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LDRC LIBELLETTER

February 1998

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LIBEL DEFENSE RESOURCE CENTER

404 Park Avenue South
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LDRC Forum on English Libel and Privacy Law May 11-12, 1998 Invitations have been mailed to all of you. More on page 2

Texas Cattlemen v. Oprah: Judge Throws Out Agricultural Disparagement Statute Claim

Trial Will Continue On Business Disparagement Claim

In a ruling from the bench, U.S. District Court Judge Mary Lou Robinson dismissed claims based upon Texas' Defamation of Perishable Food Products statute brought by members of the Texas beef industry against Oprah Winfrey and anti-beef activist Howard Lyman. Judge Robinson also dismissed defamation claims brought by the cattlemen, but will permit the plaintiffs' common law business disparagement claim to proceed. The defense is to begin presenting its case-in-chief on Wednesday, February 18, 1998.

While Judge Robinson did not issue a written ruling to accompany her decision and a pre-existing gag order prevents trial participants from discussing the case, news reports coming out of the courtroom have stated that Judge Robinson apparently agreed with defense attorney Chip Babcock's argument that the plaintiffs had failed to introduce enough evidence to support the so-called "veggie-libel" law and common law defamation claims brought by the cattlemen.

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THE LDRC FORUM ON ENGLISH LAW AND PRACTICE

Dates Changed to May 11, 12

You should have received a mailing on the **LDRC Forum on English Libel and Privacy Law** now scheduled for May 11 and 12 in London. We apologize for changing the dates, but we found that there was more to do than the March dates allowed. We plan to have a very substantive two days and understand that our English counterparts are very enthusiastic about meeting with LDRC members. The Forum is presented in cooperation with Oxford University's Wolfson College Media and Cultural Law Programme, Centre for Socio-Legal Studies, and with the sponsorship of Media/Professional Insurance.

Special thanks are due to Mark Stephens of Stephens Innocent Solicitors, London, and the English counsel he has working with him on the planning of this Forum. The Forum simply would not be possible without Mark's efforts, and those of his colleagues.

The aim of **LDRC's Forum on English Libel and Privacy Law** is twofold: First, to foster a practical discussion between American and English media lawyers on preventing and defending libel and privacy suits against American and other international media in English courts. Second, to reflect on the current status of the law and some of the specific issues that law raises for international and English publications and new media technologies; and to identify current proposals and trends, and explore what role the media can have in the development of the law.

On Day One of this two-day event, all the attendees, English and American, will sit in a roundtable fashion and, in a moderated discussion closely akin to the format of break-out sections in Reston, discuss the practical application of English law to prepub review, jurisdiction and related arguments, trial practices, and the impact of the European Court.

Day Two will involve two moderated roundtable panels made up primarily of English experts from law, journalism, politics and academia. The rest of us will be seated in circles behind the table. The "audience" will be asked at various points for comments and questions. Day Two will focus on the direction of English law, and what, if anything, the media can do to shape future law. We will look at pending legislative initiatives -- such as the proposal to incorporate the European Convention on Human Rights into English law and the new Data Protection Law -- and the role of the judiciary, both in England and at the European Court.

We are planning an Oxford-style debate at the close of Day Two, and receptions at the end of each day are being planned. We are looking into possible group flight and hotel accommodations and hope to have some information on that shortly. There is a $60 registration fee for the Forum.

If you have any questions about the Forum, please give us a call. And if you did not receive an invitation to the Forum, please give us a call. We believe that it will be a very worthwhile event and hope that a great many of you will be able to attend.

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LDRC 1998 Report on Trials and Damages

Trial Results Show High Defense Success Rate, But Highest Average Award on Record - *MMAR* Distorts Damage Picture -

The results of the LDRC 1998 Report on Trials and Damages show that 1997 proved to be a year of both good news and bad news for media defendants in libel and privacy trials. On one hand, media defendants won 50.0% (11 out of 22) of the trials held in 1997 equaling the all-time high media success rates reported in 1991 and 1993 (in both years media defendants won 13 out of 26 trials). On the other hand, the astronomical $222,720,000 verdict in *MMAR Group, Inc. v. Dow Jones & Co.*, drove the average award for the year to an unheard of $20,782,455. In fact, the total dollar amount awarded in 1997, $228,607,000, came close to equaling the total amount awarded from 1980-1989, $240,991,622. Even with *MMAR*, however, the median award for 1997 was the relatively modest $310,000, a bit lower than the median for 1990-97. Moreover, there were only two awards over $1 million, few than any study period in the 1990s.

Without *MMAR*, the damage awards in 1997 were either on a par with, or lower than, the average or median awards for the 1990s or the 1980s. Highlights of the survey include:

- LDRC found 22 trials in 1997, 20 jury and 2 bench, up from the 16 trials reported in 1996. The number of trials in 1997 was slightly more than the 21.1 trials per year average for the 1990-97 period. In the 1980-89 period an average of 25.9 trials per year was reported.

- Media success at trial in 1997 matched the previous all-time highs reported in 1991 and 1993 as 50.0% of trials were won by media defendants in each of those years. In 1997, media defendants won 9 out of 20 jury trials and 2 out of 2 bench trials. By contrast, in 1996 media defendants won only 25.0% (4 out of 16) of the reported trials.

- *MMAR* drastically distorted the damage picture in 1997

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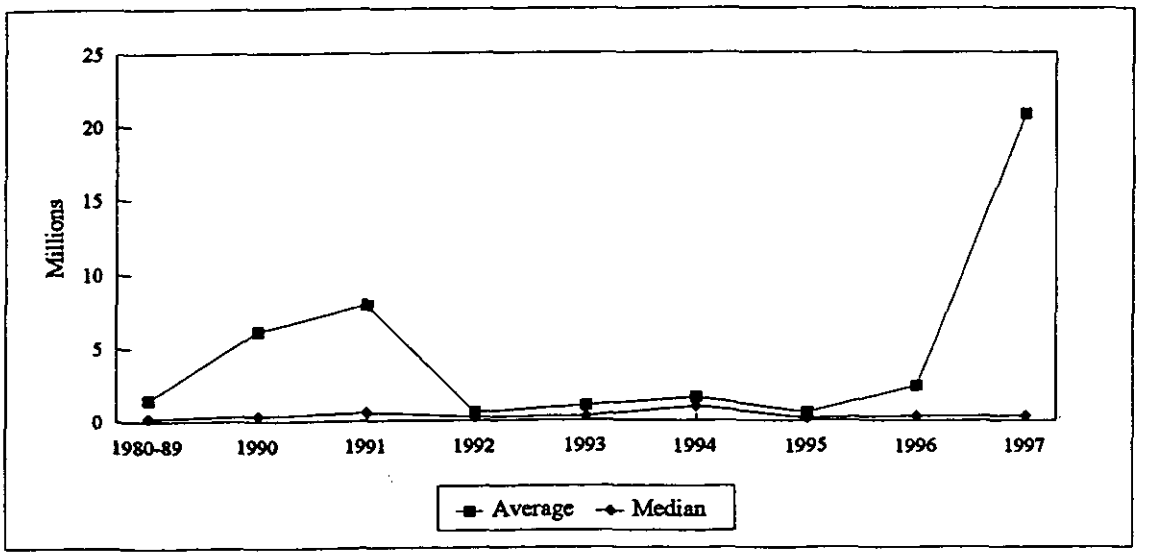
Average and Median Awards Jury and Bench Trials: 1980-97



	1980-89	1990	1991	1992	1993	1994	1995	1996	1997
Average	$1,460,616	$6,135,241	$7,909,938	$538,125	$1,010,988	$1,589,017	$540,715	$2,406,596	$20,782,455
Median	$200,000	$342,500	$550,000	$235,000	$275,500	$985,000	$150,000	$325,000	$310,000

Damages Study

(Continued from page 3)

as the average trial award was at an all-time high of $20,782,455. The next highest average award for an LDRC study period was in 1990-91 when the average trial award reported was $6,989,724. Without *MMAR* in the 1997 figures, the average trial award in 1997 drops to $588,700 — the *lowest* reported average award for any LDRC study period.

- The 1997 median award of $310,000 is the lowest reported since the 1992-93 study period which reported a $272,500 median award. The 1997 median award is also below the median for the 1990-97 period, which reported a $340,000 median award. The median award for the entire 1980-97 period is $200,000.

- The average 1997 compensatory award for jury trials, including the *MMAR* award, is $2,416,432, more than twice the average 1996 jury award. Without *MMAR*, the number is only $388,075, lower than any other study period in the 1990s. The 1997 median compensatory jury award, including *MMAR*, is $125,000, the same as the 1996 median and among the lower in the 1990s for jury trials.

- Including *MMAR*'s $200 million punitive award, punitive damages accounted for 88.4% of the total dollars awarded in 1997. Without MMAR, however, punitive damages accounted for 34.1% of the total dollars awarded. In 1996, punitive damages accounted for 59.2% of the total dollars awarded. Over the entire study period, 1980-97, punitive damages have accounted for 70.0% of the total dollars awarded.

- Only two awards in 1997 were for more than $1 million — fewer mega-verdicts than any other period in the 1990s. In fact, after *MMAR*, the next highest award was $3,673,000 in *Wynn v. Barricade Books*. This contrasts with the results reported in 1996 when 41.7% (5 out of 12) verdicts were for more than $1 million.

- Defendants continue to be most successful in federal courts. Defendants won 75% of their cases in federal court as opposed to 44.4% of those in state court. *But* the single loss in federal court — *MMAR Group, Inc. v. Dow Jones & Co.*— was the media's biggest ever.

- The percentages in public and private figure cases are close: defendants won 55.6% of the 1997 trials in which plaintiffs were public figures or officials and 50.0% of the cases where they were not, but the margin is only one case.

- For the 1990-97 period, defendants have fared slightly better where negligence is the standard but, the margin of difference may swing with one case. The 1980s present clearer evidence of the positive effect of actual malice, where defendants won 39.0% of the actual malice cases and only 27.8 % of the negligence cases.

- Television defendants won all of the trials (4 out of 4) in which they were involved in 1997, rebounding from 1996 when they won only 16.7% (1 out of 6) of their trials and 1994-95 when they won only 20.0% (1 out of 5) of their trials. Over the entire period, 1980-97 television defendants have won 46.5% (37 out of 76) of their trials. In contrast, radio defendants lost the two trials in which they were involved in 1997. Over the entire period radio defendants have won 33.3% (6 out of 18) of their cases.

- Newspaper defendants fared worse than their television counterparts at trial, both in 1997 and over the entire LDRC study period. In 1997, newspaper defendants won 41.7% (5 out of 12) of their cases and over the entire period have won 35.2% (83 out of 236) of their cases. Magazine defendants won their one trial in 1997 while book defendants lost their single case.

- Defendants have had only limited success on post-trial motions in 1997. Only 2 of 11 jury awards were modified by the trial court in 1997. The results of the overall period, 1980-97, show that defendants' greatest success on post-trial motions has been on motions for remittitur. Motions for remittitur have been granted in 13.4% (32 out of 239) of the cases.

