited Gan-

(Continued on page 48)

Washington News Council Attacks Editorial

(Continued from page 47)

nett's "Principles of Ethical Conduct for Newsrooms," which include an admonition that its newspapers "will hold factual information in opinion columns and editorials to the same standards of accuracy as news stories."

The Olympian declined to participate but responded in letters to the council saying that the newspaper "stands by its editorial." Executive Editor Vickie Kilgore wrote, "I don't believe it's within the council's purview to tell us how to write editorials." She said their newspaper's freedom to write opinions in editorials is "sacrosanct."

Panel Split

The News Council hearing was presided over by Robert Utter, former chief justice of the Washington Supreme Court. The split among members produced some interesting discussions. Several members dissented, including former Seattle mayor Wes Uhlman, who said that he was the council member "who has been the subject of more editorials than anyone else" and stated that editorials properly can be unfair, fail to include balancing facts, and even be misleading.

By contrast, Clark Nordhoff listened to the audiotape of the city council hearing and agreed that Friedman was "legalistic and somewhat confrontational" but nevertheless voted against the newspaper and attacked it for "stonewalling" and "intimidation" because it had refused to attend the News Council hearing while it editorialized in support of its views and the factual accuracy of its editorial. Don Brunell, another member, said he "could see how *The Olympian* came to the conclusion it did after listening to the audiotape" of the council meeting, and its "process" was "fair" because it had offered Friedman an opportunity to write an op-ed column or a letter to the editor, but he refused.

Council Prompts Controversy

The Washington News Council decision prompted further editorial-page controversies among several Washington State newspapers. For example, Mike Zuzel, in a column in *The Columbian* (the daily newspaper published in Vancouver, Washington) called the Council a group of "self-appointed busy bodies pretending to be on the side of readers and viewers, when really they're just on the side of media bashing" and said that it "doesn't deserve to be treated seriously by news organizations or their audiences." He expressed concern about the impact of the case. "Does (this) mean that every editorial, column, cartoon and letter from a reader must include balancing

facts or else be barred from print?" Indeed, "Friedman was offered a chance to respond in a letter or guest opinion column, but refused. So who's really playing fair here?"

News Council member Herb Robinson, a former editorial page writer for *The Seattle Times* challenged Zuzel in a later column in *The Columbian*, stating: "The Washington News Council is on trial . . . News Council members thought long and hard before accepting this complaint. We knew we'd stir controversy by focusing on an editorial, as opposed to a news story. In the end, we decided to hear the complaint because it so clearly concerned the factual accuracy of the editorial, not the opinion."

Robinson added: "This is not a judicial proceeding, but an alternative to litigation. In fact, anyone who files a complaint with the news council must sign a waiver agreeing not to sue the media organization . . . Dozens of news councils exist around the world, including in Canada, England, France, Australia, Taiwan, South Africa and Israel."

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New York's First Department Affirms Narrow Reading of New York's "Son of Sam" Law

By Victor A. Kovner and Jeffrey H. Blum

Last month, New York's Appellate Division, First Department, affirmed the dismissal of an action brought by the New York State Crime Victims Board, pursuant to the New York "Son of Sam" Law (Executive Law section 632), seeking to recover the proceeds from the best-selling book *Underboss*, which tells the life story of John Gotti's "lieutenant", Salvatore "Sammy the Bull" Gravano. *New York State Crime Victims Board v. T.J.M., et al.*, 2000 WL 261101 (1st Dep't March 7, 2000). The Son of Sam Law authorizes a crime victim to bring a civil action to recover "profits from a crime" committed by a person "convicted" of "any felony defined in the penal law or any other chapter of the consolidated laws of the state" and requires persons or entities contracting with persons "charged or convicted" of a "crime" to notify the Crime Victims Board of any contract for such profits.

The First Department construed the Son of Sam Law narrowly and held that:

(1) the statute applies only to a person convicted of a felony under the State's Penal Law — not to someone, like Gravano, who was convicted solely of a federal felony; and

(2) the statute does not authorize the Crime Victims Board to bring a civil action for damages against those parties who fail to obey the notice provisions of the statute.

Because the court affirmed on statutory grounds, it did not reach the First Amendment constitutional challenge to the statute raised by defendants. Justice Rubin, writing for the court, noted, however, that the statute, as presently drafted, "raises a significant constitutional question."

New York's Unconstitutional Predecessor Son of Sam Law

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 112 S.Ct 501 (1991), the Supreme Court concluded that the predecessor Son of Sam Law was an unconstitutional infringement of the First Amendment.

That statute, passed by the New York legislature in 1977, required any person or entity "contracting

with any person . . . accused or convicted of a crime in this state with respect to the reenactment of such crime, . . . or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime" to submit a copy of such contract to the Board.

The statute also required such contracting parties to "pay over to the [B]oard any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives." Exec. Law former § 632-a(1).

The Board was required to deposit those payments in an escrow account. The victim of the crime could then recover the money held in escrow by bringing a civil action against the criminal and recovering a money judgment for damages.

In striking the former statute on First Amendment grounds, the Supreme Court held that law was a content-based restriction on speech because "it is directed only at works with a specified content . . . [and it] plainly impose[d] a financial disincentive only on speech of a particular content."

Revised Son of Sam Law

In the wake of *Simon & Schuster*, the New York Legislature passed a revised Son of Sam Law, Executive Law § 632-a. The revised law provides for an extended statute of limitations and permits certain crime victims to bring a civil action to recover money damages from "a person convicted of a crime" within three years following the discovery of any "profits of the crime." Exec. Law § 632-a(3). Any damages awarded in such action "shall be recoverable only up to the value of the profits of the crime."

