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LDRC Libel Defense Resource Center

LIBELLETTER

June 1996

Justice White for the Eighth Circuit: Libel By Implication

By Paul R. Hannah

Retired Justice Byron R.White, sitting by designation on and writing for a panel of the Eighth Circuit, has issued an opinion that asserts the validity of certain libel by implication claims under Minnesota law, at least for private figure plaintiffs, reversing a district court's dismissal of libel claims against a local broadcast station. *Toney v. WCCO Television*, (File No. 95-1190 (8th Cir. June 7, 1996)) Justice White attempted to brush aside, or at the least narrow, the impact of cases in the Eighth Circuit and Minnesota heretofore thought to cast a relatively long and negative shadow on libel by implication, such as *Diesen v. Hessburg*, 455 N.W.2d (Minn. 1990), *cert denied*, 498 U.S. 1119 (1991), *Janklow v. Newsweek* and *Price v. Viking Peguin Press* Moreover, he sought to emphasize the implicit rejection by the Supreme Court of the United States in *Milkovich* of the four-factor *Ollman*-esque analysis of opinion used by the Eighth Circuit in *Janklow* and *Price*.

The Newscast

This dispute arises out of a news story broadcast by a Minneapolis television station, WCCO-TV ("WCCO"), in May of 1992. The story highlighted issues relating to the procurement of animals by laboratories for use in medical research, and focused on the way in which the government monitors the acquisition of dogs by research facilities. Critics of the system maintain that lost or stolen family pets somehow find their way to research facilities, even though the government

(Continued on page 11)

California Court of Appeal Fails to Adopt Neutral Reportage But Finds Obligation to Investigate

A California appeals court has declined to apply the neutral reportage doctrine to a private figure in *Khawar v. Globe*, No. BO84899 96 D.A.R. 6549 (Cal. Ct. App. June 5, 1996), affirming a $1.17 million libel award against the *Globe*, a nationally distributed tabloid.

The California Court of Appeal for the Second District (in Los Angeles) did not address the question of whether California would adopt the doctrine for an action brought by a public figure.

More troubling, however, the court analyzed actual malice to impose extraordinary obligations of independent investigation into source allegations. The court's conclusions as to which acts or failures to act constituted evidence of actual malice are fundamentally inconsistent with the law and rather ordinary journalistic behavior.

The plaintiff, Khalid Khawar, sued the *Globe* after it printed a story in April, 1989 reporting allegations that it was Khawar who assassinated Robert Kennedy, and not Sirhan Sirhan, the man convicted of the crime. The *Globe* reported that the allegations were made by Robert Morrow in his book *The Senator Must Die: The Murder of Robert Kennedy*, published in 1988. Robert Morrow previously wrote a book entitled *Betrayal*, the best selling book on the assassination of John F. Kennedy. In *The Senator Must Die*, Morrow, a former CIA agent, presented his theory that

(Continued on page 15)

***Masson v. Malcolm*: 9th Circuit Affirms Judgment for Defendants, see p. 7**

Citing Immense Potential of Internet, Three-Judge Court Enjoins Communications Decency Act

By Sean H. Donohue

In a landmark decision on the First Amendment's application to the Internet, a three-judge federal district court in Philadelphia issued a preliminary injunction on June 11, 1996 prohibiting the Justice Department from enforcing certain provisions of the Communications Decency Act of 1996 ("CDA"), Pub. L. No. 104-104, § 502 (to be codified at 47 U.S.C. §223(a) through (h)).

The challenged provisions would make it a felony to use computer technology to communicate "indecent" words or images to a minor (defined as a person under age 18) or to display "patently offensive" material in a manner available to minors. The Philadelphia court ruled that these provisions cannot survive First Amendment scrutiny in large part because they would effectively ban from the Internet speech that is constitutionally protected for adults. Two members of the court also found the CDA impermissibly vague, in violation of the due process clause of the Fifth Amendment. Left unaffected by the Court's ruling -- and unchallenged by the plaintiffs -- are CDA provisions addressing online obscenity, child pornography, and harassment.

The panel in the consolidated cases of *American Civil Liberties Union v. Reno*, No. 96-963 (E.D. Pa.) and *American Library Association v. Department of Justice*, No. 96-1458 (E.D. Pa.), is made up of Chief Judge

(Continued on page 13)

Online Update

The LRDC Bulletin Board on Counsel Connect is up and running, although many members may still not have access.

To test whether you and your colleagues currently have access, click "Private" on the 14-button menu that appears after you sign on to Counsel Connect. Under "Subscribed Private Areas," you should see "LDRC Discussion Group." The screen that appears should have the bands "Own Private Areas" and "Subscribed Private Areas." To access the board, click on "select."

If LDRC Discussion Group does not appear on your screen, and you would like access to the Bulletin Board, please contact Michael Cantwell by phone or either Michael Cantwell or Sandy Baron by e-mail within Counsel Connect. We will see that you are given immediate access.

Pamela R. Winnick: LDRC's Newly Hired Attorney

As of June 3rd LDRC hired a new attorney, Pamela R. Winnick who will share with Michael Cantwell the title of Associate Director.

Pam is a 1977 graduate of Columbia Law School where she was a Notes & Comments Editor of the Law Review. After a two year clerkship with former District Judge Herbert Stern, Pam worked from 1980-1984 as a litigation associate at Shereff, Friedman, Hoffman & Goodman. Her primary area of expertise, however, is nonprofit law, having served for over nine years as General Counsel of two international nonprofit organizations: CARE and Save the Children.

Pam's interest in media law derives from her own recent journalist experiences, including an on-site investigation she conducted of humanitarian aid in Bosnia. The resulting article, *Merchants of Mercy: Hidden Corporate Motives in Humanitarian Aid*, will be published this Fall by *Penthouse Magazine*.

We are delighted to welcome her to LDRC.

Uniform Correction Act: New York

State Senator Kemp Hannon has introduced the Uniform Correction or Clarification Act as a study bill into the New York State legislative process. While no action on the bill is anticipated this term, the New York Commissioners on Uniform State Laws have unanimously urged him and others in the State legislative leadership to support adoption of the Uniform Act. It is anticipated that the bill will be re-introduced for legislative action when the legislative session opens in January 1997.

LDRC has also urged the New York State leadership to support the bill, and it is expected that other media entities and organizations will send letters and/or memoranda indicating their support of the Act to Senator Hannon and others in Albany.

If you have any questions about the Uniform Correction or Clarification Act, or wish to register your support for its adoption in New York, please contact LDRC.

In This Issue . . .

Rice v. Paladin Enterprises, Inc.
No. AW-95-3811 (D.Md.)
The "Hit Man" Case

The application to file an amicus brief in support of the defendants Motion for Summary Judgment has been denied by the district court judge in the ***Hit Man*** litigation. No reasons were given for this unusual decision. The brief for amicus, which included a number of media associations, had been prepared by Baker & Hostetler. See, *LDRC LibelLetter*, April, 1996 at p. 5.

Amendments to FRCP26(c) Rejected

Having considered public comments on the proposed amendments to Rule 26(c) of the Federal Rules of Civil Procedure, the Advisory Committee on Civil Rules has chosen not to adopt the suggested revisions. In a report dated May 17, 1996, Mr. Patrick Higginbotham, the Advisory Committee Chair, announced the committee's decision to hold Rule 26(c) "for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45" (Report at p.1). Appended to the report is a summary of the comments submitted both criticizing and endorsing the proposed amendments.

As noted in the April 1996 *LDRC LibelLetter*, the proposed amendments to Rule 26(c) would have allowed the court to issue protective orders in discovery on the parties' stipulation and would have eliminated the requirement of a judicial determination of "good" cause. Other changes were suggested, including a specific procedure for modification or vacation of an order, but none proved to be as contentious.

Mr. Higginbotham enumerated two "set[s]" of reasons for the Advisory Committee's decision not to adopt the changes. The first set "turns on the lack of any urgent need for revision." Acknowledging that public access to discovery materials is the subject of much debate, Mr. Higginbotham nonetheless stated that "there is no clear problem that demands rapid action" (Report at p.2).