- Eight of the 11 damage awards are on appeal and 2 cases have been settled. Plaintiffs have appealed only 2 of the 11 defense verdicts.

Texas Cattlemen v. Oprah

(Continued from page 1)

"Dangerous Foods" Airs

In what was to become the first test of the agricultural disparagement laws, which are now on the books in thirteen states, several members of the Texas beef industry brought suit over an April 16, 1996 Oprah Winfrey Show entitled "Dangerous Foods." During the broadcast, vegetarian activist and former cattle rancher Howard Lyman stated that mad cow disease — known technically as bovine spongiform encephalopathy ("BSE") — could "make AIDS look like the common cold." Lyman continued to state that, "[a] hundred thousand cows per year in the United States are fine at night, dead in the morning. The majority of those cows are rounded up, ground up, fed back to other cows. If only one of them has mad cow disease, it has the potential to effect thousands."

In response, Oprah noted, "[b]ut cows are herbivores. They shouldn't be eating other cows."

"That's exactly right, and what we should be doing is exactly what nature says. We should have them eating grass, not other cows. We've not only turned them into carnivores, we've turned them into cannibals," Lyman responded.

A few moments later Oprah asked her studio audience, "[n]ow doesn't that concern you all a little bit, right here, hearing that?" And to the increasing applause and supportive cheers she continued, "[i]t has just stopped me cold from eating another burger. I'm stopped!"

Dr. Gary Weber, a policy director for the National Cattleman's Beef Association ("NCBA"), appeared on the show to dispute Lyman's claims. Weber pointed out that BSE has never been documented in American cattle and that the beef industry "started taking initiatives ten years ago to make sure [a BSE outbreak] never happened here." When pressed on the question of whether cattle were being fed to cattle, however, Weber admitted that "[t]here is a limited amount of that done in the United States." Weber continued to state, "[n]ow keep in mind that before you view the ruminant animal — the cow — as simply vegetarian, remember that they drink milk."

The Fallout

On the day of the broadcast, livestock traders on the Chicago Mercantile Exchange sold off cattle futures, which fell a penny and a half to 59 cents — the maximum allowable drop for a single day's trading. Spokespersons for the NCBA called the show "irresponsible and biased," while Weber contended that the show had selectively edited his comments, cutting out most of his "scientific" rebuttal of Lyman.

In response, Oprah broadcast a follow-up show which featured a 10-minute one-on-one exchange between Oprah and Weber. During the second show Oprah stated, "[o]ur concern was for consumer safety and not about stock prices. I had no idea the stock prices were going to fall and I wasn't trying to influence them one way or another. You all need to know, you cattle people, that we're just dependent on y'all out there."

Apparently unappeased by the follow-up program, Texas Agricultural Commissioner Rick Perry asked the state attorney general to file suit against Oprah and Lyman under the food disparagement law. When the attorney general declined, feedlot operator Paul Engler, in conjunction with a number of Texas beef and cattle feed industry interests, stepped in and filed a $10.3 million suit on May 28, 1996.

The Trial

In a whirlwind of publicity, the trial began on January 21, 1998. Oprah, who has attended every day of the trial thus far, brought her show to Amarillo, taping every night in a local theater. Plaintiffs' case-in-chief centered on accusations that Oprah intended to create a biased program.

Both Oprah and Lyman were called to testify during the plaintiffs' case. For his part, Lyman denied having an agenda to get people to stop eating beef, rather he stated that he appeared on the show in order "to express my opinion on the mad cow disease and the circumstances surrounding it." Lyman also testified that his statements were based on nearly 180 scientific articles that he had read before appearing on the show.

Oprah maintained that it was not necessary for her or

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Texas Cattlemen v. Oprah

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the staff to have determined the truth, only that the people on the show believed what they were saying. "We are a talk show, and we present guests with opposing views. We believe that Mr. Lyman believed in what he was saying, and that's what we did," she testified. Oprah also pointed out that Weber and U.S. Department of Agriculture spokesman Dr. Will Hueston also appeared on the program to refute Lyman's claims. "I wasn't there to debate the issue; I was there to create the forum to allow them to do it," she stated. Oprah also denied having anything to do with the editing.

Plaintiffs also attempted to link the broadcast to the drop in cattle prices that cost them millions of dollars. Defendants disputed the plaintiffs' assertions arguing that the ranchers would not have lost as much money if they had held onto the cattle, rather than hedge by selling futures. In court, Chip Babcock stated, "[w]e're asked to pay the first element of damages (on the cash market) because prices went down, then we're asked to pay again (on the futures market) because they went back up."

On February 13, 1998 the plaintiffs rested their case and the defendants moved for directed verdict. Judge Robinson ordered a hearing to be held on February 17 and following a full day of argument granted the defendants' motion with respect to the "veggie-libel" law claim and the common law defamation claim.

While Judge Robinson did not declare the statute unconstitutional, she did agree with the defendants' assertion that the plaintiffs failed to prove their allegations under the statute. Despite dismissing two of the plaintiffs claims, however, Judge Robinson permitted the case to proceed on a common law business disparagement theory which actually raises the requirements plaintiffs must meet.

She has not issued an opinion or any statement of her reasoning.

Business Disparagement Under Texas Law

Under Texas common law, the elements of business disparagement are (1) publication by the defendant of disparaging words, (2) falsity, (3) malice, (4) lack of privilege, and (5) special damages. The plaintiff must allege and prove the falsity of disparaging words. As a general rule (*Auvil* aside) the plaintiff must prove the alleged false and disparaging words were "of and concerning" it/him, an element the agricultural disparagement law did away with. Further, the defendant is liable "only if he knew of the falsity of or acted in reckless disregard concerning it, or if he acted with ill will or intended to interfere in the economic interest of the plaintiff in an unprivileged fashion." *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987). The "or" in the requirement is constitutionally suspect.

In addition, the disparagement must play a substantial part in inducing others not to deal with the plaintiff, thereby resulting in special damages. A plaintiff must show pecuniary loss that has been realized or liquidated, such as specific lost sales. *Id.* at 767.

Recently Published
Limitations on Newsgathering: A Journalist's Guide

A new addition to King & Ballow's Comment Series of booklets, *Limitations on Newsgathering: A Journalist's Guide*, is a succinct overview of the potential legal problems that may arise in the newsgathering process. The booklet, designed as a quick reference, references recent decisions and surveys the law of intrusion, hidden and electronic surveillance, trespass, stalking, fraud, as well as negligence and contract theories of liabilty. In addition, the booklet reviews several topical post-publication privacy claims, including publication of private facts and false light. For ordering information, call 1-800-284-3801.

Georgia Supreme Court Rejects Absolute Privilege for Charges Made in Recall Petition

By Tom Clyde

The Georgia Supreme Court held on January 26, 1998 that a Georgia voter can be sued by an elected official claiming to have been defamed by allegations made in the voter's publicly filed recall petition.

In *Davis v. Shavers*, 1998 Ga. LEXIS 27 (Ga. January 26, 1998), a city councilman of Fort Oglethorpe, Georgia, brought a libel suit against the members of a political group called "Citizens for Responsible Government" who had filed a short-lived recall petition. Under Georgia law, registered voters may seek the recall of a public official by filing a petition with the election superintendent stating the factual and legal bases for recall in conjunction with an affidavit stating that the facts alleged are true. The official may challenge the allegations as legally insufficient in the state court system, but if the petition survives such a motion to dismiss, it is left to the voters, rather than the judiciary, to determine the merit in the specific allegations of misconduct.

Despite the fact that the recall petition charging councilman Shavers with improperly amending the city retirement system was promptly dismissed by a state court, Shavers retaliated with a defamation claim. Although 21 defendants were dismissed at summary judgment, the case proceeded to trial against the chairman of Citizens for Responsible Government and the member that initiated the recall petition. Verdicts of $40,362 were returned against both defendants.

The defendants appealed claiming, in part, that the trial court erred in refusing to grant their motion for j.n.o.v. because allegations in recall petitions are protected by Georgia's statutory privilege affording an absolute privilege to "all charges, allegations, and averments contained in regular pleadings file in a court of competent jurisdiction, which are pertinent and material to the relief sought, whether legally sufficient to obtain it or not." O.C.G.A. § 51-5-8.

The Georgia Court of Appeals disagreed holding that recall petitions were conditionally privileged as "comments upon the acts of public men in their public capacity" under O.C.G.A. § 51-5-(7), but not absolutely privileged. *Davis v. Shavers*, 225 Ga. App. 497, 484 S.E.2d 243 (1997). As the Court of Appeals explained, in contrast to the absolute privilege, the conditional privilege can be overcome "if actual or express malice is proven." The Court of Appeals refused to apply the absolute privilege because, unlike civil litigation, the recall process did not afford public officials a judicial means to answer charges, conduct discovery and call witnesses. The Court of Appeals, nevertheless, reversed the verdict on the alternate ground that the trial court's instruction confused actual malice with common law malice.

The Georgia Supreme Court accepted the case on certiorari specifically to address the privilege issue. Amici curiae, the ACLU and the Georgia First Amendment Foundation, urged the Court to apply the absolute privilege. Nevertheless, by a 6-1 vote, the Georgia Supreme Court affirmed the judgment of the Court of Appeals. The majority reasoned that application of the absolute privilege was improper because "the recall procedure is not a 'judicial' or even 'official' procedure, but is political in nature." Presiding Justice Norman S. Fletcher in his dissenting opinion noted that the Georgia General Assembly had protected public officials from false accusations in the recall process by making the submission of a false recall affidavit a crime punishable by fine up to $1000. The Court's decision, Fletcher stated, "eroded the right of recall" because "few individuals will sign a recall petition, much less lead a recall effort, when they face the possibility of a libel action for their participation."

Tom Clyde is with the firm Dow, Lohnes & Albertson in Atlanta, GA.

Jury Finds Against Delaware Paper, Reporter and Source In Libel Trial
Kanaga v. Gannett Co, Inc.
$3.282 Million Award

By Leslie Arrington

On January 26, 1998, a Wilmington, Delaware jury found the *Wilmington News Journal*, its reporter and its news source liable for defaming a local obstetrician/gynecologist. *Kanaga v. Gannett Co., Inc. et. al.*, C.A. No. 92C-12-182 (Del. Super. 1998).

The libel case concerned a July 5, 1992 news article published by the *News Journal*, entitled "Patient Feels Betrayed." The article discussed a complaint filed two months earlier by a patient, Pamela Kane, with the New Castle County Medical Society against her former ob/gyn, Dr. Margo Kanaga. Kane's complaint alleged that Kanaga had recommended an unnecessary hysterectomy to remove a fibroid tumor, that the recommendation violated the standard of care a patient is entitled to receive from a physician, and that Kanaga made the recommendation for financial reasons. Two weeks after Kanaga recommended the total abdominal hysterectomy, Kane's tumor was literally twisted out by another physician in an out-patient procedure, without anesthesia or incision.