The statute contains a more narrow definition of "crime": any felony as defined in the penal law or any other chapter of the consolidated laws of the state. Exec. Law § 632-a(1)(a). "Profits from the crime" is defined to include, among other things, income "generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime. . ." Exec. Law § 632-a(1)(b)(iii).

The statute also requires persons or entities who "knowingly contract[] for, pay[], or agree[] to pay, any

(Continued on page 50)

Narrow Reading of “Son of Sam” Law Affirmed

(Continued from page 49)

profit from a crime” to “a person charged with or convicted of that crime” to give written notice of the payment or obligation to pay “as soon as practicable after discovering that the payment or intended payment is a profit from a crime.” Exec. Law § 632-a(2)(a). Upon notification, the Board is in turn required to notify “all known victims of the crime” of the existence of such payments. Exec. Law § 632-a(2)(b).

The statute also imposes a notification requirement on crime victims as well. Whenever they file or determine to file an action against the person convicted of a crime, such victim is required to notify the Board of his or her action by providing the Board with a copy of the summons and complaint. Exec. Law § 632-a(4). In addition, such victim may seek provisional remedies to avoid the wasting of assets identified in the victim's complaint. Exec. Law §§ 632-a(5), 632-a(6). These provisional remedies are limited to those available to any civil plaintiff: “attachment, injunction, receivership and notice of pendency.” Exec. Law § 632-a(6)(a).

The Crime Victim's Board Action Against Underboss

Based on the Son of Sam Law, the Crime Victims Board brought an action against Salvatore Gravano and the other persons and entities allegedly involved in the creation, publication and distribution of *Underboss*, a best-selling book about Gravano's life. The complaint alleged that “Gravano has been paid large sums of money for telling the story of his life, including his life of crime, to defendant Peter Mass, the author of the *Underboss*.” The complaint sought declaratory, injunctive and monetary relief and attorney's fees based upon defendants' alleged “intentional failure to comply with [the statute]” by failing to turn over the contracts and monies with respect to the book.

Defendants moved to dismiss the complaint on statutory and constitutional grounds. Justice DeGrasse granted the motion on statutory grounds, finding that the statute only applied to New York State felony convictions and the statute did not authorize the Crime Victims Board to bring a civil action against defendants for allegedly violating the statute's notice provisions.

The Appellate Decision

On March 7, 2000, the Appellate Division affirmed Justice DeGrasse's decision. The court unequivocally determined that the statute did not apply to Gravano's federal conviction:

In its present incarnation, the statute defines 'crimes' as 'any felony defined in the penal law or any other chapter of the consolidated laws of the state.' This provision not only serves to limit application of the statute to income earned by convicted felons, it also restricts the subject crimes to those defined under State law. Defendants argued, and the trial court agreed, that this language does not encompass conviction for a Federal offense . . . Plaintiff has not shown that the statutory language encompasses any offense other than State felony.

More significantly, however, the court held that the statute did not confer the authority for the Board to bring this action against defendants. As a threshold matter, the court found that “[t]o exercise its powers under the statute, there must exist a lawsuit brought by a victim who has filed, or is about to file, a complaint on whose behalf the Board is authorized to act.” Once this predicate occurs, the Board's authority under the statute is limited solely to seeking provisional remedies:

The right of action granted to the victim of a felony may not be extended by implication to plaintiff, whose role is limited to the application for provisional remedies on behalf of a victim who is the plaintiff in an action brought pursuant to the statute.

The court explained that “[t]he Son of Sam Law, as revised, grants no additional substantive remedies to the crime victim, but provides that the Crime Victims Board will lend assistance by acting to avoid the wasting of assets.”

The court further found that the Board cannot bring an action for alleged violations of the notice provisions of the statute. “Even if the Board were able to establish an inherent right to prosecute violations of the notification provision of the Son of Sam Law, the Legislature has provided no penalty for the infraction of the provision.”

As to the constitutional question, Justice Rubin noted that there remains “a constitutional issue with

(Continued on page 51)

Narrow Reading of “Son of Sam” Law Affirmed

(Continued from page 50)

respect to [the definition of 'profits of a crime'] insofar as it implicates income derived from expressive activity. . . . To this extent, the instant cases raise a significant constitutional question. However, it is raised in an action that plaintiff . . . has no statutory authority to bring and that concerns a crime to which the statute is inapplicable.”

Justices Mazzaelli and Nardelli concurred in the decision, but on the far narrower ground that because of the absence of an application for assistance from a crime victim, as defined by the statute, the Crime Victims Board had no authority to sue for the profits from the publication.

The Board's time to seek leave to appeal to the New York Court of Appeals expires on April 18, 2000. In early April, Governor Pataki proposed an expanded Son of Sam Law that would permit crime victims to sue for gifts, income and inheritances acquired by their assailants, even if such assets are unrelated to the crimes.

Victor A. Kovner is a partner and Jeffrey H. Blum is an associate at Davis Wright Tremaine LLP, New York, and represented International Creative Management, one of the defendants in this litigation.



BULLETIN

Don't miss the next edition of the **LDRC 2000 BULLETIN**, a collection of articles taking a practical look at the Fair Use Doctrine in copyright law, investigating what can be used, what cannot, and why.