Second, and of more importance to the Committee's decision, the Committee concluded "that it is time to reconsider ... the basic scope of civil discovery." The re-evaluation comes at the request of the American College of Trial Lawyers. The Committee report states that among the proposals offered are ones to narrow relevance for discovery purposes to issues defined in the pleadings. The Report notes, however, that defining the scope of discovery may require a review of notice pleading as well. The report cites the close relationship between protective order practice and the "sweeping scope of discovery under Rule 26(b)(1)". Deliberations on Rule 26(c) "constantly remind[]" the Advisory Committee of the importance of maintaining the "integral role of protective orders justifying discovery of this scope" (Report at p.2). If the Committee decides to make significant changes to the scope of discovery, it may in turn find it necessary to amend Rule 26(c) in light of those changes.

The comments attached to the Advisory Committee's Report demonstrate the wide range of responses to the amendments. Of the 75 responses, 40 comments opposed the suggested revisions, 29 endorsed them, and 6 registered mixed reactions. Both the bench and bar were represented among the commentators.

LDRC filed comments opposing the proposed amendments in which we were joined by The Associated Press, Dow Jones & Company, Inc., Magazine Publishers of America, National Association of Broadcasters, Newspaper Associa-

(Continued on page 4)

SANCTIONS IMPOSED ON REPORTER IN LIBEL SUIT PROTECTING CONFIDENTIAL SOURCES

On June 13, 1996, Texas state district court judge Elizabeth Ray issued an order imposing extraordinary sanctions in the form of proposed jury instructions on news reporter and libel defendant Wayne Dolcefino and KTRK Television for Dolcefino's refusal to answer questions he claims would impinge upon a confidential source relationship. *Turner v. Dolcefino*, No. 92-32914 (Tex. Dist. Ct. June 13, 1996) (order).

The trial judge has ordered that, should Dolcefino continue to disobey her order to answer questions about one of his sources, the jury is to be instructed that his refusal is "presumptive evidence that Wayne Dolcefino and KTRK Television, Inc. acted with reckless disregard for the truth in broadcasting the stories relating to Sylvester Turner on December 1, 1991." Order at p. 3.

The jury is to be instructed as well, seemingly at the beginning of the trial, of the specific questions that Dolcefino refused to answer -- broad inquiries as to his contacts and communications with his source, and the information and documents received from the source -- that the courts have rejected Dolcefino's First Amendment argument, that Dolcefino's refusal to answer the questions is in defiance of the court's order and in violation of the laws of the United States and the State of Texas, and that the jury may consider his refusal to answer the questions when they are judging his conduct in 1991.

"In that regard, I instruct you that you will presume that the evidence that would have been revealed by his truthful answers to those questions would be detrimental to the Defendants' case.

Nevertheless, you will be the judges of the weight to be given to this and other evidence in the case on this question. The Court will repeat this instruction at the conclusion of the trial in the Court's charge to you." Order at p. 2.

The facts of this case are unusual in that the court believes it already knows the identity of the confidential source. His name is Peary Perry, and the plaintiff Turner discovered him through his own investigations. Furthermore, Perry has already testified about his communications with Dolcefino. In light of these facts, the Texas First Court of Appeals noted:

"The reason for having a reporter's privilege is so informants will know that if they speak to the press, courts will not force the press to disclose

(Continued on page 4)

FRCP26(c) Rejected

(Continued from page 3)

tion of America, Radio-Television News Directors Association and Society of Professional Journalists. These comments are discussed in greater detail in the March 1996 *LibelLetter* at page 1, and are summarized in the Advisory Committee Report at page 55.

Though varied, comments on the proposed amendments tended to cluster around a number of main points. The commentators who approved of the amendments generally asserted that stipulated orders are an important means of facilitating discovery. By guaranteeing that the released information will not enter the public domain, stipulated orders, these commentators suggested, encourage free and open exchange of information. Those who endorsed the changes also noted that the amendments reflect current practice.

Critics of the proposed amendments cited a number of issues, the dominant theme of which was that the proposed amendments are inconsistent with the public interest and run counter to the principle that the courts ought to function under a presumption of openness. Stipulated orders, the amendment's detractors stated, contravene this principle. Moreover, the critics claimed that defendants can often exert considerable pressure on plaintiffs to accept stipulated orders. Commentators opposed to the changes therefore endorse the requirement that a party show "good" cause in order to justify the grant of a protective order.

Though all of the comments are noteworthy, that of the Federal Magistrate Judges Association merits mention simply because of its membership.

The Honorable Virginia M. Morgan, speaking on behalf of the Federal Magistrate Judges Association, supported the proposed amendments. Noting that stipulated protective orders are common, Judge Morgan stated that such orders are a "valuable means of facilitating discovery" (Report at p.49). The Magistrate stated that the proposed amendments successfully address "the issues of privacy, of moving the litigation forward, [and] of protecting the interests of all the parties" (Report at p. 66).

Reiterating her Association's support for stipulated orders, Judge Morgan cited the importance of the affected party's reliance on protective orders. Though she acknowledged that lawyers often resist protective orders out of a desire to share the "fruits of discovery" with colleagues embroiled in similar cases, Judge Morgan emphasized that litigation is aimed at redress to the plaintiff rather than the dissemination of information. (Report at p. 66)

Others who filed in support of the amendments included the Tort and Insurance Practice section of the ABA, trial lawyers for the Public Interest, bar associations and committees, and trade and consumer associations.

In contrast, all of the members of Congress who commented on the proposed amendments were opposed to the changes. Congressman Lloyd Doggett, once a Justice of the Texas Supreme Court, criticized the stipulated order proposal for being inconsistent with the principle that courts should operate under a presumption of openness. "I am convinced," Congressman Doggett lamented, "that buried in discovery documents are too many secrets that can maim or kill consumers" (Report at p. 52).

Similarly opposed to the proposed amendments were Senators Herb Kohl, Howell Heflin, Edward M. Kennedy, William S. Cohen, and Paul Simon. In a joint comment, the Senators cited evidence that protective orders are abused to the detriment of public health and safety. They further suggested that adoption of the proposed amendments would push the courts closer to becoming an exclusive, private system in which litigating parties determine what information to make available to the public.

The Senators also asserted that eliminating the "good" cause requirement would weaken Rule 26(c). They thus favor strengthening Rule 26(c) by requiring consideration of public health and safety in granting or denying protective orders.

Copies of Patrick Higginbotham's Report of the Advisory Committee, detailing the Committee's decision not to adopt the proposed amendments to Rule 26(c), are now available. Please contact the LDRC for further information.

Sanction on Reporter

(Continued from page 3)

their identity. Plainly, there is no danger of that here." *Dolcefino v. Ray*, 902 S.W.2d 163, 164 (Tex. App. 1995).

Dolcefino and amici argued that this analysis overlooks the threat to confidentiality this precedent may set. By forcing a reporter to confirm testimony from a person claiming to be a confidential source, that reporter may in fact be helping to identify the confidential source, or at least to narrow the list of possibilities for people who seek the identity of the source.

This order comes nearly fifteen months after Dolcefino first refused to answer the questions put to him concerning his source. He appealed the initial order compelling him to respond to questions to the Texas First Court of Appeals which affirmed the trial court order. *Dolcefino v. Ray*, 902 S.W.2d 163 (Tex. App. 1995). His attempts to obtain review from the Texas Supreme Court and the Supreme Court of the United States were rejected. *Dolcefino v. Ray*, *cert. denied*, 64 U.S.L.W. 3656 (4/1/96, No. 95-1250).

The court order indicates that if Dolcefino complies with the Court's Order prior to the first day of trial, the sanctioning jury instructions will be withdrawn and the court will determine what, if any, other sanctions would be appropriate based upon any detrimental effect brought about by Dolcefino's refusal to provide answers. A rehearing on the sanctions is scheduled for Thursday, June 27.