Ms. Kane contacted the paper about her complaint and provided it with a copy, as well as with a surrepticiously taped telephone conversation between Kane and Kanaga. Kanaga would not talk to the paper, apparently awaiting the Medical Society decision. That decision, rendered several months later, exonerated Kanaga, and was reported by the *News Journal*.

Up to the Jury If Opinion Or Not

The defendants successfully moved for summary judgment in 1995, arguing that the article was not actionable because it (1) was opinion, and (2) was a substantially accurate report of the patient's Medical Society complaint. Plaintiff appealed, and in December 1996 the Delaware Supreme Court reversed (687 A.2d 173). The court held that the fair report privilege did not apply because the Medical Society was not an executive branch of government and its proceedings were not judicial. The court also found that an ordinary reader of the article could "infer the existence of undisclosed facts," and accordingly held that it was up to the jury to assess whether the article was opinion.

A three-week trial ensued, with lengthy testimony by Kanaga, Kane, the reporter, medical experts, and four days of testimony on compensatory damage issues. The jury awarded the plaintiff $2.6 million in compensatory damages against the media defendants, and $402,000 in damages against Kane. The damages award was predicated primarily upon an "expert's" predictions of lost future income resulting from the article's publication. In the second stage of a bifurcated proceeding, the jury awarded punitive damages of $260,000 against the media defendants ($10,000 of which was allocated to the reporter), and $20,000 against the patient.

Post-Trial Motions

The media defendants have filed post-trial motions; raising a range of issues, including the admissibility and sufficiency of the plaintiff's damages evidence. In a rather interesting twist, the plaintiff has moved to amend the judgment, claiming that the punitive damages award is too low and seeking additur from $.2 million to $71.2 million. The motions have not been determined.

Leslie Arrington is an associate of Nixon, Hargrave, Devans & Doyle, which represented the Wilmington News Journal reporter in this matter.

ILLINOIS APPELLATE COURT ALLOWS NEGLIGENT HIRING CLAIM TO PROCEED AGAINST BROADCASTERS

By Steven L. Baron

On January 30, 1998, the Illinois Appellate Court, First District, issued an opinion which paved the way for former Chicago Bear lineman, Keith Van Horne, to pursue claims for negligent and reckless hiring, supervision and retention against Chicago radio station WRCX and its owner, Evergreen Media Corporation (now Chancellor Media Company). *Keith Van Horne v. Matthew "Mancow" Muller, Irma Blanco, Evergreen Media Corporation and WRCX Radio, No. 1-96-0331* (Slip Op., 1-30-98).

The Defamation Claims

Van Horne's claims arise out of a November 11, 1994 radio broadcast on "Mancow's Morning Madhouse" during

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Negligent Hiring

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which the show's host, Mancow Muller, repeatedly reported on the air that Van Horne, who was then an Evergreen employee and host of his own radio show, had waited for Muller to arrive at the studio that morning, chased Muller down the hall and threatened his life. Van Horne swiftly filed a multi-count suit alleging defamation *per se* against Muller, Muller's co-broadcaster, Irma Blanco, WRCX Radio and Evergreen Media Corporation. Cook County Circuit Court Judge Michael Hogan dismissed the defamation claims against Blanco without prejudice but found the that the balance of the complaint stated proper defamation claims against the remaining defendants.

The Negligent Hiring, Supervision and Retention Claims

Van Horne filed an amended complaint in which he attempted to re-plead and bolster his claim for defamation against Blanco, who had reported the incident between Van Horne and Muller in her news broadcasts during the show. Van Horne also added new claims against WRCX and Evergreen for negligently and/or recklessly hiring, supervising and retaining Muller. In the amended complaint, Van Horne described seven instances where Muller allegedly acted in an irresponsible, outrageous and reckless manner in previous broadcasting jobs and in his current job. Specifically, Van Horne alleged that while Muller was a radio personality in California, he obstructed access to the San Francisco Bay Bridge for three hours causing a traffic jam involving 35,000 commuters; dropped cinder blocks off a California Bayshore overpass causing damage to cars parked below; harassed the host of a local television program by calling her "fat" and "unprofessional" over the air; and designated a day as "Alzheimer's Awareness Day" where he visited a geriatric center and asked the residents questions they could not answer. Van Horne also alleged that while employed by WRCX and Evergreen, Muller declared a "Roadkill Tuesday" where he prompted listeners to leave dead animals at a shopping mall, and directed an on-air associate to stand on a Chicago bridge while holding a sign that read "Honk and we'll drop a cinder block." According to Van Horne's amended complaint, WRCX and Evergreen knew or should have known of Muller's conduct at other radio stations and, therefore, should have refused to hire him to host a radio show in Chicago. Once on the air at WRCX, said Van Horne, the station and Evergreen breached their duties to properly supervise Muller and negligently kept him on the air even after he instigated the stunts noted above.

The Trial Court's Ruling

Defendants Blanco, WRCX and Evergreen filed a second motion to dismiss challenging the sufficiency of the defamation allegations against Blanco and arguing that Van Horne could not state claims for negligent or reckless hiring, supervision and retention against Muller's employers. WRCX and Evergreen argued that no Illinois court had recognized causes of action for negligent hiring, supervision and retention in the absence of some underlying *physical* injury to the plaintiff, and there were no reported cases in the country where the predicate injury was damage to reputation resulting from an alleged defamation. The trial court agreed and dismissed the employment tort counts with prejudice. The trial court also dismissed with prejudice the claims against Blanco. The trial court certified an interlocutory appeal.

The Appellate Court Reinstates Claims

After more than eighteen months on appeal, the Illinois Appellate Court, First District, reversed the trial court's dismissal of the defamation claims against Blanco and also reversed the dismissal of the claims for negligent and/or reckless hiring, supervision and retention against WRCX and Evergreen. *Van Horne*, Slip Op. 1-30-98 at 2. As against Blanco, the Appellate Court found that Van Horne had sufficiently plead facts to support a claim that Blanco had participated in Muller's defamatory comments. "Blanco was not a disinterested or detached witness to Muller's defamatory remarks," stated Justice Quinn (writing the opinion for the three judge panel), "rather she was an active participant." *Id.* at 5. The Appellate Court also found that Van Horne adequately plead a claim for defamation based on Blanco's own comments. The Appellate Court based its ruling principally on Blanco's news reports of the incident, in which she stated:

> Keith Van Horne's violent side was shining through this morning shortly after 5:00 a.m. in the John Han-

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Negligent Hiring

(Continued from page 9)

> cock building. Former Bears lineman Van Horne, who is already in a little bit of trouble for allegedly hitting a woman at a gas station, literally ran into Mancow at the elevators in the building, with a near brawl with Van Horne threatening Mancow's life, calling him names, and even talking about a lawsuit.

The Appellate Court found these statements to give rise to a claim for defamation *per se* because Blanco imputed that Van Horne had committed the crime of assault. *Id.* at 8.

Perhaps the most significant aspect of the Appellate Court's ruling was its decision to reinstate the employment tort counts against WRCX and Evergreen. Although the Appellate Court acknowledged that in Illinois "some form of physical injury" had been alleged in each of the cases where claims for negligent hiring had withstood challenge, the Court held that physical injury was not a prerequisite to such a claim. *Id.* at 12. The Appellate Court also rejected the defendants' First Amendment argument that extending negligent hiring claims to broadcasting companies who hire controversial broadcasters would have a chilling effect on speech. The Court stated that "the intent of this holding is not to discourage companies from hiring controversial broadcasters, rather, the intent is to protect innocent persons from defamatory remarks." *Id.* at 13. WRCX and Evergreen had also argued in their brief on appeal that if Van Horne's claims are recognized, then radio and television companies could be held liable not for what a broadcaster *has* said, but for not accurately predicting (i.e. guessing) what he *might* say at some point in the future. The Appellate Court disagreed and dismissed the argument in one final sentence, noting "[w]e do not consider a review of a prospective employee's past to determine his or her fitness for a job as a broadcaster to be unduly burdensome."

Defendants are seeking leave to appeal to the Illinois Supreme Court.

Steven L. Baron, a partner at the Chicago based firm D'Ancona & Pflaum, represents Mr. Muller, Ms. Blanco, WRCX Radio and Evergreen Media Corporation in this matter

Reporter and Paper Ordered to Pay $500,000 for Civil Contempt

In a case that pitted the institution of the free press against the inherent power of the court to punish civil contempt, an Eastern District court in North Carolina recently awarded $500,000 to Conoco, Inc. for damages it claimed it suffered as a result of a press report that disclosed the terms of a confidential settlement Conoco had entered to end a toxic tort case. *Ashcraft v. Conoco, Inc. et al*, No. 7:95-CV-187-BR(3), slip op. (E.D.N.C. January 21, 1998). Kirsten B. Mitchell, a reporter for the Wilmington *Morning Star* and the New York Times Regional Newspaper Group, was held joint and severally liable, along with the *Morning Star*, for willfully violating a court order that sealed the terms of the settlement. Mitchell discovered the terms of the settlement when a court clerk inadvertently gave her a file containing the sealed agreement.

The court did, however, find that another reporter involved in the story, Cory Reiss, was not in contempt. Reiss had not seen the sealed documents, but had learned of their contents from confidential sources. The court refused to compel Reiss to divulge the identities of the confidential sources who had divulged the settlement figure to him. The court previously found Mitchell in criminal contempt. *See LDRC LibelLetter*, January 1998 at 20. Sentencing is scheduled for February 24, 1998.

Confidential Settlement Reported

The civil contempt charges arose out of an order entered by the court on September 22, 1997. The order granted the joint motion of Ashcraft and Conoco to approve a confidential settlement agreement and to permit filing and maintenance of confidential documents under seal. Some of the terms of that sealed agreement were published in the October 15, 1997 edition of the *Morning Star*. That publication led defendants to request that the *Morning Star* and the two reporters involved with the story, Reiss and Mitchell, be held in criminal and civil contempt. At the conclusion of the criminal pro-

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Civil Contempt

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ceedings, the court found Mitchell in criminal contempt, and found that Reiss and the *Morning Star* were not guilty. *Id.* at 4.

As for the civil contempt charges, Conoco argued that Reiss repeatedly canvassed plaintiff's mobile home park in an effort to induce someone to violate the court's order and reveal the terms of the settlement. Conoco contended further that Mitchell opened a sealed envelope given to her inadvertently by a court clerk in defiance of the message contained on the face of the envelope which warned that its contents were confidential. Mitchell testified that she did not see this legend until after she reviewed the document. The other side of the envelope, which she did see originally, bore a window saying "opened" on its flap. Last, Conoco argued that after an editor at the *Morning Star* had been placed on notice by the lawyers in the case that the information was confidential, the *Star* published the court-sealed material without taking further affirmative steps to determine whether the document was still under seal. *Id.* at 9.