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Author Wins Libel Case Against UK Newspaper

Sean McPhilemy, an author and documentary film maker (and presently a libel defendant in Washington D.C.), recently won a large judgment against the *The Sunday Times* newspaper in a libel action in London. At issue was a *Sunday Times* article that criticized his television documentary as a hoax and “little more than a collage of unsubstantiated rumors and fabrications.” This documentary alleged that prominent Northern Irish businessmen, politicians, lawyers and police conspired with Protestant paramilitary leaders to murder Irish Catholics.

The jury awarded McPhilemy £145,000, approximately \$230,000, in damages, finding the *Times* had failed to prove that the allegations in McPhilemy’s documentary were false. Under English libel law, the defendant bears the burden of proving the truth of alleged defamatory statements. The *Times* was also ordered to pay the plaintiff’s attorney costs which are estimated at over \$1.6 million.

Broadcast by Channel 4 television in 1991, the documentary covers the same subject as McPhilemy’s book *The Committee: Political Assassination in Northern Ireland*, which implicates particular loyalists in a paramilitary conspiracy to assassinate Irish Catholics. This book is the subject of an ongoing U.S. libel action. See *LDRC LibelLetter*, May 1999 at 29.

Publishers in the United Kingdom refused to publish the book at least in part to avoid liability for defamation. The book was published in the U.S. by Roberts Rinehart, a small Colorado-based publishing house, and reportedly became a bestseller in the UK via Internet sales from U.S. companies. The leader of the Ulster Unionist Party, David Trimble, is suing the British division of Amazon.com for distributing the book, which he claims implicates him as one of the conspirators.

Two men, brothers David and Albert Prentice, offended by their characterization in the book, sued McPhilemy and his publisher in D.C. Superior Court last year.

McPhilemy has situated himself in the best of both worlds, as it were: as a libel plaintiff in plaintiff-friendly Britain and as a defendant in the U.S. In a pretrial ruling in the American libel action, McPhilemy managed to avoid very extensive discovery requests for the names of his sources by virtue of the Washington, D.C. Free Flow of Information Act (D.C.’s reporter’s shield law). See *id.*

British Reporters Win Libel Case Against Marxist Magazine

In another unusual English libel trial, ITN, the London-based news agency, and two of its reporters won substantial damages from LM, a fringe Marxist magazine, which accused them of essentially faking news reports on conditions of Bosnia Muslim prisoners in a Serbian detention camp. *Independent Television News Ltd. v. Living Marxism*, (High Court March 14, 2000); See *LibelLetter* Dec. 1997 at 6.

In February 1997, LM (formerly known as *Living Marxism*) published a cover story under the headline “The Picture That Fooled the World.” It alleged in particular that a 1992 ITN photograph of a Bosnian prisoner — one that came to symbolize the conflict — was staged. After hearing testimony from reporters on both sides, as well as a former camp prisoner, the jury found LM’s story to be a highly damaging attack on ITN and the reporters’ reputations and professional integrity. It awarded reporters Penny Marshall and Ian Williams £150,000 each and ITN £75,000. ITN announced that it will donate its award to the International Red Cross. The plaintiffs will also be entitled to recover their costs, estimated at £300,000. The editor of LM has stated the judgment will force the magazine into bankruptcy.

Two American Newspapers in London

By Adam Liptak

On April 5, 2000, a jury in London returned a libel verdict of about \$125,000 against *The New York Times* and the *International Herald Tribune*. The papers are also liable for attorneys' fees that will amount to multiples of the award.

The case arose from a generally flattering profile of the British chef Marco Pierre White. He objected to this sentence in the profile: "Beneath Mr. White's rock-star veneer — including a well-publicized bout with drugs and alcohol — lies a very savvy and rich businessman."

Plaintiff's Own Words

The statement was based mostly on a passage in White's autobiographical cookbook *White Heat*:

I suppose I got to some kind of peak when I was working for Nico, then I hit a trough. I gave up my job and went on a big bender, became a gastro-punk. From time to time I'd cook casually, make enough money to last a few more weeks, then I'd blow off again. It was great to be decadent. At first, anyway. But eventually I couldn't stand watching another person getting drunk or someone else injecting smack into their veins. Eighteen months and I'd had enough of the world outside. I needed to get back into the kitchen. But in cookery terms, I'd cooked my goose. Pierre Koffmann started me on my rehabilitation course.

About five months after the original articles, both newspapers published this editors' note:

An article in the Dining section on May 13 about Marco Pierre White, a British chef and restaurateur, described his climb to success. It said that in the past he had "a well-publicized bout with drugs and alcohol." The statement was based largely on an ambiguous passage in Mr. White's autobiographical book, "White Heat." But no such allegation has been "well publicized," and in fairness Mr. White should have been asked to comment on the statement. He has since said there is no truth in it. In the absence of any confirmation, the statement should not have appeared.

The case, then, would be a fairly easy one in the United States. The statement at issue was at worst a good-faith misunderstanding of a public figure's own

ambiguous statement. In England, though, where it is the defendants' burden to prove truth and no other significant defenses exist, the case was impossible to win.

Stripped of Other Defenses

In a series of pretrial rulings, the court stripped the newspapers of nearly every conceivable defense and mitigating evidence. We had conceded that we had no admissible evidence of the truth of the disputed statement shortly before trial, thus limiting slightly the "aggravation" of damages that maintaining a plea of "justification" invites. On the eve of trial, the court rejected the defense that the passage in *White Heat*, along with similar statements in interviews, should be considered by the jury for other purposes — call it "licensing the tort," consent, contributory negligence, volenti, something.

After the jury was sworn, the court also rejected the papers' argument that *White Heat* should be considered in mitigation of damages. We were thus forbidden from referring to the book for any purpose at all. The court also rejected our attempt to submit evidence of the papers' good faith. This latter ruling meant that our reporter was not allowed to testify.