New York Appellate Division Affirms Quashing of Brown & Williamson Subpoenas

On June 6, 1996, the New York Appellate Division, First Department, unanimously affirmed the New York Supreme Court decision granting CBS' motion to quash subpoenas served by tobacco company Brown & Williamson. *In re Brown & Williamson Tobacco Corp.*, Index No. 101678/96 (N.Y. App. Div., 1st Dept. 1996). As reported in LDRC's March, 1996 *LibelLetter*, B&W had sought certain information from CBS in support of its Kentucky breach of contract action against Jeffrey Wigand, a former B&W executive.

The Lower Court Decision

In the lower court decision, *In re Brown & Williamson Tobacco Corp.*, 24 Media L. Rep. 1720 (1996), New York Supreme Court Justice Lippman relied primarily on the decision of the New York Court of Appeals in *O'Neal v. Oakgrove Const.*, 71 N.Y.2d 521 (1988), and its codification in section 79-h(b) and (c) of the New York Civil Rights Law, known as the reporter's shield law. Both the *O'Neal* decision and its codification require that three criteria be met before requiring that a member turn over confidential information. First, the information sought must be "highly material and relevant." Second, the information must be "critical or necessary" to the litigant's claim or defense. Third, it must not be "obtainable from any other source."

In the lower court case, Justice Lippman held that B&W failed to satisfy *any* of the three criteria. First, because B& W had already admitted that the Wigand interview itself sufficed to prove breach of the confidentiality agreement, the requested information was not "material", as required by the first prong of *O'Neal*. Second, because B&W had already admitted it had sufficient evidence against Wigand, the material was not "critical or necessary" to the action against Wigand. Finally, Justice Lippman rejected out of hand B& W's "mere assertion" that it needed the information in question to prove that Wigand was inherently "dishonest and untrustworthy." Such a blanket assertion would, Justice Lippman reasoned, effectively negate the need for the third prong of the *O'Neal* test.

Justice Lippman also rejected B&W's claim that CBS had waived its rights under the reporter's shield law by leaking the Wigand interview transcript to non-party sources. While Civil Rights Law 79-h(g) does provide a waiver, the court held that the waiver must be narrowly limited to what the journalist disclosed and that B& W could not use CBS' partial disclosure as a basis for full disclosure. Likewise, while the court agreed with B&W that CBS had partially waived its attorney-client privilege by "approving or tacitly consenting" to the "widespread and ongoing public airing" of the network's decision not to run the Wigman interview, the court held that this waiver, too, must be narrowly construed and limited to disclosures already made.

The Appellate Division's Decision

In affirming the lower court's decision, the Appellate Division (Murphy, P.J., Wallach, Williams, Mazzarelli, JJ.) did not address *all* the issues decided by Justice Lippman. Rather, the court appeared to rely primarily on B&W's failure to satisfy the second prong of *O'Neal* and its codification: the "critical or necessary" test. Evidently disagreeing with Justice Lippman on the first prong of the *O'Neal* test, the Appellate Division conceded, without discussion, that the materials in question were, in fact, "highly material" to B&W's action against Wigand. However, since B&W already had "ample proof" of Wigand's breach of contract in the publicly available tapes of the interview, the Appellate Division held that B&W had failed to meet the "critical or necessary" requirement. While the Appellate Division stated that it need not reach the third prong of the test--that the unpublished information "is not available from any alternative source"--the court did note that Wigand was himself a source of evidence necessary to prove breach of contract in the Kentucky action.

The remaining arguments of B&W, including, presumably, the waiver claims, were found to be without merit and were not addressed by the Court.

CAMERAS IN JURY ROOM IN MAINE

In just an odd twist, in a state in which cameras are not allowed in the courtrooms, the Maine Supreme Court granted a CBS request to tape a trial and the jury operations and deliberations in a yet-to-be-determined civil case. The jurors, plaintiffs, defendants and lawyers would all have to agree to the taping. And the camera in the jury room would be hidden to as to make the taping process as unobtrusive as possible. While the legislature was working on legislation that would prohibit the CBS taping, we are told that the courts in Maine do not recognize the authority of the legislature over such matters in the courts.

This would not be the first time that the operations of a jury were put on videotape. In 1986, Public Television's Frontline produced a documentary on a criminal case, in which the defendant accused of illegal possession of a firearm was acquitted.

MARK YOUR CALENDARS!

Defense Counsel Section Breakfast

Thursday, November 7, 1996

7:00 a.m. Crowne Plaza

BMW V. Gore: Punitives and The Media

By Jeffrey H. Drichta

The U.S. Supreme Court more rigorously constrained the state law of punitive damages this term in BMW v. North America, Inc. v. Gore, (64 U.S.L.W. 4335 May 21, 1996), holding that the Fourteenth Amendment due process clause limits punitive damage awards to those that are not "grossly excessive." The decision will likely have useful application in the media law context, and signals the Court's willingness to take a more active role and to assign a greater role to judges generally in regulating this area of law. A few points about BMW deserve a brief elaboration.

First, BMW offers guidelines to judges and juries, something that earlier punitive damages cases have avoided. Writing for a 5-4 majority, Justice Stevens concluded that punitive damages meet due process standards only when they properly reflect: (1) the degree of reprehensibility of the defendant's conduct; (2) a rational ratio to the harm the plaintiff actually suffered; and (3) the possible civil or criminal penalties that could have been imposed on the defendant for similar misconduct.

The Court had signaled the existence of constitutional limits on general punitive damages in a trio of 1990s cases, but BMW for the first time struck down a general punitive damages award and set out these three due process "guideposts."

Justice Ginsburg, joined by Chief Justice Rehnquist, and Justice Scalia, joined by Justice Thomas, lamented in their dissents that this framework undermines state law prerogatives and provides little specific guidance.

BMW, however, does seem to have moved the constitutional ball forward; defendants no longer must argue over what elemental standards the Fourteenth Amendment imposes on punitive damages. In terms of applying those standards, while again eschewing a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" ratio for general to punitive damages, 500 to 1 "must surely 'raise a suspicious judicial eyebrow.'" 64 LW 4342 (quoting O'Conner, J., dissenting TXO).

Gertz v. Robert Welch, Inc. and its progeny had demonstrated that the First Amendment places limitations on punitive damages awards in speech cases. At a minimum, BMW supplements these limitations, finding additional constraints in the Fourteenth Amendment. BMW leaves unanswered the question of whether the justices will find additional guideposts or constraints in the speech context.

Second, the BMW decision will be a welcome tool for media defendants, who now may hang their traditional First Amendment arguments on the BMW due process framework. Media lawyers undoubtedly will ask judges to reflect BMW guideposts in jury instructions. Trial and appellate briefs also will take advantage of these affirmative constitutional limitations on punitive damages.

For example, New York Times v. Sullivan recognized that punitive damages are "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." Read in BMW's light, this concern and the requirement that regulation that impinges on speech be subjected to heightened judicial scrutiny, may mean that instead of requiring just a rational ratio between compensatory and punitive damages, the Court may mandate a closer fit for the second prong in speech cases. It also may heighten the importance of the third prong -- comparing possible civil or criminal sanctions to the punitive damages award. As the post-BMW body of law grows, the media may witness greater order imposed on apparently arbitrary and limitless punitive damages awards.

BMW also is important because, unlike earlier punitive damages cases, it may have teeth. Normally when the Supreme Court hands down a decision that affects other cases pending its review, the justices remand them with instructions to the lower courts to follow the new precedent. After BMW, however, the Court took the unusual step of sifting through the nineteen punitive damages cases pending review this term to determine itself which were worthy of a remand or an affirmance, and which should be denied review altogether. In these cases -- none of which involved media law defendants -- the Court denied review to fourteen, vacated and remanded four, and affirmed one petition without comment. Although the precise contours of the BMW guideposts are unclear, the justices apparently have something in mind more specific than the mere reasonableness inquiry that had previously prevailed.