Reporter Opens Document From Court Clerk

In its findings, the court concluded that Mitchell had acted in contempt of court when she opened the sealed case file that the court clerk had inadvertently handed to her. The court found that Mitchell had knowledge that the case file was sealed, or that it had been sealed because, in reviewing the file, she viewed both the language on the front of the envelope and the order sealing the agreement attached as a cover by butterfly clip to the actual document. *Id.* at 10. Mitchell testified that she did not recall seeing the two pages sealing the order. "[W]hen Mitchell read the settlement and disclosed its contents to her editor, she violated the court's express directive to maintain the agreement under seal." *Id.* at 11.

The court rejected Mitchell's argument that once the file was handed to her, "the cat was out of the bag," saying that "Mitchell was not privy to the settlement figures until she took the affirmative step of opening a sealed document." *Id.* at 11. It faulted her for making no effort to determine if the documents were still under seal. The court gave no weight to its finding that the court clerk had segregated part of the file containing other documents saying that those were sealed.

The court also found that the order had been for Conoco's benefit and that the company was harmed by Mitchell's action. The court then rejected as a mitigating factor that the *Morning Star* could have printed the settlement amount from independent confidential sources interviewed by Reiss. The court found that though "it is true that the story, as put together by Reiss, would no doubt have disclosed the settlement figure from the 'confidential sources,' the fact that those terms were confirmed added greater weight and credibility to the *Morning Star*'s story. *Id.* at 12.

Newspaper Knew Info Had Been Sealed

The *Morning Star* itself was found in contempt upon the finding of "uncontroverted, clear and convincing evidence of actual knowledge on the part of the *Morning Star* of the existence of an order and of Mitchell's violation thereof." *Id.* at 14. Mitchell's testified that she informed the City Editor of the paper that the Settlement Agreement was either under seal or had been under seal. *Id.* at 14. The court added that, under the circumstances, the contempt charge could be premised upon agency theory. The court concluded its analysis concerning the *Morning Star* by saying that "[t]he inescapable facts are that the newspaper's employee intentionally violated the terms of a known court order and that the newspaper itself knowingly published information obtained in violation of that order." *Id.* at 13. Had the *Morning Star* "printed only Reiss' story, without the paragraph 'confirming' the agreement from sealed court documents, it would not have violated any order of this court." *Id.* at 15.

Last, the court rejected Conoco's argument that Reiss, the by-line writer, should be found in civil contempt. The court found that it did not appear that Reiss was aware that the Settlement Agreement was officially filed under seal by the court. *Id.* at 16. Most importantly, said the court, the testimony indicates that Reiss did not play a role in adding the sentence disclosing that court documents confirmed the

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Civil Contempt

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settlement figure.

Reporter's Sources Found Privileged

The court believed testimony that indicated that Reiss had discovered the actual settlement amount from confidential sources whom he refused to identify. The court denied Conoco's request to compel Reiss to identify the sources, ruling that the reporter's privilege applied. The court found that Reiss should not be made to identify his sources because, first, Conoco could not demonstrate that the information was relevant to the civil contempt proceeding. The court found to whom Reiss spoke irrelevant to the civil contempt analysis; all that matters is that he discovered the settlement number from some source other than the sealed court document. Also, the court ruled, Conoco had not exhausted the alternative means by which it could find the identity of the sources. *Id.* at 19.

The court arrived at the award of $500,000 in its effort to compensate Conoco for the "losses it sustained" as a result of the breach of the court order. *Id.* at 20. The court found it "highly likely" that most if not all of the remaining 50 or so similar toxic tort cases that Conoco is defending will be harder for it to settle. One expert testified that as a result of the disclosure, Conoco could expect to spend 15 to 20 percent more defending other toxic tort cases. The court also awarded Conoco attorneys fees that it expended in pursuit of the contempt citation.

The *Morning Star* and the reporters have filed notices of appeal of the civil contempt ruling to the U.S. Court of Appeals for the Fourth Circuit. They had already announced that they would appeal Mitchell's criminal contempt conviction soon after the February 24 sentencing.

Ethical Guidelines for Legal Television Commentators Considered

The proliferation of lawyers as television commentators has led some in the legal community to suggest the voluntary adoption of a code of ethics to guide legal commentators. The February issue of the *ABA Journal* dedicates an article to the topic, pointing out that there is a movement afoot to adopt such ethical standards.

Two lawyer commentators, Laurie Levenson and Erwin Chemerinsky, have placed themselves at the forefront of the debate, having written two recent law review articles calling for a voluntary code of ethics for legal commentators.

Among Chemerinsky and Levenson's suggestions are the following: commentators should refrain from commenting unless they know the law of the jurisdiction and the facts of the case; they should never reveal confidential information; they should not act as an investigator or reporter; they should disclose or rid themselves of conflicts of interest; they should avoid making predictions; they should make only neutral comments that do not favor one party over another; and, most onerously, they should refrain from commenting unless they have seen or read every moment of the trial.

These suggestions have served as the springboard for discussion among others who are concerned with the on-air behavior of legal commentators. One group to take up the suggestions and debate them vigorously is the National Association of Criminal Defense Lawyers (NADCL). Its president, Gerald Lefcourt, wrote a column in November of 1997 announcing that the NADCL was considering ethical guidelines to assists members who provide legal commentary. He stressed that the guidelines would be precatory, and that there would most likely be no enforcement committee.

Since Lefcourt's article appeared, members of the NADCL have met several times to discuss proposed recommendations. An ad hoc group within the NADCL called the Ethical Standards For Commentators Committee has proposed recommendations that meet each time with vigorous opposition and debate. As yet, no code has been adopted, and the committee is working on refining its suggestions.

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Santa Monica Court Convicts Photographers in Schwarzenegger Incident

By Rex S. Heinke and Heather L. Wayland

After a two-day bench trial ending February 2, 1998, a Santa Monica Superior Court judge convicted two celebrity photographers of false imprisonment, and one of the two for reckless driving. Sentencing is scheduled for February 21, 1998. On the misdemeanor false imprisonment charges, the two photographers face a potential sentence of up to two years in prison. The reckless driving charge could carry an additional 90 days. The judge acquitted the photographers of all other charges, including battery.

Schwarzenegger, Shriver and Son Pinned in Car

The charges against the two photographers arose from their aggressive effort to be the first to photograph Arnold Schwarzenegger after open-heart surgery. Judge Robert Altman found that, on May 1, 1997, the two defendants followed Schwarzenegger and his wife Maria Shriver as they drove their son to nursery school, and upon arrival at the school, essentially trapped the family inside their car. One of the photographers hit the Schwarzenegger car as he pulled alongside the car in his sports utility vehicle. The two photographers briefly pinned the family inside their car while they took pictures.

Judge Altman emphasized the serious health risks created by the photographer's actions: Schwarzenegger, who had undergone heart surgery for a valve replacement only about one week earlier, testified that he feared death and held a pillow to his chest during the incident to prevent his stitches from ripping out; Shriver, meanwhile, was five months pregnant with the couple's fourth child and had spent time in the hospital for complications.

Some commentators have suggested a link between these convictions and the anti-paparazzi backlash associated with the death of the Princess of Wales. However, the Schwarzenegger incident occurred on May 1, 1997, well before Princess Diana's death in August 1997. Furthermore, the misdemeanor of false imprisonment is notorious for the potential breadth of what it covers: Assuming the two photographers committed the acts as found by the judge, it is not surprising that the false imprisonment statute would be found to apply.

Celebrity/Paparazzi Rows an L.A. Regular

This case merely reaffirms the unremarkable principle that paparazzi are not immune from criminal prosecution. In fact, confrontations between celebrities and paparazzi have also led to criminal charges against celebrities, such as Tommy Lee, Alec Baldwin, Robert De Niro and Sean Penn. Thus, this is not the first time that Los Angeles authorities have invoked criminal laws to regulate aggressive confrontations between photographers and celebrities, nor is it likely to be the last.

Paparazzi Harrassment Act

While the death of Princess Diana did not spawn the Schwarzenegger case or the other criminal prosecutions involving paparazzi, it has spawned attempts to create new regulation. On January 2, 1998, California Senator Tom Hayden (D-Los Angeles) introduced a bill which would make it a tort to "harass a public figure or other person of media interest . . . by photographing, videotaping, or otherwise intruding upon the privacy of that person for compensation or the expectation of compensation." Entitled the Paparazzi Harrassment Act of 1998, that bill would also impose strict liability on any publisher or employer who "requests, encourages, induces, or instructs another to take photographs or videotapes and knows or reasonably should know that obtaining the photographs or videotapes will violate this section." 1997 CA S.B. 1379.

California Senator Charles Calderon (D-Montebello) has made similar proposals to protect celebrities from unwelcome media attention. Under Calderon's proposal, which has not yet been formally introduced, photographers would be required to remain at least 15 feet away from any celebrity who wanted privacy. Both the Hayden and Calderon proposals raise serious constitutional questions because they would substantially restrict newsgathering.

Mr. Heinke and Ms. Wayland are in the Los Angeles office of Gibson, Dunn & Crutcher.

Post-Diana Syndrome Continues: U.S. Senators Hatch and Feinstein Plan to Introduce Federal "Anti-Paparazzi" Bill

California Senator Dianne Feinstein (Dem.) and Utah Republican Senator Orrin Hatch, the powerful chairman of the Senate Judiciary Committee, announced at a February 17, 1998 press conference before the Screen Actors Guild in Los Angeles, that they will introduce a bill this month to criminalize aggressive behavior of "paparazzi" photographers. In a Judiciary Committee press release, Senator Hatch described his co-sponsorship of the legislation as "a tribute to the efforts of Congressman Sony Bono, who brought this issue to the fore."

The spirit of Diana also hovers over this bill. Both Senators cite her tragic death as an event that focused attention on overly aggressive photographers who invade people's privacy. The recent conviction of paparazzi for trapping Arnold Schwarzenegger, Maria Shriver and their young son, (see preceding article p. 12) no doubt influenced this bill. Describing the problem in dramatic terms, Senator Feinstein added that:

> There is something wrong when a person cannot visit a loved one in the hospital, walk their child to school, or be secure in the privacy of their own home without being chased, provoked, or intruded upon by photographers trying to capture pictures of them to sell to the tabloids.

The proposed legislation, called in short form the "Personal Privacy Protection Act," makes it a federal crime for photographers and their direct assistants (apparently drivers and other on-scene technical assistants) to harass people, which is described as "persistently following or chasing a person in a manner that causes them to have a reasonable fear of bodily injury, in order to photograph, film, or record them for commercial purposes." Violators are subject to a prison term of up to one year; at least five years if serious bodily injury is caused; and at least 20 years if the harassment causes death. In addition, the bill creates a civil cause of action that allows victims to sue for compensatory and punitive damages, as well as injunctive and declaratory relief.