That left only two issues to be decided. The first was whether the article as a whole harmed White's reputation. The second was what damages he is entitled to.

A Strict Liability Trial

These rulings were worse than we had expected, and we had not expected much. The court took a very narrow view of already-unfriendly English libel law. The judge said, simply: "What you [the papers] fail to appreciate is that the [English] tort is one of strict liability. Maybe you think it shouldn't be." Well, yes.

White's barrister, George Carman, opened by recounting White's rise from humble beginnings to great success as the only English-born chef ever to be awarded three Michelin stars. He then discussed the alleged libel; White's denial of it; his efforts to prevent its publication in the *International Herald Tribune* two days after it was published in *The Times*; his efforts to obtain a correction; the effect of the libel on his feelings, family and business; the newspapers' arrogance; the inadequacy of the editors' note (in its belatedness,

(Continued on page 54)

Two American Newspapers in London

(Continued from page 53)

in its failure to accept White's denial, in its failure to apologize); and the papers' employment of private investigators to look into the truth of the disputed statement. He concluded by asking for "reasonable, proper and fair damages."

White testified. He was by the third or fourth question on the verge of tears in discussing his mother's death when he was six and his father's alcoholism. He marched through his resume, with emphasis on his early poverty and hard work.

He said he seldom drinks and then only a glass of wine. He said he objects to illegal drugs and has "never taken drugs in my life." He described his anger and distress on reading the articles. He said he was also angry and upset over the absence of an apology in the editors' notes. He had the same reaction toward the private investigators. He said he started the action seeking only an apology and attorneys' fees. He said he is not seeking "heavy damages" but only vindication.

On cross-examination, the papers' barrister, Geoffrey Robertson, walked White through the article and had him concede, at length and in detail, its many positive passages. White was made to admit that he had no evidence that anyone has avoided his restaurants as a consequence of the article.

Introducing the Book . . . Finally

Then the cross-examination of White took an interesting turn. White testified that he had never seen anyone inject drugs. This was at odds with *White Heat*, in which he says: "But eventually I couldn't stand watching another person getting drunk or someone else injecting smack into their veins."

After considerable legal argument, the judge allowed cross-examination on this point solely to impeach White's credibility. The judge continued to stress that our questioning could not suggest that our interpretation of this passage was reasonable or in good faith. This opening allowed Robertson to march White through the entire passage in *White Heat*, his first-person account of a "decadent" period in his life, when he went on "a big bender." His answers were nervous, contradictory and implausible.

White said a ghostwriter had written the autobiographical account. He denied the truth of much of it.

He said that he had not read his own book due to dyslexia. We vainly hoped that, although this important evidence came before the jury in a roundabout way, the jury would appreciate its significance.

Aside from brief testimony from another chef on his interaction with our private investigator, that concluded the testimony. The judge ruled that our reporter, who was prepared to testify on her newsgathering and good faith, had nothing relevant to say.

Closings: Nationalism v. Rationalism

George Carman gave an impassioned and xenophobic closing argument, focusing on the papers' arrogance and failure to apologize. He characterized our case as suffused "with a kind of suicidal logic that can only come transatlantically." He concluded by asking the jury to "send a message across the Atlantic" that "English juries award damages when reputations are sullied and award more damages when the defendants' conduct aggravates the hurt."

Our barrister, Geoffrey Robertson asked the jury to ignore the appeal to nationalism. He minimized the defamatory impact of an allegation of long-ago drug use, particularly in the context of an otherwise positive article. He tried, within the limits of the court's earlier rulings, to show that we had dealt fairly with White's complaints. He did an effective job explaining why we could not do more than what the editors' notes did.

He then addressed damages by reference to other kinds of cases. The going rate for losing one's senses of taste and smell is 9,000 to 12,000 pounds (\$15,000 to \$20,000). Losing one's hand is worth 45,000 pounds (\$75,000).

He also suggested that the passage from *White Heat* — which he read out in its entirety — is relevant to how distressed White could have been on reading our articles. If White is prepared to let the book circulate under his name without particular distress, he cannot be terribly distressed by our not very different statement (whatever its source). This approach tested the limits of the court's earlier rulings.

The judge, Justice Morland, gave an opinionated summary of both the law and the facts. (He had been consistently unfriendly through the trial. He gave this assessment, for instance, of the *International Herald*

(Continued on page 55)

*He characterized our case as suffused
"with a kind of suicidal logic that can
only come transatlantically."*

Two American Newspapers in London

(Continued from page 54)

Tribune: “It’s the sort of paper you get when you are traveling and can’t find anything else. It’s the sort of paper they give away on airplanes.”) His instructions to the jury left little doubt that he expected the ruling to go against us. He did, however tell the jury a cumulative award of damages against the two papers in excess of 75,000 pounds (\$125,000) would be “extravagant” and below 20,000 pounds (\$32,000) would be “niggardly.” The jury hit the top end of the suggested range.

The New York Times and the International Herald Tribune were represented by barristers Geoffrey Robertson QC and Antony White, by solicitors Mark Stephens and Amber Melville-Brown of Finers Stephens Innocent and by hapless American, Adam Liptak.

British ISP’s Settlement of Internet Libel Suit Raises Censorship Fears

At the end of March, and shortly before trial was to begin, Demon Internet, one of Britain’s largest Internet service providers, settled a libel suit brought against it by Laurence Godfrey over a third-party newsgroup posting that was accessible through and stored in Demon’s computers. *Godfrey v. Demon Internet Limited*, 1998-G-No. 30. See also *LDRC Libelletter* April 1999 at 19, June at 16. Godfrey is a notorious litigant who has sued at least six other ISP’s over third party postings.