Finally, BMW provides a few media "tea leaves" to read. Those hopeful that the Court now will be more solicitous of media defendants in libel cases may point to the majority opinion's substantial citation of First Amendment precedent. Justice Stevens noted that Dr. Gore, like Commissioner Sullivan in New York Times, received an especial punitive damage windfall. The majority also cited Gertz and Bigelow v. Virginia for the propositions that punitive damages awards only are proper when they further a legitimate state interest in punishing and deterring unlawful behavior, and that states may not impose punitive damages to deter what would be lawful conduct in other states. While First Amendment precedent may have been on the tip of the Court's collective mind, however, no justice actually discussed or referred to the impact of BMW in the media context.

Mr. Drichta, a student at the University of Virginia School of Law and a summer associate at Rogers & Wells, wrote this article under the direction of Richard N. Winfield of Rogers & Wells.

Cases Worth A Note

1. *ABC Faces Suit for Interference With Contract*

Evan Chandler, who previously accused rock star Michael Jackson of molesting his son, has filed a new suit against Jackson alleging breach of the confidentiality provisions of the agreement by which the prior suit was settled. As part of the settlement in that suit, both parties agreed not to discuss any of the claims and allegations.

But of some note, ABC is also named as a defendant, alleged to have intentionally interfered with plaintiff and Jackson's agreement as a result of an interview with Jackson and his wife, Lisa Presley (also named as a defendant), on ABC's *Prime Time Live* during which Jackson declared his innocence of the Chandler accusations, referring to them as "lies."

ABC is accused of having induced Jackson to intentionally breach the confidentiality agreement by offering Jackson various financial benefits to appear on the ABC News program, including valuable advertising time. Plaintiff alleges that the appearance was part of a scheme to enhance Jackson's reputation (and the economic value of his records, including the new HIStory) by affording him an opportunity to deny the Chandler allegations.

ABC is also accused of tortious conduct -- ABC "should have known" that defendant Jackson would violate the agreement and defame plaintiff -- and with conspiring with Jackson and his wife to intentionally breach the agreement. ABC is named with Jackson in a libel claim as well arising out of the content of the interview, and in a related negligence claim.

Also named as a defendant is Sony Corporation, which released Jackson's HIStory album. Plaintiff alleges that the lyrics to Jackson's songs, which elude to victimization, are slanderous of him (although his name is not used and the specifics of his grievance with Jackson are not mentioned) and that Sony had a duty not to distribute any music that made claims or allegations violating the confidentiality agreement. Chandler alleges that the lyrics could be understood to defame him and to make the public believe that his accusations of sexual abuse against Jackson were false.

2. *Mad Cattleman Sues Under Texas Disparagement Statute*

In what LDRC believes is the first suit to be brought under the recent wave of state product disparagement statutes, an Amarillo-based cattlegrower has sued the Oprah Winfrey show under the Texas 1995 False Disparagement of Perishable Food Products Law. The suit, filed on May 26 in Texas District Court in Amarillo, names Oprah Winfrey, guest Howard Lyman, and production companies Harpo Productions and Cannan Communications as defendants. Lyman, identified on the show as the executive director of the Humane Society's "Eating With Conscience" campaign, appeared on Winfrey's April 16 show making remarks on Bovine Spongiform Encephalopathy (BSE), or mad cow disease. The plaintiffs, Cactus Feeders, Inc. and its owner Paul Engler, claim that the defendants are liable under the statute for knowingly allowing Lyman

Ninth Circuit Rejects Masson Appeal

The Ninth Circuit Court of Appeals has affirmed a district court judgment in favor of The New Yorker and Janet Malcolm after a second trial in the case between them and Jeffrey Masson. *Masson v. The New Yorker Magazine, Inc.*, No. 94-17147 (9th Cir. June 5, 1996) You may recall that in the first trial, the district court granted judgment in favor of The New Yorker after the jury found that The New Yorker was not liable, and ordered a new trial for Janet Malcolm when the jury found that Malcolm had libeled Masson but was unable to reach a verdict on the damages to be awarded.

The issues on Masson's appeal against Malcolm were unremarkable, a quiet end to a long and contentious dispute. The finding of the Ninth Circuit that the suit against The New Yorker was governed by defensive collateral estoppel was an interesting and efficient means of shutting down endless appellate review.

In the second trial, only against Janet Malcolm, the jury returned a special verdict in favor of Malcolm on all five alleged false and defamatory statements. The jury found that Masson failed to meet his burden of proving that three of the statements were false, that one was defamatory, and that as to one, Malcolm had published it with actual malice.

Masson challenged the verdict on several grounds. He claimed that the instructions to the jury on falsity were erroneous. The challenged instructions provided that he must prove that he did not make the challenged statements and, with respect to quotations that he did make, that they were deliberately or recklessly altered so as to effect a material change in the meaning. The court correctly found that the instructions tracked the Supreme Court decision in *Masson*.

Masson challenged the instruction on actual malice to the effect that the defendant was under no legal duty to check any contradictory information. The Ninth Circuit found it unnecessary to reach the issue because the jury found that the statement at issue was not false, thereby never reaching the question of fault.

The Ninth Circuit upheld the trial court's judgment to limit the introduction of sections of Malcolm's book, *The Journalist and the Murderer*, as within the discretion of the trial court.

And, as noted above, it upheld The New Yorker's contention that the verdict in the second trial in favor of Malcolm on the question of liability compelled an affirmance in its favor under the doctrine of defensive collateral estoppel.

to make "false, disparaging, and misleading remarks . . . about BSE" as well as negligently allowing him to imply that beef is generally unsafe for public consumption. The plaintiffs also claim negligence per se, slander, slander per se, defamation, and intentional infliction of emotional distress, seeking unspecified actual and punitive damages.

3. *Plaintiff to Pay CNN, Finally*

In its early years, CNN's *Crossfire* featured duels between two unreconstructed pundits: liberal Tom Braden and conservative Pat Buchanan. Braden stayed on through Buchanan's frolics to and from the White House; but, in 1989, CNN wanted a change and let Braden go. The *Washington Times* covered the change with quotations from an anonymous source. Taking offense at the article's implications, Braden sued. Through two years of active discovery in the D.C. Superior Court, Braden and his counsel changed admissions, asserted facts, testimony and legal theories, running up large fees for CNN and the *Times*.

After the court granted summary judgment in February 1991, the defendants moved for sanctions. In September 1993, the court granted the motion and directed the defendants to submit their accounting draught of inaction during which Braden and his counsel resisted paying anything. (*Braden v. News World Communications, Inc.*, 22 Med. L. Rptr. 1065 (D.C. Super. Ct. 1993)) (See *LDRC LibelLetter*, Oct. 95 at page 3) Following the court's order that the parties participate in mediation, Braden and his counsel agreed that they would pay: CNN: $90,000; The *Times*: $35,000

4. *Fair Report Privilege Applied Despite Inaccuracies*

In an unpublished decision, the California Court of Appeal for the Second District (in Los Angeles) upheld the dismissal of a libel suit against the National Enquirer on the basis of the fair report privilege, despite the article's inaccuracies, including the inclusion of an allegedly fictional plaintiff. (*Fortensky v. National Enquirer Inc.* No. B084685 (Cal. Ct. App. Apr. 25, 1996)).

Actress Elizabeth Taylor and her ex-husband Larry Fortensky sued the tabloid claiming libel, invasion of privacy/false light and appropriation stemming from an article printed in 1993. The article reported on a lawsuit by the man next door charging Taylor and Fortensky with illegal removal of a fence between their home and their neighbor's property. The neighbor claimed that Fortensky made threats of physical harm. (*A.M. Real Estate, Inc. v. Taylor, Fortensky, Doe Fence Contractor* No. BC062909).

The National Enquirer story, however, misnamed the plaintiff in that case, who was not an individual, and was alleged by plaintiffs to be a fictitious character, but a real estate company which owned the property at the time. Moreover, the article misreported certain details of the threats that Fortensky allegedly made.