The bill also creates a second civil cause of action, with identical remedies, for incidents of trespass by photographers. Trespass, most notably, will not be limited to physical invasion of private property, but will be broadened to incidents where photographers use visual or auditory enhancement equipment, such as telephoto lenses, parabolic microphones, and helicopter surveillance, to capture images that they otherwise could not have captured without trespassing.

A "Background" paper on the proposed act suggests that the expanded trespass action is designed to protect people's private lives, but other statements on the Act suggest it applies broadly to use of high powered equipment and helicopters. The Act takes aim as well at ride-alongs and what the senators see as other trespass/intrusion law limitations. The Background paper notes that one of the insufficiences in current trespass law that the Act is designed to remedy was illustratd by a jury verdict in Oregon for defendants in a ride-along case, where a TV crew taped the execution of a search warrant at plaintiff's home. The jury had found the alleged intrusion was not "highly offensive."

The full text of the proposed bill is not yet available. Thus it is unclear whether or how the bill purports to treat First Amendment concerns. According to Senator Hatch's press release, the bill will be limited to the "paparazzi" and will not apply to publishers. Senator Feinstein's announcement is more ominous with respect to the First Amendment issues. According to her announcement, federal legislation is necessary, in part, because of "news gathering" exceptions permitted by certain unnamed state courts. In addition to the late-Congressman Sony Bono, the Senators also credit Professors Erwin Chemerinsky of USC Law School, Cass Sunstein of the University of Chicago Law School and Lawrence Lessig of Harvard Law School for drafting the legislation.

Injunctions Lifted on Rock N' Roll Hall Of Fame Photos

By Richard M. Goehler

On January 20, 1998, the United States Court of Appeals for the Sixth Circuit vacated the preliminary injunction which had been issued against a professional photographer who was selling photographs of the Rock and Roll Hall of Fame Museum in Cleveland.

In 1996, Charles Gentile, a professional photographer, began to sell posters featuring a photograph of the Rock and Hall of Fame Museum. The poster-size photographs were framed by a black border and in gold lettering in the border underneath the photograph were the words "ROCK N' ROLL HALL OF FAME," above a smaller, but elongated, word "CLEVELAND." In response to Mr. Gentile's poster, the Rock and Roll Hall filed a five count complaint in the United States District Court for the Northern District of Ohio. The complaint alleged that the Hall had used both its registered service mark "THE ROCK N' ROLL HALL OF FAME" and its business design as trademarks and that Gentile's photographs infringed upon those marks. The complaint asserted claims for trademark infringement and unfair competition.

At the preliminary injunction hearing, the Rock and Roll Hall argued that the Hall had used both its building and design and its service mark "THE ROCK N' ROLL HALL OF FAME" as trademarks and that the photograph of the Hall and the words identifying the Hall in Gentile's poster were uses of the trademarks that were likely to lead to consumers believing that Gentile's poster was produced or sponsored by the Rock and Roll Hall.

Judge George L. White, U.S. District Court Judge, ultimately found that the Hall's building design was a fanciful mark and that Gentile's use of the building design and the word "ROCK N' ROLL HALL OF FAME" were likely to cause confusion and, as a result, issued the injunction ordering Gentile to refrain from further infringements of the trademarks and to "deliver . . . for destruction all copies of defendants' poster in their possession."

In its January 20 decision, the Sixth Circuit vacated the preliminary injunction because it did not find that the Hall had established a strong likelihood that Gentile had made an infringing trademark use of the Hall's name or building design. The Sixth Circuit's decision was based on the following findings:

1. There was no evidence in the record which would demonstrate a public recognition of the Hall's building design as a trademark;

2. A picture of the Hall on a product might be more readily perceived as ornamentation than as an identifier or source for trademark purposes; and

3. Gentile's use of the words, "ROCK N' ROLL HALL OF FAME," may very well constitute a fair use of the Hall's registered service mark.

Finding, therefore, that the District Court had abused its discretion when it concluded that the Hall had shown a strong likelihood of proving its trademark infringement claims, the Sixth Circuit vacated the injunction and remanded the case for further consideration.

Richard M. Goehler is with the firm Frost & Jacobs in Cincinnati, OH.

Federal Legislation To Limit Punitive Damage Awards

By Victor E. Schwartz and Mark A. Behrens

As readers of this newsletter know, tort litigation against media and entertainment defendants appears to be on the rise. The Texas cattlemen's multimillion dollar "food disparagement" suit against talk-show host Oprah Winfrey in the Texas Panhandle is perhaps the most current and visible example of this apparent trend. Other noteworthy examples include:

- - In August 1997, a federal court in North Carolina entered a $315,000 punitive damages judgment in a case brought by Food Lion Inc. against Capital Cities/ABC Inc., ABC Holding Companies, and four producers of ABC's "Prime Time Live" program alleging fraud and criminal trespassing arising out of a hidden-camera report on the grocery chain. The jury awarded only $1,402 in actual damages;

- - In October 1996, a Texas jury awarded $4.5 million in punitive damages and $550,000 in actual damages against an ABC-owned television station in Houston which allegedly ran a malicious story on a Houston mayoral candidate in 1991; and

- - In March 1996, a federal jury in Texas awarded $5 million in punitive damages and just $1 in actual damages to a company that said it was defamed by a story on Tri-Star Television Inc.'s "TV Nation" program about sludge the firm spread on a Texas ranch. The segment, "Sludge Train," won an Emmy Award.

Recently, Utah Republican Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Connecticut Democratic Senator Joseph Lieberman introduced legislation to help reduce the problem of excessive punitive damages awards in defamation and other "financial injury" lawsuits that involve little or no physical Injury. While their recitation of the findings and purpose of the bill speaks of "financial injury cases," in fact, when one looks at the specific provisions of the proposed act, it would cover a wide range of cases, including those in which the damages awarded are for reputational harm.

The civil actions covered include cases in which "the claimant seeks to recover punitive damages under any theory for harm that did not result in death, serious and permanent physical scarring or disfigurement, loss of a limb or organ, or serious and permanent physical impairment of an important bodily function." Section 4(a)(1). There are exceptions for certain crimes of violence, terrorism, etc., but none would be relevant to media content-based claims.

Puts Cap on Punitives

In general, the Hatch-Lieberman bill, S. 1554, the Fairness in Punitive Damage Awards Act, would limit the amount of punitive damages that could be imposed in financial injury cases to three times the amount awarded to the claimant for economic loss (*e.g.*, lost wages or loss of business opportunities) or $250,000, whichever is greater. A special rule in the bill would limit the amount of punitive damages that could be awarded against an individual whose net worth does not exceed $500,000 or against an owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization which has fewer that twenty-five full-time employees, to three times the claimant's economic loss or $250,000, whichever is less. The bill would not affect lower punitive damage "caps" in the states.

Rand Study Finds Big Jump in Punitives

The bipartisan legislation addresses a large and growing problem for the media, insurers, realtors, securities firms, and banks, among other businesses. A June 1997 Rand Institute for Civil Justice Study which examined all jury verdicts in New York and California, as well as Houston, Texas, St. Louis, Missouri, and Chicago, Illinois from 1985-1994, and for the entire state of Alabama from 1992-1997, found that punitive damages were awarded in one out of every seven cases alleging a financial injury. The Rand study also found the average punitive damage award in fi-

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Federal Legislation To Limit Punitive Damage Awards

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nancial injury cases rose from $3.4 million to $7.6 million during the time periods studied, and that the total amount of punitive damages awarded nearly doubled from $1.2 billion to $2.3 billion. The Rand study was the subject of a Senate Judiciary Committee hearing on June 24, 1997.

Though significant on their own, the Rand findings represent just the tip of the iceberg in regard to the problem of excessive punitive damages awards in financial injury cases. The amounts paid in actual awards are dwarfed by the amounts paid out in settlements due to the *in terrorem* effect of punitive damages. As a February 1996 study by the Pacific Research Institute for Public Policy concluded: "[T]he uncertainty posed by the prospect of unlimited punitive damages, combined with the relative probability of a punitive damage award if a case goes to jury trial, provide litigants who demand punitive damages with potent leverage against risk-averse defendants, and tip the balance in settlement bargains in favor of litigants with weak or frivolous cases."

The Fairness in Punitive Damage Awards Act would provide a significant benefit to individuals and businesses who find themselves on the receiving end of a financial injury lawsuit. Already, the legislation has received the support of several effective trade groups, including the American Council of Life Insurance, the Mortgage Bankers Association of America, the National Association of Realtors, and the National Federation of Independent Business, which represents approximately 600,000 smaller businesses nationwide. The legislation may be the subject of additional hearings in the Senate or House of Representatives this Spring.

Victor Schwartz is a senior partner in the Washington, D.C., law firm of Crowell & Moring LLP. Mark Behrens is Of Counsel at Crowell & Moring LLP. Messrs. Schwartz and Behrens serve as counsel to the American Tort Reform Association (ATRA).

Sunshine in New Hampshire

Victory for Right-to-Know

By Joseph D. Steinfield

Right-to-Know laws allowing citizens to inspect public records exist throughout the country. Reporters often rely on these laws when they investigate government activites, or the activities of private individuals doing business with the government. A recent New Hampshire Supreme Court decision issued not only a ringing endorsement of its state's Right-to-Know law -- which like those of many states, is modeled on the federal Freedom of Information Act -- but suggests a new, and potentially potent, use of the *Vaughn* index requirement. *Union Leader Corp. v. New Hampshire Housing Finance Authority*, N.H. (http://www.state.nh.us/courts/supreme/opinions/9712/union.htm) (December 31,1997).

Since its creation by the District of Columbia Court of Appeals in 1973 in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974), the *Vaughn* index has been widely adopted. Courts have recognized that in order to deal with requests for large numbers of documents, some practical device is essential in order to deal with exemptions claimed by resisting parties. In *Union Leader Corp.*, the New Hampshire Supreme Court adopted the *Vaughn* index requirement for the state. If that were the full extent of the decision the case would be important to the press in New Hampshire but otherwise of little moment. However, the decision addressed another issue - what sanction is available when a party fails to provide a proper index?

Two newspapers, the Manchester Union Leader and the Concord Monitor, wrote letter requests to the state's Housing Finance Authority in 1994, seeking to inspect documents dealing with the authority's funding of two housing projects. After initially opposing the request, the Authority, a quasi-public agency, assumed a neutral position when the newspapers filed suit. The developer and its principal, Stephen M. Duprey, intervened and contended that several thousand documents were exempt from public disclosure by reason of one or more of the statutory exemptions – confidential matters, personal financial papers and the like.

When the matter came before the trial judge it quickly became apparent that some device was needed in order to cope with the vast quantity of documents at issue. Counsel for Duprey argued that New Hampshire precedent required the judge to review each document in camera. Counsel for the Concord Monitor had a different idea – that the court should order Duprey to provide a *Vaughn* index, a detailed description, by category, of the withheld documents and the legal grounds for withholding them from public view. The court granted the Monitor's re-

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quest.