The settlement brings to an end a closely watched case that highlighted the harshness of English libel law, particularly as applied to the new medium of the Internet. As part of the settlement, Demon agreed to pay about \$25,000 in damages and \$400,000 in legal costs. A pretrial ruling (described below) had stripped Demon of all meaningful defenses, a decision which surprisingly was not appealed.

Case Raises Fears of Censorship

Although the settlement marks the end of the case, it has set off alarm bells in the UK over potential censorship of the Internet. Media lawyers in the UK have

(Continued on page 56)

British ISP's Settlement Raises Censorship Fears

(Continued from page 55)

noted that ISP's in Britain will now face enormous pressure to delete or block access to newsgroups or web sites, such as newspapers' web editions, in response to complaints over allegedly libelous material.

ISP's, which — at least with respect to third party content — are the functional equivalent of a telephone exchange, will now in Britain also be vetting third party content, perhaps with the same deft touch one would expect from a phone company. ISP's will no doubt err on the side of a complainant rather than engage in a meaningful analysis of such concepts as “defamatory meaning” or “fair comment.”

London media lawyer Mark Stephens described the potential effect on U.S. publications.

If you're rich and powerful, you could sue the Internet company to take something off the Internet edition of an American newspaper, because you know they're going to censor the newspaper even if the newspaper doesn't censor itself.

See *British Internet Provider to Pay Physicist Who Says E-Bulletin Board Libeled Him*, NEW YORK TIMES, April 1, 2000 at A5.

Not just the rich and powerful can target an ISP. Within days of the settlement, a UK gay current affairs magazine, *Outcast*, had its web site shut down by its ISP host in response to a complaint (ironically from another gay-oriented publication, *Pink Paper*) that *Outcast* was planning to publish a defamatory article about *Pink Paper's* chairman. The ISP, Netbenefit, reportedly shut down the web site after an examination of the entire online content. See *Website closed in wake of libel verdict*, THE INDEPENDENT, April 4, 2000 (available at www.independent.co.uk). *The Independent* also reported that several months ago an ISP shut down a web site containing offensive comments about judges. See *A thoroughly modern case of good, old-fashioned libel*, THE INDEPENDENT, April 4, 2000.

Background

The defamation claim against Demon was based on a forged message, written in Godfrey's name and posted to a newsgroup alt.soc.culture.thai. The exact words of the message are not clear. The High Court described the message as “squalid, obscene and defamatory” and news reports have abjured from repeat-

ing the message. Godfrey complaints to Demon about the message were not answered. In any event, the message was removed automatically after two weeks.

An interesting fact that was never developed in the case was the context in which the message was posted. Godfrey is known for engaging in provocative discussions in newsgroups. His postings have often led to vituperative and insulting responses — a reaction known as “flaming” in Internet parlance. Given this context, the argument could surely be made under U. S. defamation law that the newsgroup participants understood such exchanges as hyperbolic rhetoric and juvenile insults, but not as statements of fact.

A more sinister interpretation is that Godfrey engages in provocative postings precisely in order to bring libel suits, all of them in London courts. For example, an ongoing lawsuit of his stemmed from his comment in the newsgroup alt.soc.canada that Canadians are boring and that their lackluster country will never amount to anything. This not surprisingly prompted a heated rebuke from a Canadian graduate student, Michael Dolenga, who replied with both serious and insulting responses. Godfrey obtained a default judgment against Dolenga of approximately \$26,000. Still ongoing is Godfrey's lawsuit against Cornell University, which merely operated the computer server that hosted the newsgroup. Godfrey complained to Cornell about the posting and asked that it be removed which Cornell refused to do.

These facts, which under American defamation law are relevant to meaning and reputation, were unfortunately never developed and perhaps could not have been under England's strict libel laws.

The High Court Ruling

In a highly publicized pretrial ruling last year, an English High Court essentially eviscerated Demon with a two prong ruling on publisher liability. First, the court ruled that under English common law Demon is the publisher of any material it hosts or transmits on its computers. Oblivious to the millions of messages transmitted by Demon, the court analogized the situation to a 1937 case involving the posting of a message on a golf club's bulletin board. *Byrne v. Deane* (1937) 1 KB 318. In this case the club was held liable for a notice on its bulletin board that accused the plaintiff of tipping off the local police about the club's illegal gaming machine. Second, the court held that Demon could not take advantage of the innocent dissemination defense under Section 1 of the British Defamation

(Continued on page 57)

British ISP's Settlement Raises Censorship Fears

(Continued from page 56)

Act 1996, because it had notice of Godfrey's complaint and failed to respond.

Demon's decision not to appeal was surprising. News reports last year speculated about an appeal all the way to the House of Lords or to the European Court. Now ISP's and the media will have to petition the government for legislative relief along the lines of Section 230 of the Communications Decency Act. As of now, no specific initiatives have been introduced.

British Historian ***David Irving Loses UK Libel Suit*** **U.S. Author's Claim That Historian** **is a Holocaust Denier is Found True**

In one of England's most dramatic and emotive libel trials, a High Court judge after hearing extensive testimony on details of the Holocaust found as true an American scholar's accusation that David Irving, a controversial British historian, is a "holocaust denier." *Irving v. Lipstadt* (High Court April 11, 2000). After a three month bench trial, Judge Charles Gray issued a 300-page opinion rejecting the libel claim and finding as true statements that Irving is a Holocaust denier, as well as an anti-Semite and a racist. A copy of the decision is available at www.focal.org/judg.html. A collection of the Guardian newspaper's articles on the case is available at www.newsunlimited.co.uk/irving/. David Irving's own missive on the verdict is available at his own web site at www.fpp.co.uk.