The trial court sustained the defendants' demurrers, ruling that the National Enquirer "story did not constitute so substantive a variation of the judicial proceeding that a reasonable reader's impression of Plaintiffs would have been altered in any measurable degree." (*Fortensky v. National Enquirer Inc.*, 22 Med. L. Rptr. 1599, 1601 (Cal. 1994)).

The appeals court agreed that since the article captured the "gist" of the court proceeding it fell within the fair report privilege.

5. *McFarlane Petitions Supreme Court for Certiorari*

Dissatisfied with his unanimous defeat in the D.C. Circuit this January, Robert "Bud" McFarlane has petitioned the U.S. Supreme Court for certiorari in his libel suit against *Esquire* magazine. McFarlane, the national security advisor to President Reagan, was accused of having worked with Israeli intelligence and the 1980 Reagan-Bush campaign to forestall a release of the American hostages in Iran until after the presidential election. *See LDRC LibelLetter*, February 1996, at 1.

The Court of Appeals noted in its opinion that "[t]he standard of actual malice is a daunting one," and sounded genuinely sorry that because of it McFarlane has been unable to secure vindication. 24 *Med. L. Rptr.* 1332 at 1341. So maybe we shouldn't be surprised that McFarlane, in his petition for cert., argues for a reexamination of the actual malice standard itself. Petitioner's brief at 25, *McFarlane v. Esquire*. Likening freedom of the press to a kite, which requires string to stay aloft, McFarlane asserts that the standard of actual malice "cuts the string of truth" that keeps our free press from crashing.

"What would be the harm to freedom, and to freedom of the press, if the standard for liability in a public fugure defamation case was less strict than "actual malice"? What would be the harm to freedom if the American public actually believed the press, because the public had some confidence that defamatory, harsh and critical statements about public fugures were true, and not protected inventions and buttressed rantings of acknowledged liars? Does anyone imagine that if Ford Motor is kept to a standard of care which includes liability for carelessness, it will stop making cars? Of course not." Petitioner's brief at 27.

(continued on page 9)

(continued from page 8)

6. In the "Everyone Sues" Category: Dummy Copy Used To Compose Student Paper Brings $850,000 Suit in VA

A technical error during the composing process of a college student newspaper has resulted in the paper being sued for $850,000 in Virginia state court. The *Collegiate Times* of Virginia Tech erroneously listed a school vice-president's job title as "Director of Butt Licking." The incorrect title was due to the use of "dummy copy" (called "TK's" in typographer's parlance) often used in the editorial process. When editors are composing pages but do not have the complete information such as an exact job title, "dummy copy" is inserted in the appropriate place in order to more correctly estimate word counts for copy fitting purposes. Before the page is sent to the printer, the dummy copy is replaced with the correct information. In this case, "Director of Butt Licking" was the dummy copy the college students used to fill the space of the correct job title.

Although the plaintiff in the action, Sharon Yeagle, refused to comment about the lawsuit, according to reports published in the *Roanoke Times* Yeagle asserts that the editing error "caused her shame, humiliation, embarrassment and financial loss." Yeagle's Roanoke lawyer, S.D. Roberts Moore, told reporters that the phrase was printed with "malicious intent" and he is relatively certain it will mean financial loss for Yeagle. The suit asks for $500,000 in compensatory damages and $350,000 in punitive damages. Moore explained that the defamatory meaning requirement was met because the phrase charges Yeagle with "the commission of a crime involving moral turpitude and therefore constitutes defamation. Butt licking is sodomy, and that is a crime."

Katy Sinclair, *Collegiate Times* editor in chief, told reporters that the newspaper never meant to print the title. "It was not an intent to harm Yeagle. We never intended it [the dummy copy] to get out," Sinclair said. According to Sinclair, the use of dummy phrases kept in the computer's system began several years ago. This is not the first time that the phrase has slipped by the editors. The same "Director of Butt Licking" phrase had made it way to print in an October issue, however the associate dean who was incorrectly identified in that edition took the mistake with a sense of humor, and graciously accepted the apology of the newspaper staff. Sinclair said a letter of apology was sent to Yeagle the day after this recent publication and has since changed the dummy copy. Lynn Nystrom, the paper's faculty adviser since 1978, said this is the first time a libel lawsuit has been filed against the newspaper. Tim Reed, assistant director of student activities and chairman of the University's Media Board, said the newspaper has $1 million in libel insurance and counsel is being provided through their insurance carrier.

— — Charles J. Glasser, a former LDRC intern, is an associate at DCS member firm Preti, Flaherty, Beliveau & Pachios in Portland, Maine.

1. Anti-Slapp Statute in California Applies to Politicians' Speech

In addition to the press efforts to assert protection under the California Anti-Slapp Statute, it would now appear that politicians as well have found remedies under the statute. In *Beilenson v. Superior Court*, 2d Civil No. B097615 (Super. Ct. No. CIV 158188)(96 Daily Journal D.A.R. 4710) (Cal.App. 2d Dist. April 24, 1996) A California Court of Appeal panel has held that the Section 425.16 of the California Code of Civil Procedure applied to a suit brought by Richard Sybert, candidate for Congress, against his successful opponent, Anthony Beilenson, a campaign worker, a consulting firm, and a campaign committee. The complaint alleged that during the last week of the election Beilenson's campaign distributed libelous campaign literature.

2.California SLAPP: Private Conversations

The Superior Court of Orange County determined in February that private conversations regarding a public issue are within the purview of California's Anti-SLAPP statute. In *Averill v. The Superior Court of Orange County*, 96 Daily Law Journal D.A.R. 2061, the court issued a writ of mandate dismissing a complaint for slander and intentional interference with prospective advantage filed against Jeannie Averill for criticizing a plan to convert a house in her neighborhood into a shelter for battered women.

Averill was present at a number of Anaheim City Council meetings and Planning Commission hearings concerning Eli Home, Inc.'s plan to purchase the house. When Averill and other homeowners expressed their opposition to the plan, Eli sent them a letter threatening to take legal action if their allegedly slanderous comments were repeated. Averill continued her activities, sending a petition signed by herself and others to the City Council and writing to a local newspaper to convey her objections to the plan. Averill also requested that her employer, Rockwell International, discontinue its support of Eli as one of its Christmas charities. Averill voiced her opposition to Rockwell's human resources department and community relations office, but the company did not change its position toward Eli.

As it had threatened in its

(Continued on page 10)

SLAPP STATUS

(Continued from page 9)

letter, Eli filed its complaint against Averill. Hoping to elude dismissal pursuant to section 425.16, Eli, in the court's words, "carefully craft[ed] the suit to exclude the public comments, circumsribing the basis for the action to comments petitioner made in private to her employer." 96 Daily Law Journal D.A.R. at 2063.

Averill responded with a motion to strike pursuant to California Code of Civil Procedure section 425.16, the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. Enacted in 1992, the statute seeks to deter nonmeritorious litigation filed to dissuade or punish the First Amendment rights of defendants. The statute protects, according to subdivision (e),

> any written or oral statement or writing made before or in connection with a matter under consideration or review by a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.

The trial court denied the motion to strike, finding that a conversation between Averill and her employer was not a matter of great public interest as contemplated by the Anti-SLAPP statute. Averill filed a petition for writ of mandate, which this court issued after independently considering the statute's proper interpretation. Whether section 425.16 applied to private conversations regarding a public issue was not clear in the statute's language, nor was answered in case law. All but one other case arising under section 425.16 concerned statements made in a public forum. However, in *Wilcox v. Superior Court*, 27 Cal.App.4th 809, the court held a memo circulated privately among court reporters to invite them to join a lawsuit against insurance companies was protected as the exercise of free speech in connection with a public issue.

Judge Rylaarsdam, with Judges Sills and Sonenshine concurring, found Averill's comments to be "oral statements made in connection with an issue arguably still subject to review by the city" 96 Daily Law Journal D.A.R. at 2062. Although the statements may not have been expressly covered under subdivision (e), the court held the use of the word "includes" in the statute indicated the Legislature intended a broad interpretation and so other acts not explicitly mentioned in the statute were protected. *Id.* Holding Averill's private conversation protected, the court thus dismissed Eli's suit, which it characterized as appearing "to have been filed solely to punish Averill for her criticism of the Eli project." *Id.*

About twenty cases have invoked California's Anti-SLAPP statute since its enactment in 1992.