When the index was produced – some 478 numbered paragraphs – it shed little light on what the documents were or why they should not be made public. The Monitor moved for a better index, one which would enable the newspapers to argue their case for disclosure. The court granted the motion and warned Duprey that failure to comply would lead to serious sanctions. The second index, however, was little more than a rehash of the first, albeit spread over more pages. The Monitor then moved for summary disclosure, arguing that the proper remedy for failure to comply with the *Vaughn* index order was immediate disclosure of the documents, without further inquiry as to whether they might meet one or more of the statutory exemptions. The trial judge so ruled.

The New Hampshire Supreme Court affirmed the lower court in a lengthy opinion attesting to that court's absolute commitment to the underlying purposes of the Right-to-Know law. First, the court agreed that the Agency, even though not supported by public funds, performs a vital public function and is a "public instrumentality" subject to the statute. Second, the court approved the *Vaughn* index procedure, explaining that it places an appropriate burden on a party seeking not to disclose and is consistent with the statute's purpose to maximize disclosure of public documents. And, finally, the court agreed that the second index was inadequate and upheld the summary disclosure order as a reasonable exercise of the trial judge's discretion.

This last ruling, applicable to state agencies and objecting private parties alike, represents a significant development in right-to-know jurisprudence. The question of what sanctions are available when a party fails to provide an adequate *Vaughn* index has not arisen with great frequency, but public or private parties in FOIA litigation are now on notice that such an index must contain a detailed description of each withheld document together with a specific reason why the document is exempt from disclosure. Ordering immediate disclosure for failure to meet these requirements, according to the New Hampshire court, serves the public interest in obtaining the greatest possible access to government documents. If, as Brandeis said, sunshine is the best disinfectant, New Hampshire has become a state where the sun never sets.

Joseph D. Steinfield and Robert A. Bertsche of the firm Hill and Barlow in Boston, MA represented the Concord Monitor in this case.

Megan's Law: The Problems of Further Disclosure

By Peter Banta

Can Passing the Information on be Barred?

On July 29, 1994, Megan Kanka, a seven year old child, was abducted, raped and murdered near her home. The man who confessed to Megan's murder lived in a house across the street from the Kanka family and had twice been convicted of sex offenses involving young girls. Megan, her parents, local police, and the members of the community were unaware of the accused murderer's history; nor did they know that he shared his house with two other men who had been convicted of sex offenses. The result of Megan's brutal death in her own neighborhood was outrage and fear, even panic, not just in the community, but throughout the state. Citizens, newspapers, legislators called for legislation requiring registration and community notification for released sex offenders.

Quick Passage of Law

Bills were soon introduced in the legislature. Some citizens and civil libertarians felt the issue needed some thoughtful response and study before action was taken. Not to be. The bills were never referred to committee for study. No legislative hearings were held. Quickly, two bills were passed and signed by the governor.

The first (*N.J.S.A.* 2C:7-1 to -5) called for registration for all released sex offenders, including those who had served their full sentences. The second (*N.J.S.A.* 2C:7-6 to -11) provided for community notification. The attorney general was charged to develop guidelines, with the assistance of a Notification Advisory Council, for assigning an offender to a particular level of risk to the community based on the type and circumstances of the offense, degree of rehabilitation and other factors.

In Level One, the mildest, the offender had to register with the police, and only law enforcement officials were notified of the offender's presence in the community. In Level Two, the same registration and police notification took place, and community institutions likely to encounter the of-

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Megan's Law

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fender would be notified. These could be schools, religious institutions, libraries, scouts, YMCA's, etc. The Third Level, the most severe, included Level Two notification plus door to door notification in affected neighborhoods - the scope to be determined by the local police in conjunction with the county prosecutor.

Law Challenged and Stayed

As soon as the law took effect, litigation commenced against it in both federal and state courts. The chief argument was that as to offenders whose offenses predated the law (all offenders at that point) the law was essentially punitive and violated the *ex post facto* prohibition of the U.S. Constitution. It would expose offenders who had paid their debt to society and had served their time to harassment, vigilantism, stigma and would drive them from community to community. In fact, several "vigilantes" did attempt to commit an assault on a released sex offender, but beat up the wrong person, an innocent victim. Prosecuted, they were sentenced to no jail time. Another issue was due process violations in that there was no means for the offender to challenge the prosecutor's classification.

Despite the public clamor for action, the law was stayed by injunction pending final ruling. Finally, the New Jersey Supreme Court ruled in November 1995 in *Doe v. Poritz*, 142 N.J. 1, 666 A.2d 367 (1995). The court labored mightily to uphold Megan's Law, primarily by making dubious assumptions and imposing procedural requirements not found in the statute.

New Jersey Supreme Court: Assumes No One Will Tell

The opinion recognized that there would be a substantial stigma attached to community notification without limits and such stigma and humiliation could be sufficiently punitive as to implicate the *ex past facto* law prohibition. The court found that the state's interest in disclosure outweighed the offender's interest in privacy. 100 N.J. at 88.

The court said that for the law to be constitutional the court would have to assume that people and groups who received the notification would not further disclose it to others. The court recognized that the press might learn of the presence of the offender in the community and publicize that fact. The court acknowledged that there were constitutional issues inherent in trying to restrain or punish press disclosure and disclosure by members of the public. It assumed that the press in the spirit of the law would not reveal the presence of the offender, even if law enforcement authorities, community institutions and whole neighborhoods had received handbills about the residence of the sex offender in the community. The court noted there was no specific prohibition against further disclosure in the statute. And without trying to reconcile its prior acknowledgment of constitutional concerns, the court invited the legislature to specifically criminalize further disclosure, referring to several other statutes about disclosure, involving names of child sex abuse victims and juvenile records.

The court stated "public notification implicates a privacy interest in nondisclosure, and therefore triggers due process" 142 N.J. at 100. The court further found that a Tier Two or Tier Three classification would cause harm to reputation, which coupled with the primary right was a protected interest. To save the law from due process deficiencies, the court created a closed court proceeding in which the offender could challenge the prosecutor's classification of him or her.

A Dissent: But People Will Tell

The sole dissent, by Justice Stein, in effect said that however laudable the court's attempt to save the law, its dubious assumptions as to the likelihood of further nondisclosure were contrary to human nature and experience. He noted that although an injunction prevented police from implementing Megan's Law, in one instance, in Passaic, Curtis Sliwa's Guardian Angels organized a community protest and demonstrated outside a released offender's mother's house where he intended to reside. Justice Stein believed extensive disclosure and notoriety was inevitable and sufficient that the law was facially *ex post facto* punishment.

The laws remained stayed while litigation continued in the federal courts. In *E.B. v. Poritz*, 914 F. Supp. 85 (D.N.J. 1996), the district court granted a preliminary injunction for the plaintiff sex offender. But in *W.P. v. Poritz*, 931 F. Supp. 1199 (D.N.J. 1996), the district court granted the New Jersey attorney general's motion for summary judgment. The cases were consolidated on appeal. The Third Circuit ruled in *E.B.*

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Megan's Law

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v. Verniero, 119 F.3d 1077, *reh. den.* 127 F.3d 298 (3rd Cir. 1997), upholding the law but putting the burden of persuasion on the prosecutor in the closed court proceeding created by the New Jersey Supreme Court as to the level of dangerousness. The burden also had to be met by clear and convincing evidence.

State Attorney General Revises Guidelines: Don't Tell

In the meantime, the state attorney general was revising the guidelines as to community notification. Now they ordered anyone receiving such a notice not to further disclose the contents.

Shortly after the final court decision and lifting of the stays, classification of released offenders and community notification began. In January 1998 a released convicted offender settled in Rahway where a relative lived. He was classified as a Level Three offender and each house in the neighborhood around him received a hand delivered handbill with the man's name, address, description, type of offense, description of dangerousness, type of car driven and other information. Persons receiving it were told they could not further disclose the information.

The Home News of New Brunswick learned of his presence in Rahway and ran a story featuring the handbill and a picture. The article created a sensation. The attorney general was outraged and ordered the county prosecutor to conduct an investigation to find out how the "leak" occurred. The attorney general obviously felt that the law, having barely survived the facial challenge on *ex post facto* grounds, would be at risk of failing as applied in the real world.

He announced publicly that the court orders in the closed classification hearings, to which only the offender and the prosecutor are parties, would contain a specific prohibition on any person receiving the notice disclosing its contents to any person not entitled by Megan's Law to the same notice. Persons violating the order would be held in contempt.

The press rallied behind *The Home News*. In meetings with the attorney general, press representatives indicated no blanket intention to publicize such information but said it was a matter of editorial judgment. Civil libertarians and counsel for released offenders said the incident proved the law was fatally flawed and predicted further assaults on its constitutionality. The attorney general said the court orders restricting further disclosure and vigorous contempt proceedings against violators would cure the problem and save the law.

Troublesome Issues

These are troublesome legal issues. The original statute, passed in haste, dealt only with the scope of community notification. It did not prohibit those learning of the presence of the offender from telling others, including the press, or forbidding the press from publishing. The New Jersey Supreme Court, recognizing the law's vulnerability to unlimited *de facto* community notification, engaged in a fiction that persons learning of the presence of the offender in their midst, and not wishing to jeopardize the law which brought them this information, would heed the prohibition in the notice and keep the information to themselves.

How a judge can issue an order prohibiting conduct (further disclosure) not specifically prohibited by the statute or even ordered in the Supreme Court opinion is a mystery. The attorney general suggests it is implied in the law. But the attorney general's first set of nondisclosure guidelines, before the Supreme Court opinion, had no reference to any further disclosure. Obviously the "implication" only arose *after* the Supreme Court ruled.

An issue not discussed is whether the offender could get damages for breach of his rights of privacy and reputational interest. The New Jersey Supreme Court expressly recognizes privacy and reputational rights for due process purposes. The statute immunizes the law enforcement community against any civil liability, but no one else. When the press was attacked by the attorney general for the disclosure in the Rahway case, the local state assemblyman promptly introduced a bill allowing further disclosure.

Behind the legal issues are the public memories of the violent death of Megan Kanka, the reluctance of communities to have sex offenders in their midst, and the skepticism that parental and community vigilance can prevent further sex crimes by released sex offenders, whose recidivism rate is high.

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Editor's note: For those of you coming to the LDRC Forum on English Libel and Privacy Law this book is highly recommended reading as Professor Barendt is currently scheduled as a panelist.

BOOK REVIEW

Libel and the Media: The Chilling Effect

By Eric Barendt, Laurence Lustgarten, Kenneth Norrie and Hugh Stephenson

Oxford University Press, 1997

American media lawyers are generally familiar with the basic facts of the English libel system. The English common law of libel is the progenitor of our common law of libel. But English libel law was never "constitutionalized" as it was here in *New York Times v. Sullivan*. As a consequence, in English courts, falsity is still presumed in libel cases and defendants are saddled with the difficult and sometimes impossible burden of proving truth. Moreover, successful plaintiffs can recover substantial damages, including recovery of American-sized, if not higher, attorneys' fees. These rules -- aided, perhaps by the limited discovery available -- has brought international libel plaintiffs to the British courts, earning London a reputation as the libel capital of the world.