Lipstadt's Charges

The suit arose from Emory University Professor Deborah Lipstadt's 1995 book entitled *Denying the Holocaust: The Growing Assault on Truth and Memory*, in which she accused Irving of distorting and ignoring historical evidence surrounding the Nazi regime's mass murder of millions of European Jews. Irving sued Lipstadt and her publisher, Penguin Books, claiming that her charge was part of an "organized international endeavor" to destroy his career and "vandalise [his] legitimacy as a historian."

Irving is the author of several historical works, including *Hitler's War* and *Goebbels: Mastermind of the Third Reich*. In the 1977 book *Hitler's War*, Irving claimed that Hitler had not known of the plans for the mass killing of European Jews until 1943 and that Hitler had ordered that there be no mass killings. His claims put him on the fringes of contemporary historians and in the 1980's Irving regularly addressed right-wing groups in Austria and Germany. In 1992, he was fined by the German government under a statute that prohibits denying the existence of the Holocaust.

History on Trial

The lawsuit and trial are therefore remarkable for a number of reasons. From an American legal perspec-

(Continued on page 58)

David Irving Loses UK Libel Suit

(Continued from page 57)

tive it is amazing that Lipstadt's scholarly opinions based on documented facts could ever form the basis of a libel suit. Yet they could under English law. The English press regularly referred to the case as putting "history on trial," and the trial essentially took the form of a politically and emotionally charged scholarly seminar on the historical evidence and details of Nazi genocide.

The case was also remarkable as another example of a British libel plaintiff marching high-mindedly into court to vindicate his reputation only to be felled by the buzzsaw of truth. See for example the cases of Neil Hamilton and Jonathan Aitken.

The defendants bearing the burden of proving their charges true brought to the witness stand leading Holocaust scholars in an effort to show that Irving had unquestionably twisted facts to arrive at his controversial conclusions. Remarkable in this regard was the Israeli government's release to the defendants of Adolph Eichman's prison diaries, which had been held in secret until this time.

The defendants also presented evidence of Irving's personal views regarding Jews and ethnic minorities. Irving's own diaries, all 26 volumes, supplied to defendants in pretrial discovery, provided damning evidence against him. One particularly biting example was an anecdote in which he transcribed a racist ditty he sang to his young daughter.

In a judgment issued April 11th, Judge Gray found that Irving was indeed an active Holocaust denier who associates with neo-Nazi extremists. The opinion cited, for example, Irving's blatant disrespect for the first-hand stories of survivors of the Auschwitz concentration camp. Further, the judge found that many of Irving's documented comments indicated his anti-Semitic and racist sentiments.

Irving, who was pelted with eggs as he entered the court house to hear the judgment, now must pay the defendants' legal costs, potentially amounting to two million pounds.

Although the court undoubtedly reached the right verdict it is nevertheless deeply unsettling that it ever amounted to a case. That it did, is a warning to all those who take lightly the risk posed by English libel law and English libel plaintiffs.

From an American legal perspective it is amazing that Lipstadt's scholarly opinions based on documented facts could ever form the basis of a libel suit.

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LDRC COMMITTEE REPORTS

Editor's Note: *We asked our Defense Counsel Section Committee Chairs to send us short summaries of the projects that their committees are undertaking or considering. We all owe a debt of gratitude to the DCS Committees, to their chairs, vice-chairs and membership, for all the good work they produce for LDRC members. If you are interested in participating on a committee or on a particular committee project, please let me know.*

— Sandy Baron

• *Advertising & Commercial Speech Committee*

Co-Chair: Bruce Johnson, Davis Wright Tremaine

Co-Chair: Richard M. Goehler, Frost & Jacobs

Vice Chair: Felix H. Kent, Hall, Dickler Kent, Friedman & Wood

1. To monitor current developments in the area of advertising law and commercial speech, with particular attention to any new developments in the area of proposed regulation of commercial speech.
2. To regularly report to the membership — primarily through the monthly *LDRC LibelLetter* — any such current developments, case decisions and proposed regulations.
3. To develop a liaison relationship with other groups dealing with advertising law and commercial speech issues in order to stay abreast of the activities of other groups active in the area.

• *Agricultural Disparagement Committee*

Chair: Dawn Phillips Hertz, Dawn Phillips Hertz Law Office

Vice Chair: Seth Berlin, Levine Sullivan & Koch

We are continuing to monitor and, when necessary, marshal resources to oppose state veggie libel legislation across the United States. Our goal is to prevent any further state from adopting such legislation and, if we can, work with local groups to repeal or obtain some form of a declaration of invalidity or unconstitutionality of at least one state's veggie libel law.

• *Conference and Education Committee*

Co-Chair: Peter Canfield, Dow Lohnes & Albertson

Co-Chair: Dan Waggoner, Davis Wright Tremaine

The LDRC Biennial Conference Committee assists the Center, the Newspaper Association of America and the National Association of Broadcasters in organizing and presenting the NAA/NAB/LDRC Biennial Libel Conference. The next conference is scheduled for September 12-14, 2001, and the Committee's principal organizational meeting will be held this fall in New York at noon the day following the LDRC annual dinner. All volunteers are welcome.