3. Massachusetts SLAPP

As reported in the May 1995 edition of the *LibelLetter*, Massachusetts enacted its own version of an anti-SLAPP statute entitled, "An Act Protecting the Public's Right to Petition Government." Only three cases have invoked the law since it was enacted on December 29, 1994, when the Massachusetts House of Representatives and Senate overrode Governor Weld's veto of the bill. The scope and application of this statute is still unsettled, as evidenced in *Milford Power Limited Partnership v. New England Power Company*, No. Civ.A. 94-40180-NMG, 1996 WL 115415 (D. Mass. Mar. 14, 1996).

This case involved various tort, breach of contract and statutory violation claims against the power company. The defamation action arose when Milford issued a news release which reported the filing of this lawsuit and contained accusations of criminal activities, incuding RICO violations, against NEP. NEP argued that the accusations were false and subjected the company to ridicule and scorn. Milford sought to dismiss the defamation action, as well as claims of civil conspiracy and abuse of process, pursuant to the Massachusetts anti-SLAPP statute, M.G.L. c. 231, section 59H.

Milford argued that these claims against them arose from the exercise of their right to petition through filing a complaint and issuing a news release. They claimed that this statute created a deliberately broader right of petition which completely altered the law of defamation and abuse of process. The fact that it was vetoed by Governor Weld was cited as evidence of this sea change. 1996 WL at *15.

The United States District Court for the District of Massachusetts was not persuaded by Milford's arguments, holding the anti-SLAPP statute was inapplicable to this situation. The court found that NEP's counterclaims against Milford did not constitute a meritless lawsuit filed against individual citizens as contemplated by the statute. However, the court recognized that the statute did broaden the right to petition in Massachusetts. Because the anti-SLAPP statute's scope and application is unsettled, and because the Massauchusetts Supreme Judicial Court is reviewing a case which raises the issue of whether the anti-SLAPP statute applies commercial entitites as well as to individuals, the motion to dismiss was denied without prejudice.

LDRC would like to thank the following interns for their contributions to this month's LDRC LibelLetter:
Nora Field, Ann Marie Heimberger, Neil Rosenhouse and Ethan Skerry

Justice White for the Eighth Circuit: Libel By Implication

(Continued from page 1)

requires that those who sell dogs for research document the source of the animals to ensure that such pets don't find their way into the research pipeline.

WCCO-TV interviewed a representative from the University of Minnesota research laboratories, an official of the United States Department of Agriculture (USDA) and owners of dogs who believed their pets may have been stolen and sold to research laboratories. The story also included references to two dog dealers licensed by the USDA to sell dogs to research laboratories. One of those licensed dealers was Julian Toney of Lamoni, Iowa.

The story contained the following references to Toney:

South about 40 miles on the Iowa/Missouri border, we found the place where Class B dealer Julian Toney buys the dogs he sells to the University.

According to USDA records, Mr. Toney supplies about a thousand dogs a year to the University of Minnesota. He told us the University is only about a fifth of his business. He said he seldom gets animals from dog pounds. But when we checked his 1990 records, we found he was telling the USDA just the opposite.

Last week the USDA confirmed that Julian Toney himself is under investigation for falsification of records.

The information relating to Toney was obtained from an interview with him, an interview with a USDA official and publicly available records. Four months after the story aired, Toney was charged with falsification of records by the USDA. In April, 1995, an Administrative Law Judge found that Toney had, indeed, falsified records filed with the USDA relating to the source of some of the dogs Toney provided to research facilities. The judge recommended that Toney's license be revoked and that he be assessed a civil penalty of $200,000.

The District Court

Toney brought suit in U.S. District Court against WCCO-TV in May of 1994, alleging that he was defamed by the story which, he asserted, accused him of selling stolen dogs to research institutions. He also alleged that WCCO-TV's story "carried a defamatory meaning by implication," and, in effect, accused him of selling stolen dogs, of being an untruthful and dishonest businessman and a thief.

In December of 1994, U.S. District Judge James M. Rosenbaum dismissed Toney's defamation claim, finding that the statements relating to Toney were neither defamatory nor false. In an opinion issued from the bench, he also rejected Toney's "defamation by implication" claim, on the ground that no reported Minnesota case has recognized such a cause of action. Toney appealed Judge Rosenbaum's decision to the Eighth Circuit Court of Appeals. Early this month, the Eighth Circuit reversed Judge Rosenbaum's decision and remanded Toney's claims to the District Court for further proceedings. (Toney v. WCCO Television, et al., File No. 95-1190, June 7, 1996).

Justice White's Opinion

Even before the decision was filed, the presence of Supreme Court Associate Justice Byron R. White (ret.) on the three-judge panel caused some to view the case with interest. Having authored the decision, Mr. Justice White has made it clear that retirement has not mellowed his views of the press.

Justice White remanded the defamation cause of action to the district court simply because he did not believe that WCCO-TV had proved the truth of its statement that Toney's 1990 records, showing that Toney obtained his dogs from dog pounds, conflicted with his purported statement to WCCO-TV that he seldom obtained his dogs from pounds. Moreover, plaintiff contended that he had not made the statement to the reporter, which Justice White found created another issue of fact. Thus, the appellate panel ultimately could concur with the district court that most of the challenged statements were either true or not defamatory, but did not concur with the trial court's judgment on one of the statements.

While defendants certainly would disagree with the panel's determination on this issue and its handling of the statement in question, the conclusion of the appellate court that a disagreement as to whether or not a fact issue remains on an early, pre-discovery motion for summary judgment does not, as a matter of law, break new ground. What is likely to cause more discussion is how Justice White and the panel discuss the state of Minnesota law involving defamation by implication.

Toney claimed that the story accused him of theft and dishonesty. WCCO-TV argued that the words of its story did not level that accusation, and that neither Minnesota law nor decisions of the Eighth Circuit established such a cause of action without a more explicit accusation. See Diesen v. Hessburg, 455 N.W.2d 446, 452 (Minn. 1990), cert. denied, 498 U.S. 1119 (1991); ("an allegedly false implication arising out of true statements is generally not actionable in defamation to a public official.") Price v. Viking Penguin Press, 881 F.2d 1426, 1432 (8th Cir. 1989), cert. denied, 493 U.S. 1036 (1990); Janklow v. Newsweek, Inc., 788 F.2d 1300, 1304 (8th Cir.) (en banc), cert. denied, 479 U.S. 883 (1986).

The holding of the Eighth Circuit case appears to be that Diesen applies only to public figures and that several other Minnesota cases appear to allow the cause of action when the plaintiff is not a public official or public figure. In reaching this result, Mr. Justice White seems to have found a middle ground. First, he does not define

(Continued on page 12)

Justice White for the Eighth Circuit: Libel By Implication

(Continued from page 11)

defamation by implication as a cause of action completely dependent upon an interpretation of the offending language by the aggrieved party. He finds that "the touchstone of implied defamation claims is an artificial juxtaposition of two true statements or the material omission of facts that would render the challenged statement(s) non-defamatory." This finding relies heavily on the discussion of such a cause of action in W. Page Keeton, et al., Prosser & Keeton on the Law of Torts, § 116 (5th Ed. 1984). Under this analysis of defamation common law, only these two situations would give rise to a potential cause of action for defamation, and only if the offending implication is both a statement of fact and defamatory.

In order to accomplish what some might think of as a small task, however, Mr. Justice White is required to deal with the Diesen, Price and Janklow decisions, and to interpret several other Minnesota decisions. It is here that the decision may raise some additional questions.