Media lawyers have become rightfully wary of the risks their clients are exposed to in England's pre-*Sullivan* regime, especially with the American media's growing international presence. Interestingly, the increasing globalization of the media seems not only to be exposing more American clients to risk but it is also exposing the shortcomings of the English system -- if not on a normative level than at least as an intolerable cost of doing business in the new information age. Whether the English libel system inhibits speech or promotes responsible journalism, whether it will persist or be reformed are points of debate in England and the heady questions legal conferences are made of.

New to the debate is *Libel and the Media: The Chilling Effect*, authored by three British law professors, Eric Barendt, Laurence Lustgarten and Kenneth Norrie; and Hugh Stevenson, a professor of journalism at City University in London, and formerly the longtime editor of the Guardian Newspaper. Modestly describing their book as an investigation of the impact of libel law on the English and Scottish media -- rather than as a call for reform -- they examine its impact on the different segments of the media from three general perspectives; 1) as a cost of doing business; 2) as an obstacle to get around; and 3) as an impediment to what is published or publishable.

Their conclusion, delivered in measured words, amounts to a serious indictment. According to the authors, England's libel laws have created to differing extents within the English media not only a mindset of self-censorship, epitomized in the editor's maxim of "when in doubt, strike it out" but a more devastating "structural chilling effect" that causes certain subjects of real public interest to be treated as "no go" areas where "certain subjects are . . . minefields into which it is too dangerous to stray. Nothing is edited to lessen libel risk because nothing is written in the first place." p. 192. As for what is written, the authors suggest that their libel laws make the British press more "polemical." Influenced by what they are allowed to say it is safer for the English journalist "to write opaquely or make comment than it is to engage in clear and hard-edged investigative journalism." p. 193.

Their conclusions are based on questionnaire responses and interviews of editors, journalists, producers and their media lawyers. Whether the British press is overly polemic is hard to judge from this side of the Atlantic, but the authors add a significant caveat that may also apply to the bulk of their claims. "The idea that the style of the press, and possibly other media, has been moulded at least in significant measure by the law of defamation is not empirically testable, but none the less has a ring of truth to it." p. 193. What lends the ring of truth to the conclusions of *Libel and the Media* are the surprisingly candid responses the authors received, although not all of what they heard supported their conclusions -- see, certainly, the views of those in national newspapers who saw little or no harm from the current libel regime.

The authors found that a majority of regional newspaper editors responding to the authors' queries admitted either dropping or not covering a story of public interest

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BOOK REVIEW

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because of libel laws. The most prominent "off-limits" area being incidents of police misconduct. One editor stated that: "Allegations of violence and bad behavior by officers, unsupported by very reliable and preferably numerous witnesses are avoided." p. 89. Numerous witnesses, it should be added, are desired, not to confirm the story, but essentially as libel insurance. Libel claims by police are funded by a powerful Police Federation which "reputedly maintains a seven-figure libel budget." And whether this is an accurate figure "matters much less than the undoubted fact that belief in such a fund materially influences the way stories about police officers are handled." p. 58 n.4. Other public officials are similarly "off limits." Teachers and local government officials are areas of concern because they are also "represented by associations which are known to be very prepared to go to court on behalf of their members." Fear of publishing stories about Robert Maxwell were universal throughout the media and almost legendary.

A similar phenomena has allegedly infected book publishing. One major publisher adopted a formal policy of not taking on "high risk" projects. "High risk meant primarily investigative works by journalists; certain subject matter, including anything to do with named police officers or sporting personalities; biography of living persons; and financial markets." p. 140.

Respondents from the national press identified these same potential plaintiffs as areas of concern, but in what the authors characterize as "[p]erhaps the most surprising finding to emerge from these interviews," (p.61), there seemed to be a consensus among them that the libel laws were not significantly effecting the content of their papers. p. 66. A comment by one national press reporter is apparently typical. "We can usually find ways to get the meaning across to readers even if we can't say it exactly as we would like to" – a sentiment that appears harmless at first but that may ultimately feed into the authors' description of the British press as overly polemical. The authors speculate as well that journalists and editors have so internalized the restrictions of the libel laws that they do not perceive the self-censorship. The authors note that staying out of libel trouble apparently is important for reporters' careers.

Broadcasters, who recognized that they operated under a great deal of self-censorship, are burdened by a stiff regulartory and licensing scheme, which imposes program standards and the Broadcasting Standards Commission, an official body that hears complaints of unfairness, privacy and standards violations. The BSC may serve as a "dry run" for libel litigation.

Scottish law and culture is just enough different that media report far fewer complaints and far less self-censorship. They fear most the impact of English law and juries from cross-border publication and litigation.

The authors endeavor to obtain the same empirical data that LDRC works with -- complaints, trials, damages, costs of litigation -- and as noted, numerous interviews with journalists and lawyers. They look at statistical data, review industry practices in meeting libel strictures, as well as reviewing generally the law in England and Scotland. The specifics of how each industry approaches the process is, in and of itself, interesting reading. They conclude that libel affects media differently, with national newspapers expressing the least impact from the laws (while they may tinker with stories, they rarely fail altogether to cover a matter) to regional papers, book and magazines, all of which report more significant impact from the law. Broadcasting, with its unique regulatory scheme, is somewhere in the middle. All media agree, in a conclusion with which U.S. media can empathize, that legal, insurance and other costs that result from libel litigation is a major concern.

In the current climate of reflection on the extremes to which the American press may be said to go -- and amidst calls for curbs -- it is instructive to see how law made with the best intentions may nevertheless impact the fundamentally worthwhile principle "that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Defending Against Celebrity

By Gerson A. Zweifach

When prospective jurors blush at the mere sight of the plaintiff, counsel for any media defendant has a serious problem. As lead trial counsel for the National Enquirer in the commercial appropriation case brought by Clint Eastwood in federal court in Los Angeles, whatever illusions I harbored about the difficulty of our task were punctured in the first 30 seconds of voir dire by the reaction of the jurors when they first recognized the plaintiff. I smiled gamely at the juror panel, and told my associate what one of my partners had told me before my first jury trial: "this ain't gonna be a no-hitter." We did not pitch a shutout against Clint Eastwood. But in a trial where the name of the game for the Enquirer was preserving our ability to get to the Ninth Circuit (rather than having to trade our appellate rights to buy down a devastating judgment), the Enquirer avoided the big inning. After four days of deliberations, the jury awarded Eastwood $150,000 in compensatory damages and nothing in punitives, rather than the $15 million plus he was seeking. For my fellow media defense lawyers who have the privilege of trying a case against a wildly popular celebrity, I offer a few thoughts on how we survived Dirty Harry.

Background of the Case

In December 1993, the Enquirer published a front-page interview with Clint Eastwood reporting on the birth of his daughter. It was titled, "Clint Eastwood at 63: Being A New Dad Has Made My Day." The interview was labelled an "exclusive." It was a positive self-portrait of Eastwood. He insisted, however, that the entire interview was a fabrication -- it never happened, he never said any of these things, and he was outraged at the suggestion that he would give an interview about personal matters to the National Enquirer, a tabloid that he had sued ten years earlier.

The Enquirer had purchased the interview from a free-lancer who lived in the United Kingdom, and who had first published the interview in the British newspaper *Today*. The freelancer made himself unavailable once the litigation got underway. The Enquirer was left to defend against claims of commercial appropriation and "false endorsement" under the Lanham Act. The defense was no actual malice -- even if the freelancer had fabricated the interview, the Enquirer did not know that at the time of publication. It believed the interview was real. And, the Enquirer had labelled the interview "exclusive" because it had purchased the exclusive publication rights in its market (North America).

The case was brought in the United States District Court for the Central District of California, and assigned to Judge John G. Davies. Judge Davies had earlier tried the federal portion of the Rodney King case. After discovery, the Enquirer sought summary judgment on grounds of no actual malice.

Eastwood resisted our motion, arguing principally that the Enquirer's failure to call Eastwood to verify the interview in advance of publication evidenced a purposeful avoidance of the truth – in other words, that the Enquirer knew the interview was a phony. Eastwood wrapped himself in the "purposeful avoidance" language of the Supreme Court's opinion in *Harte-Hanks v. Connaughton*, 491 U.S. 657 (1989) (ignoring that in that case six eyewitnesses had put the publisher on notice of falsity in that case before the publisher decided not to call the plaintiff). Eastwood also attacked the description of the interview as an "exclusive interview," which he insisted suggested that the interview was given directly to the Enquirer, when the Enquirer knew that it was purchased from a freelancer. Once again, the parties had a sharp disagreement about the application of what appeared to be a controlling case -- *Cher v. Forum International*, 692 F.2d 634 (9th Cir. 1982), which appeared to hold that the word "exclusive" means only that the material can be found only in the defendant's publication, not that the plaintiff had cooperated with the publisher.

Judge Davies denied summary judgment, and the case was set for trial. The Enquirer believed that it had significant legal defenses, but they would have to be presented to the Ninth Circuit. To get there, the defendant

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first had to survive a trial against an actor who annually heads the list of the "most admired men in America."

The Trial

Trial commenced on October 3, 1995 in federal court in Los Angeles. Eastwood's able trial counsel, Ray Fisher of Heller Ehrman in Los Angeles, played Eastwood's celebrity for all it was worth. Most of Eastwood's direct consisted of an extensive review of his film career. Eastwood concluded by declaring that he never gave the interview; that the Enquirer is staffed by "phonies;" and that the interview was "a lie." For his damages, Eastwood relied on an accountant from Price Waterhouse, who testified that the Enquirer made close to $2 million on the issue in question (and so, the Enquirer was unjustly enriched through the use of Eastwood's name); and an agent knowledgeable about Eastwood's "endorsement value," who told the jury that what the Enquirer took from Eastwood was worth at least $15 million in the market. And, although Eastwood had already testified at length in plaintiff's case in chief and rebuttal case, Ray Fisher closed his own rebuttal argument to the jury by turning the floor over to Eastwood once again and playing an excerpt from Eastwood's videotaped deposition, in which the rugged actor spoke about the importance of standing up to liars, and fighting for the truth. In effect, he asked the jury to saddle up and join his crusade.

The trial lasted almost three weeks, including deliberations. Eastwood was there every day. He sat at counsel table through every witness, lunched in the courthouse cafeteria, and seemed to be in constant eye contact with every one of the 10 jurors. And -- no surprise -- he was a compelling witness, not because he is a fluid speaker or glib, but in part because he is not. He is the worst kind of witness to cross-examine -- he comes across as a good guy.