• *Cyberspace Committee*

Chair: Kurt Wimmer, Covington & Burling

Vice Chair: Patrick Carome, Wilmer, Cutler & Pickering

1. Continue the practice of authoring a group of papers on Internet libel issues to be distributed at the fall libel conference in Arlington.
2. Inform the LDRC of particular cases presenting novel issues of Internet libel/privacy law or content regulation in which the litigant in question could be assisted by the filing of an amicus brief by a coalition of our clients.
3. Work with our committee to author a standing column on Internet libel issues and/or obtain more Internet-related articles for the *LibelLetter*.
4. Establish a listserv for LDRC members that could be useful for discussing quick-moving Internet libel developments.
5. Work with LDRC Staff to establish an on-line brief bank. This could be a password-protected area of the LDRC website on which electronic copies of briefs could be maintained, with appropriate security to guard against non-member access (the technology for this already is in the works).
6. Create liaisons with other groups dealing with First Amendment issues in the Internet context including
 - Electronic Frontier Foundation
 - Center for Democracy and Technology
 - Electronic Privacy Information Center, etc.

LDRC COMMITTEE REPORTS

- *Jury Committee*

Chair: Daniel Barr, Brown & Bain

The Jury Committee will come out with a revised Jury Instructions Manual by the end of August.

- *Legislative Affairs Committee*

Chair: James Grossberg, Levine Sullivan & Koch

LDRC's Legislative Affairs Committee continues to monitor legislative developments on both the federal and state level affecting the potential liability of the media. In recent months, legislative activity in the privacy arena has been especially intense.

On the federal level, there have been rumors that special interests may urge Congress to consider legislation creating a federal right of publicity. While some key Senate staff members have said this issue is not on their radar screen, we have heard that Sen. Trent Lott, R-Miss., may take up the cause after being lobbied by influential Hollywood stars. It is not clear what type of legislation may be planned, though a proposal being touted by the Screen Actors Guild in California may serve as a starting point.

Nevertheless, privacy, especially privacy on the Internet, has spawned numerous proposals on Capitol Hill as lawmakers have seized on a seemingly widespread fear that too much personal information is too readily available and thus ripe for misuse by commercial and other enterprises. Legislation to create a "privacy commission" has been introduced in both the House and Senate that would create a panel of "experts" to examine ways to ensure that consumers' "private" information is secure. The Online Privacy Act of 1999 would ban the collection of personal information such as name, address and Social Security numbers on the Internet without a consumer's consent.

Meanwhile, the chairman and ranking minority member of the Senate Judiciary Committee, Senators. Orrin Hatch, R-Utah, and Patrick Leahy, D-Vt., are working on a comprehensive bill with a working title of "Internet Security Integrity Act" that would address issues of law enforcement access, information gathering and dissemination, and online security. Their intent, it appears, is to mold all Internet privacy-related issues into one omnibus bill. Whether any of these privacy bills get serious consideration this year is unclear. The Senate Judiciary Committee has a full plate, and with a legislative session cut short by the upcoming election, Congress may defer most of their hearings and deliberations until next year.

Privacy legislation also appears to increasingly popular among state legislators. *See also*, "Government Foxes

and Privacy Henhouses" on pg. 31, *infra*.

The Legislative Affairs Committee also has canvassed all 50 states to identify those in which so-called "video voyeurism" or "anti-paparazzi" statutes have been introduced. As of the end of 1999, legislation along these lines had been introduced, and in some cases enacted, in nineteen states. The committee will be issuing a report about the scope and status of these bills.

The Committee also is in the process of recruiting a group of legal coordinators to assist in monitoring state legislative developments.

- *LibelLetter Committee*

Chair: Adam Liptak, The New York Times

Vice Chair: Mike Giudicessi, Faegre & Benson LLP

The *LibelLetter* continues to be a timely, comprehensive and sophisticated survey of developments in libel, privacy and related fields. Its continued success is due in equal parts to tips from Committee members and others in the LDRC membership, which seem to be increasing in volume and speed; to focused and lively writing from contributors; and to the tireless work of the LDRC staff.

- *Prepublication Review Committee*

Chair: Robert D. Nelon, Hall Estill, Hardwick, Gable, Golden & Nelson

Vice Chair: David Korzenik, Miller & Korzenik

1. Finish the initial stage of the seminar bank project

(Continued on page 61)

LDRC COMMITTEE REPORTS

(Continued from page 60)

by (a) completing the outline of topics for which we have or would like to have materials, (b) obtaining more seminar materials from lawyers who give in-house seminars to their media clients, and (c) obtaining more audio and video materials which exemplify the issues being discussed in the client seminars.

2. Because this is an election year, enlist a committee member (or anyone else in the DCS who wants to help) to research and write an article about election coverage issues, especially in the limits on reporting charges and countercharges by the candidates and the duty, if any, to investigate what one candidate says about another before publishing.

3. Enlist a committee member (or anyone else in the DCS who wants to help) to research and write an article on recent developments in the law regarding the publication of confidential information (trade secrets, stolen documents, unlawfully recorded conversations, etc.) obtained lawfully by the journalist. There have been conflicting developments in recent cases that should provide fertile ground for discussing this issue.

4. Create an "e-mail" alert network among committee members so that any development in the prepublication area (new decisions, especially if not generally reported; new ideas about prepub review techniques; "off-the-wall" questions that come up in doing prepub review for clients) can be circulated quickly among members for input and comment.