First, in Diesen, the Minnesota Supreme Court refused to allow a public official to proceed on a theory that a harshly critical article necessarily raised a false and defamatory "implication" that the public official was derelict in performing his duty. Diesen was decided, however, by a split court, and Justice White questions whether there was, in fact, any majority view on libel by implication claims, even ones by public officials. In his discussion of the decision, Mr. Justice White may well give public officials comfort in believing that amorphous claims of harm arising out of critical articles will support defamation claims. In the end, however, he finds that at minimum, Diesen did not preclude libel by implication claims brought by private figures.

Second, the decision goes to great lengths to distinguish Price and Janklow, both decisions of the Eighth Circuit, from Toney's claim. Justice White asserts that the *Diesen* majority opinion cited *Price* nor *Janklow* for no more than the proposition that public figures/officials cannot sue for libel by implication, that *Price* and *Janklow* do not hold that even public officials can never maintain such a claim, and finally, that if *Price* and *Janklow* were read to broadly bar libel by implication, then as pre-*Milkovich* opinions, they would no longer control the analysis.

Justice White parses *Janklow* and *Price* in a manner that limits their holdings. But in the end, he asserts that if the four-factor opinion analysis used by the Eighth Circuit in those decisions would bar all defamation by implication claims, then he felt no obligation to be bound by that analysis in light of the decision of the Supreme Court in *Milkovich*. He states that the Court in *Milkovich* "'rejected a number of factors developed by lower courts' used to provide constitutional protection for opinion...'in mistaken reliance' on the dictum in *Gertz*..." Slip op. at 19. Even if *Price* and *Janklow* found "that implications are constitutionally suspect, *Milkovich* made clear that implications, like plain statements, may give rise to a defamation claim." Id. at 20-21.

Justice White notes that "relevant commentary" seemingly agrees with his position that the four part "totality of the circumstances" tests for opinion, used in *Price* and *Janklow*, among other jurisdictions, had been "implicitly rejected...in favor of a single inquiry into whether the alleged defamatory statement is actionable." Slip op. at p. 20 n.7, citing a law review article by Abner Mikva. Having said that, however, he also notes that "some courts" have found the four-factor test "instructive" in determining whether or not a statement is provably false, and cites, among other cases, several recent Minnesota decisions. In the past, the analyses in Price and Janklow have been very useful to media defendants. Toney may be argued as limiting that usefulness in the future.

The panel endeavors to buttress its decision about the state of libel by implication law in Minnesota by citing to various pre-*Diesen* Minnesota decisions. Justice White's decision ignores an important factor which distinguishes those decisions from the *Toney* and from the *Diesen* cases. None of the cases involve media defendants or publication about matters of public concern. Furthermore, most of the cases, unlike Toney, involved a claim of defamation by innuendo, which requires extrinsic evidence which turns seemingly non-defamatory statements into actionable ones. Such evidence did not exist in Toney. Therefore, future claims may not require evidence of extrinsic facts.

The most disturbing aspect of the Toney decision is that it makes no effort to relate the general academic discussion of what the law might be to either the facts of the Toney case or to the type of story of which Toney is an example. As a result, it is difficult to describe the possible impact of the case other than to recite the court's discussion.

Furthermore, the decision makes no effort to deal with the realities of the broadcast news profession or the litigation to which the profession is subjected. While it may open the courthouse doors to a greater number of vague claims, it does not even pretend to set standards by which those claims are to be decided. The best that can be said for the decision is that, because it is grounded only upon the Prosser & Keeton discussion, its precedential value will be limited to those fairly garden-variety claims for defamatory implications raised by omitted material facts or artificially juxtaposed facts. The more dangerous claims based on fanciful interpretations of the ultimate meaning of the offending words will find little language on which to rely in Toney v. WCCO Television.

Paul R. Hannah is in private practice in Minnesota and represented WCCO-TV in this matter.

Court Enjoins Communications Decency Act

(Continued from page 1)

Dolores K. Sloviter of the Third Circuit, and District Judges Ronald L. Buckwalter and Stewart Dalzell of the Eastern District of Pennsylvania.

Plaintiffs in the two actions are large coalitions including public interest and professional organizations, online service providers, and individual Internet users. See Lawsuits Challenging Internet Indecency Provisions Promise to Chart Course of First Amendment in Cyberspace, See *LDRC LibelLetter*, March 1996, at p. 19.

Detailed Factual Findings

Although the Philadelphia court necessarily addressed only plaintiffs' likelihood of success on the merits, its emphatic 175-page opinion leaves little doubt that the court would hold the challenged provisions unconstitutional. Central to the court's decision (and of great importance for eventual Supreme Court review) are the panel's extensive and detailed factual findings about the history and operation of the Internet -- described by the court as a "global Web of linked networks and computers" carrying content "as diverse as human thought" -- and the effect of the CDA on that medium.

In those findings, for example, the court noted that, contrary to a central premise of the CDA, speakers on the Internet generally cannot control who receives their messages.

The court also found that the CDA's "safe harbor" defenses -- available to content providers who, for example, restrict access to their communications by requiring credit cards or adult access codes -- would be costly and impracticable for a large proportion of content providers, especially noncommercial speakers.

The findings reject the Government's argument that any online speaker could comply with the CDA by labelling or "tagging" his speech to indicate its potentially "indecent" content. The court found that there exists no agreed-upon "tag" that speakers can use, reviewing and tagging material within large databases would be extremely burdensome, and the efficacy of tagging would depend entirely upon the cooperation of users to acquire and use compatible blocking software.

At the same time, the court found that user control technologies -- such as software that blocks designated web sites or categories of materials -- provide parents with a "reasonably effective" means to prevent their children from accessing sexually oriented material online and that such means will soon be "widely available" in the private marketplace.

The Judges' Shared Legal Conclusions

The members of the three-judge district court each wrote lengthy opinions. Although there are some noteworthy differences among the three, the panel was unanimous on the basic First Amendment standards applicable to the CDA and on the statute's failure to satisfy those standards.

All three agreed that the CDA is subject to strict scrutiny as a content-based restriction of speech. All rejected the Government's argument (ultimately abandoned) that speech restrictions in cyberspace should be judged under the less exacting scrutiny applied to broadcast media in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and other cases. The judges found that the special medium characteristics that justify comparatively relaxed First Amendment standards for broadcast -- principally spectrum scarcity and the medium's tendency to intrude upon listeners without invitation -- do not apply to cyberspace.

All three judges agreed, moreover, that the CDA would operate as an effective ban on constitutionally protected expression for a large number of content providers. Such a ban, the judges concluded, was unconstitutional under *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), and earlier decisions holding that "indecent" but non-obscene speech may not be banned for adults in the name of protecting children.

The judges all rejected the Government's arguments that the CDA could be construed to apply only to a narrow category of speech, such as commercial "pornography." The court noted that the CDA could not reasonably be construed as limited to "pornography," and that plaintiffs had reason to fear prosecution for engaging in various kinds of non-"pornographic" speech. The judges also noted that the CDA contained no exception for "indecent" material that possessed serious artistic or other social value.

The judges all specifically rejected defendants' argument that federal prosecutors should be trusted to restrict CDA prosecutions to online "pornographers" and refrain from applying it to speech with serious social value. Judge Sloviter responded that "the First Amendment should not be interpreted to require us to entrust the protection it affords to the judgment of prosecutors" and Judge Buckwalter complained that the Government's argument would give "unfettered discretion" to prosecutors subject to the "vagaries of politics." A brief summary of the judges' separate opinions follows:

Judge Sloviter

Judge Sloviter agreed with Judge Buckwalter's conclusion that the CDA was void for vagueness, but her own opinion focuses largely on her conclusion that the CDA operates as an impermissible ban on speech that is constitutionally protected for adults.

"A wealth of persuasive evidence," she stated, "proved that it is either technologically impossible or economically prohibitive for many of the plaintiffs to comply with the CDA without seriously impeding their posting

(Continued on page 14)

Court Enjoins Communications Decency Act

(Continued from page 13)

of online material which adults have a constitutional right to access." Thus, "many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution."