The Verdict

The jury deliberated for the better part of 4 days. And although several members of the jury lined up for autographs from Eastwood as soon as they were discharged (and some arranged for deliveries of glossies!), the monetary award more closely tracked the Enquirer's position on damages than Eastwood's. We had suggested to the jury that the Enquirer's profits attributable to the alleged misappropriation would approximate $60,000, not the millions that Eastwood's expert suggested. The jury awarded $75,000 for unjust enrichment. The jury added $75,000 for injury to Eastwood, not the $15 million that his expert suggested. And, the jury expressly rejected any award of punitive damages, in effect finding actual malice but no common law malice. The court, pursuant to a California statute, also awarded Eastwood a portion of his costs and fees.

The Appeal

The Ninth Circuit agreed with our position on the central issue of the case -- whether the Enquirer published the interview with actual malice -- but affirmed on the back-up argument that the description of the interviews as an "exclusive" was intentionally misleading. The panel suggested that if the Enquirer had expressly noted that the interview was given to a freelancer, the outcome would have changed. The Court of Appeals agreed that Eastwood failed to demonstrate that the Enquirer knew the interview was a phony.

Whether the Ninth Circuit made good law, or bad law, or any law, is an open question. My subject here is how we got to the Court of Appeals. To get there, we had to avoid being put in the quandary other publishers and broadcasters have faced of choosing between vindicating legal rights and ensuring survival. We had to achieve two distinct and sometimes inconsistent goals -- make a strong record for the appeal, but also avoid a judgment that could effectively render that record moot.

Surviving A Celebrity Plaintiff

Every case is of course different, and I would not hesitate to alter our approach with a different plaintiff, a different defendant, or even a different article. But I believe that we did some things that helped us survive our encounter with Mr. Eastwood, and that might be useful in

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other celebrity cases.

Put A Human Face On The Newspaper

Most trial lawyers try to get by with the fewest witnesses possible, on the theory that each personality presents another independent (and unpredictable) variable once cross-examination begins. In the Eastwood trial, however, we were dealing with a corporate defendant that stood for an institution not terribly well understood or, frankly, well liked by some members of the jury -- the tabloid press. It is of some value of course for counsel to talk to the jury about all the useful things that the press does, but my sense was that the best thing we did was expose the jury to the various people who help put out the newspaper: editors, researchers, writers, management, the works. Most jurors had no idea how hard these people work, how many articles they work on, and how rarely things go wrong. And, while it is highly unlikely that your witnesses are going to rival the movie star in looks or eloquence, to some extent the expectations game works for you when you call reporters and editors to testify. Jurors expect a great performance from a movie star witness, but they may well be more struck when others discover that a journalist appears to be a decent and fair person.

Notwithstanding that Eastwood introduced excerpts of deposition testimony from several Enquirer witnesses in his case, we both counter-designated additional testimony from these witnesses and brought them back live in our case, to tell their story of who they are and what they did. At minimum, we put distance between Eastwood's star turn in his case in chief and the deliberations, by putting on a substantial defense case. Obviously you don't want to call witnesses who are more trouble than they are worth, but there is significant value in replacing the impression of a generally disliked institution with a series of decent people trying to do their job.

In our case, the jurors told us that they were surprised at how much they liked many of the Enquirer witnesses. Their reaction clearly played a role in the decision on damages.

Go Easy With the Dirt

Eastwood is a genuinely charming witness, and when he explains that he was moved to sue not for money (of which he has plenty) but to stand up to liars, phonies and parasites, you can almost hear the jurors rushing forward to join his posse. How do you bring someone as likeable as Eastwood off his pedestal, without running the risk of inviting the jury to conclude that, like the press itself, you too are just another mudslinger?

The answer for us was to recognize that, regardless of how strong your impeachment evidence, jurors are extremely reluctant to accept that their hero is a thoroughly bad guy. Obviously, if the piece you are defending is extremely tough, you have to make the charges stick. But that is a road you should travel only with a clear recognition that you may be putting your client's franchise in play. If the piece you are defending is not terribly damaging, your cross-examination and even criticism of the hero in final argument should be focused on those areas where jurors have retained some skepticism and perhaps a measure of jealousy about the celebrity.

In our case, we were prepared to bring one of Eastwood's ex-girlfriends to testify with respect to certain personal statements in the article that he denied ever making to anyone. And, there was certainly a basis in the article to examine Eastwood about his divorce and other complexities in his personal life. My sense, however, was that the jurors seemed uneasy with these subjects. The reality is it takes more than a few days of evidence at a trial to shake an image developed and reinforced over decades of films and visual impressions. While taking discovery is all about developing options, trials require choices. We concluded that, while we might well bloody Eastwood's nose with a focus on his personal life, the likelihood is that we were only going to trigger anger at our effort to shoot the king.

On the other hand, as to business and money matters -- his own manipulation of the press for business purposes; his utter and complete lack of damages; and the fact that his experts, agents, and various hangers on were exaggerating the impact of the Enquirer article -- we found a more willing audience.

The jury *was* willing to hear and learn that Eastwood is a businessman who uses the media to publicize his films, and that his expression of outrage at an article about his personal life was overly dramatic. And, the jury was positively receptive to cross-examination designed to demonstrate that

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Eastwood's claims of injury were wildly overstated, and that the agents, publicists and accountants who did his bidding in his damages case were not cut from the same cloth as the hero himself. Indeed, if I had it to do over again, I would spend even more time pounding Eastwood's other witnesses, and less time trying to take on Eastwood himself. And, my guess is that Ray Fisher has the corresponding view from the plaintiff's side: he probably wishes that he had found even more subjects for Eastwood to talk about, and simply left the other players on the bench.

Not every celebrity is as personally compelling as Clint Eastwood, and on the other hand, few witnesses are as inviting targets as Hollywood agents and publicists. But my strong sense is that what we observed is generally true -- unless the piece you are defending itself slams the celebrity, it is an unreasonable risk to attempt to undo in a few hours cross-examination a strong image. But however jurors admire celebrities personally, the glow does not extend to their lawyers, accountants, publicists, and expert witnesses. On the contrary. That is where you should focus your defense.

Talk About Actual Malice

The late Irving Younger of my firm said that he did not argue actual malice to the jury in *Tavoulareas v. The Washington Post* because he was fearful of implicitly conceding that the article was not true. On the other hand, Gary Bostwick lectured the jury -- quite effectively, apparently -- about actual malice and the First Amendment in the second *Masson* trial. I come down somewhere in between.

We argued actual malice to the jury. And, while they ultimately misapplied the legal standard, my sense is that the jurors were willing to hear about what actual malice is and what it is not. We had far less success selling the jury on the rationale for the actual malice standard, and in particular, the reasons for the distinction between public figures and private persons. Our research suggests that, to the extent juries accept any aspect of the actual malice standard, it is because they agree with the general proposition that good faith should matter, and not because they accept the notion that First Amendment "breathing space" tolerates more errors in the case of public figures than private persons. And although my sense is that jurors are inclined to find liability whenever they find falsity, they care very much about good faith – at least on damages.

Accept and Embrace the Jury's Bias

The jurors will assure the judge in voir dire that they will be totally impartial, and they will probably mean it, at least during the nanosecond when they are answering his question. But of course they cannot and will not be impartial. You may win against a celebrity, but rest assured that it is because you overcame a huge disadvantage. The celebrity has given them some wonderful moments, and all your client has done is from time to time tell them about facts that would not exist in a better world. How do you and your client survive?

Our answer was to reach out to the jury, acknowledge the problem, and challenge them to overcome it. The first step to de-mythologizing Eastwood was to embrace and examine the myth. We repeatedly acknowledged his great films, talent, and compelling personal manner -- while reminding the jury that the fact that he may have done some great things in his life does not mean that he has brought a great lawsuit. I as much as conceded that I too was dying for his autograph, while observing that what was at issue was not him but a set of allegations that were not well grounded in the evidence. You cannot run away from the force of a plaintiff's celebrity – your only hope of moderating its influence is to bring it out into the open, talk about it, embrace it, and let everyone know that it is ok to admire the plaintiff for everything else he has done in his life. You gain credibility with the jury by telling them that you understand that by following the evidence and the judge's instructions, they may end up in a place that they did not plan to go.

The second step is to challenge the jury to overcome the effect of celebrity. Most trial lawyers agree that jurors want to be fair. With a celebrity plaintiff, the best course is to turn the power of celebrity in your favor, by reminding the jury that they took an oath that is easy to meet in the prosaic case, but in this case requires real heroism on their part. In our case, I told the jury that the single hardest

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thing they had to do was to keep the first promise they made in this case, and that while Eastwood was a celluloid hero, a hero in this case was a juror who decided the case based strictly on the evidence. Our interviews with the jurors after trial revealed that most jurors took that challenge seriously. They began their deliberations by asking for individual copies of the court's instructions, with multiple highlighter pens. And, they spent 4 days deliberating after only a two week trial. And, while they ultimately got the actual malice issue wrong -- an all too frequent occurrence -- the jury delivered a damages award that preserved our ability to present our legal challenge to the Ninth Circuit.

Whatever your record, I believe that defense counsel will gain with the jury by acknowledging the difficulty posed by plaintiff's celebrity, admitting how difficult it is to put aside the feelings generated by the celebrity, and talking frankly to the jury about the challenge they face. The only chance you have of the jury separating the celebrity from his case is if you bring the fact of celebrity out in the open, and talk about it in a realistic way. Like anyone else, jurors will rise to the occasion if they are presented with a challenge. Because our jury took its job seriously, we are able to tell the celebrity plaintiffs of this world that even a tabloid can go to trial and live to tell about it.

Gerson A. Zweifach is a partner at Williams & Connolly in Washington, D.C.

Ethical Guidelines

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Some critics of the proposals within the NADCL charge that the code, though voluntary, will unnecessarily stifle criticism of attorney performance, even when criticism is warranted. Others warn that it will limit what defense lawyers can say, leaving media organizations to turn to prosecutors and crime victims for commentary.

Though the NADCL has gone furthest in addressing the ethics issue, according to the *ABA Journal* article, the American College of Trial Lawyers is working on a report that is expected to address the issue of legal commentators. Also, the *ABA Journal* reported that although the ABA's "Ethics 2000" committee is in the process of reassessing the Model Code of Professional Conduct, the legal commentator issue is not being discussed.

Another lurking issue pointed to in the *ABA Journal* article is what role the media will play in a commentator code. In their law review articles, Chemerinsky and Levenson speak of the media as a partner saying that without the cooperation of the media in culling out unethical commentators, the project will fail.

For now, though there is some movement in the direction of adopting a code, it is clear that even though the proposed guidelines are voluntary, they make many people uncomfortable. The *ABA Journal* article quotes Bruce Collins, an attorney with C-SPAN in Washington, DC and co-chair of the ABA National Conference of Lawyers and Representatives of the Media as saying that the proposed rules are "inherently inconsistent with the right of free speech or free press." In the article he also says that though lawyer groups are welcome to develop a code, they should not expect reporters to enforce it by restricting what questions they ask.

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LDRC 50-State Survey 1998-99: Media Privacy and Related Law Due out this June

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