• *Pre-Trial Committee*

Co-Chair: Charity Kenyon, Riegels, Campos & Kenyon

Co-Chair: Joyce S. Meyers, Montgomery, McCracken Walker & Rhoads

Vice Chair: Henry Abrams, Saul Ewing Weinberg & Green

We are filling in the last gaps on our summary judgment checklist. A number of us have received the Anti-SLAPP materials prepared by the California Newspaper Publishers Association and should be ready to discuss a strategy with the Legislation Committee. The mediator idea is new and we have not heard back from committee members about the value of this idea.

Short term committee goal: Complete and distribute a summary judgment checklist that guides the inexperienced

or experienced practitioner through a complaint and raises issues for potential pretrial disposition.

Long term goals:

- *A road map for discovery.* Following up on the summary judgment checklist approach. The lawyer finds that the complaint cannot be knocked out by a dispositive motion. A guide to planning discovery to addressing the issues to be tried.

- *Anti-SLAPP.* Responding to our clients' wish to be reimbursed for attorneys fees imposed for defense of constitutional rights. A package of material that attorneys can use to assist their clients and professional organizations to promote legislative reform in their states. The goal would be to have more states adopt the special motion to strike California enacted with the assistance of the California Newspaper Publishers Association.

- *Mediators.* Addressing the practical need to identify mediators who are highly skilled, experienced and credible from the perspective of plaintiff and defendant in defamation actions. Develop a list of mediators we can recommend.

• *Trial Techniques Committee*

Chair: David J. Bodney, Steptoe & Johnson

Vice Chair: Guylyn Cummins, Gray Cary Ware & Friedrich

Short-Term Goals:

1. Complete Update of Model Trial Brief (Sep. 2000);
2. Initiate and develop collection of opening and closing statements (Nov. 2000);

Long-Term Goals:

1. Work with Ad Hoc Jury Survey Committee to Implement Juror Survey Project;
 2. Work with Jury Committee on jury instructions or other issues of mutual interest;
 3. Encourage prompt and routine submission by DCS members of exemplary trial briefs and opening/closing Statements, and reports to members on significant trial verdicts.
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Mark Your Calendars!

LDRC's London Conference 2000 Developments in English Libel and Privacy Law London, England September 25-26, 2000

The Conference is presented with the generous sponsorship of of Media/Professional Insurance, The Hearst Corporation and the National Magazine Company Limited, The Guardian, Granada Television, Trinity Mirror Plc, and the law firms of Biddle, Clifford Chance Rogers & Wells, Coudert Brothers, Finers Stephens Innocent, and Haynes & Boone, LLP.

As several articles in this month's *LibelLetter* make clear, English libel law is a club that can be wielded against American media with expensive consequences. U.K. media law has its own rules, practices and mores that a publisher and its counsel ignore at their peril. As a follow up to LDRC's successful 1998 Forum on English Libel and Privacy Law, LDRC's London Conference 2000 will be a timely and sophisticated examination of recent developments in English law and practice.

Since 1998, there have been a remarkable number of significant developments in these areas. In *Reynolds v. Times*, for example, the House of Lords articulated for the first time a public interest privilege that could offer substantial protection to the English media (and international media hauled into English courts). See *LDRC LibelLetter* November 1999 at 27 and March 2000 at 45.

The House of Lords has heard the case of *Berezovsky v. Forbes* and the soon to be rendered decision will offer significant guidance on the critical issue of forum non conveniens. See *LDRC LibelLetter* Nov. 1998 at 39.

In *Godfrey v. Demon Internet*, a English High Court held that Internet service providers could be liable for the third party content they transmit or store. See *LDRC LibelLetter* April 1999 at 19. The recent settlement in the case, reported on in this issue, has raised fears that ISP's, fearful of liability, will block access to potentially libelous sites, including blocking American newspapers' web editions.

In addition to exploring these areas of substantive law, LDRC's London Conference 2000 will continue the dialogue between U.S. and U.K. media defense lawyers (as well as media defense lawyers from other jurisdictions) on current issues and trends in US, English and other international laws relevant to the growing globalization of the media.

As for format, LDRC's London Conference 2000 will be a unique participatory event, drawing on the expertise of conference goers. Most conference sessions will be done as moderated discussions at a large roundtable setting, allowing attending lawyers the opportunity to exchange ideas with other media lawyers and the media. Conference sessions will include:

- Libel Defenses
- Privacy Law
- Jurisdiction
- Internet
- Trial Practices.

A panel of U.S. and English print and broadcast lawyers will discuss handling claims. And a panel of US and English trial lawyers will discuss their recent cases.

The conference will be held September 25 - 26, 2000 at Church House, Dean's Yard, Westminster. Invitations have been sent out and we urge all interested members to register early because space is limited.

LDRC wishes to thank International Committee Co-chairs Kevin Goering, Coudert Brothers; Bob Hawley, The Hearst Corporation; and Dick Winfield, Clifford Chance Rogers & Wells, and Chad Milton, Media/Professional Insurance; David Hooper, Biddle; and Mark Stephens, Finers Stephens Innocent for their efforts in organizing the London Conference.

In addition, LDRC wishes to thank the following members who helped set the agenda for the London Conference. Jan Constantine, NewsAmerica; Siobhain Butterworth, The Guardian; Marietta Cauchi, Finers Stephens Innocent, Harriette Dorsen, Random House; Laura Handman, Davis Wright Tremaine; Stuart Karle, Dow Jones; Lee Levine, Levine, Sullivan & Koch; Adam Liptak, New York Times; Amber Melville Brown, Finers Stephens Innocent, Geoffrey Robertson, QC, Doughty Street Chambers; Brian McLeod Rogers; David Schulz, Clifford Chance Rogers & Wells and David Sternlicht, NBC.