Even if the statutory "safe harbors" were technically feasible, Judge Sloviter noted, they are defenses that can be vindicated only after a trial. The risks and costs of trial would be enough to chill many speakers; given the burdens of a criminal prosecution, a not guilty verdict pursuant to a statutory safe harbor "would be small solace indeed."

Noting that prior efforts to regulate "indecent" speech had involved narrow and "clearly harmful" categories of speech such as commercial "dial-a-porn" messages, Judge Sloviter questioned whether the Government indeed had a compelling interest in restricting minor's access to the broad array of materials covered by the CDA. She also questioned whether such a "patent intrusion" on protected speech could ever be permitted, even if under the standard strict scrutiny formula the intrusion could be deemed necessary to serve a "compelling governmental interest."

Judge Sloviter noted that Congress could take steps to facilitate parents' efforts to prevent their children's access to material deemed harmful for them, such as facilitating the use of parental blocking software and enforcing existing obscenity and child pornography laws. However, by selecting the more intrusive course of regulating what material may be posted on the Internet, Congress had brought the CDA "in serious conflict with our most cherished protection -- the right to choose the material to which we would have access."

Judge Buckwalter

Judge Buckwalter agreed with his colleagues that, given "current technology," the CDA operates as an ban on speech that is constitutionally protected for adults, in violation of the holding in *Sable*. He cautioned, however, that it was "too early in the development of this new medium" to conclude that "any and all statutory regulation of protected speech on the Internet could not survive constitutional scrutiny."

Judge Buckwalter's main theme was that the CDA's liability provisions and defenses are unconstitutionally vague. He acknowledged that the Conference Report on the CDA intended that "indecent" have the same meaning as the FCC indecency standard at issue in *Pacifica*. However, he observed that in *Pacifica* the Supreme Court had not considered a broad vagueness challenge to the term "indecent", but only whether the FCC had the authority to regulate the particular broadcast at issue, and that in any case had made clear that its holding was confined to the broadcast medium. Nor has the Court addressed such a broad challenge to the term "indecent" in any other medium.

Judge Buckwalter emphasized the difficulty of applying "community standards" (as the CDA requires) to a nationwide medium, and that the Government had demonstrated no "national standard or nationwide consensus as to what would be considered `patently offensive.'" Nor had Government counsel been able to give more precise definition to the "indecency" standard in response to hypothetical examples given by the court. In Judge Buckwalter's view, the statute's "good faith" defense was also fatally uncertain because it does not specify what speakers must do to avoid prosecution.

Judge Dalzell

Judge Dalzell disagreed with his colleagues' conclusion that the CDA is impermissibly vague, but his opinion is the most ardent and sweeping of the three. Judge Dalzell concluded not only that the CDA itself is a flagrant First Amendment violation, but also that -- because of the "special qualities of this new medium" -- "Congress may not regulate indecency on the Internet at all."

Judge Dalzell identified several "novel characteristics" of the Internet in support of his conclusion that this medium "deserves the broadest possible protection from government-imposed, content-based regulation":

*it allows ordinary speakers to reach a mass audience at unprecedently low cost;

*these low barriers to entry into the online "marketplace of ideas" are same for speakers and listeners;

*"astoundingly diverse content is available" online;

* and the Internet "affords significant access to all who wish to speak" and "even creates relative parity among speakers."

Judge Dalzell argued that the CDA would impair or destroy the very qualities that make the Internet a uniquely democratic and speech-enhancing medium. By requiring speakers to screen their databases for potentially indecent material and to establish expensive age verification procedures, the statute would cause the costs of online communication to "skyrocket, especially for non-commercial and not-for-profit information providers," and "diversity of the content will necessarily diminish as a result."

"The CDA's wholesale disruption of the Internet will necessarily affect adult participation in the medium," Judge Dalzell warned, thereby "diminish[ing] the worldwide dialogue that is the strength and signal achievement of the medium."

Judge Dalzell added that, for all its destructive effects for the Internet, the CDA "will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet," given that a large proportion of online communications originates outside the United States and therefore beyond the effective reach of domestic law.

Judge Dalzell suggested that the

(Continued on page 15)

Communications Decency Act

(Continued from page 14)

First Amendment would never tolerate a "Newspaper Decency Act," a "Novel Decency Act," or a "Village Green Decency Act." Indecency regulation of cyberspace is even more clearly unconstitutional, he concluded, because "[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails."

After quoting one of plaintiffs' experts who had described the anarchic, unregulated environment that contributed to the development of today's Internet, Judge Dalzell concluded that: "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech that the First Amendment protects."

The Next Step

The CDA gives the Government a right to a direct Supreme Court appeal of an order holding any provision of the statute unconstitutional, and expressly includes interlocutory orders such as a preliminary injunction. Under the statute, the Government has 20 days from entry of the district court's order to appeal the preliminary injunction decision.

Alternatively, the Government could choose to remain in the district court and appeal only if the court ultimately grants a permanent injunction; or it could opt not to appeal at all.

At this writing, it appears most likely that the Government will appeal sooner rather than later, thus making way this Fall for the Supreme Court's first foray into cyberspace.

Sean H. Donahue is an associate at Jenner & Block, Washington, D.C., which represents the plaintiffs in ALA v. Department of Justice. The district court's June 11 decision is available online at, among other places, http:\\www.cdt.org\CIEC and http:\\www.aclu.org.

California Court of Appeal Fails to Adopt Neutral Reportage

(Continued from page 1)

Sirhan was actually a decoy for an Iranian plot to kill Kennedy. Morrow claimed that the Iranians were acting under orders from the Mafia.

Morrow says that a man identified as "Ali Ahmand" was the actual killer, and he includes in the book a photograph of a man he says is "Ahmand" standing next to Kennedy moments before the shooting. Morrow reports in the book that "Ahmand" lives in Iran. But the man in the picture is actually the plaintiff, Khawar. Ali Ahmad is in fact the name of the plaintiff's father.

Khawar was a photojournalist at the time and is shown in the photograph standing with other men near the president and holding a camera.

The *Globe* reprinted the allegations and the photo in a story headlined "Former CIA agent claims: IRANIANS KILLED BOBBY KENNEDY FOR THE MAFIA."

Morrow and the book's publisher, Roundtable Publishing, were also named as defendants, but Khawar settled with Roundtable before trial and a default was entered against Morrow. (*Khawar*, 95 D.A.R. at 6550).

An Inconsistent Trial Verdict

At trial, the jury found that 1) the article was a neutral and accurate report of the statements made by Morrow, 2) Khawar was a private figure, 3) the *Globe* was both negligent in publishing the article and did so with knowing falsity or with reckless disregard for the truth, and 4) the *Globe* published the article with malice or oppression. The jury awarded damages to Khawar as follows: $100,000 for reputational harm, $400,000 for emotional distress, $175,00 in presumed damages, and $500,000 in punitive damages.

The trial judge disagreed with the finding that the article was a neutral and accurate report, but otherwise accepted the jury's findings and entered a judgment for Khawar. On appeal, the *Globe* argued, among other issues, that the trial court exceeded its authority by disregarding the jury's finding that the article was a neutral and accurate report, and that the jury's finding of a neutral and accurate report precluded a finding of negligence, and that there was no evidence of actual malice.

On Appeal

A key argument of the *Globe* was that the report of the allegations made in a book written by a prominent author should be protected under the neutral reportage doctrine. The appellate court noted that the neutral reportage doctrine, arising out of *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977), cert denied, 434 U.S. 1002 (1977) required four elements: the charges must be 1) newsworthy, 2) made by a responsible source, 3) reported neutrally and accurately, and 4) about a public official or figure.

The *Globe* maintained that Khawar was a public figure as a result of Morrow book, which thrust him, involuntarily to be sure, into the controversy surrounding Kennedy's assassination, which is of continuing nationwide interest. Even before Morrow's book, Khawar's photograph had appeared in numerous articles and he was interviewed several times by the police.

The court found, however, that Khawar took no voluntary action to put himself in the center of the controversy, nor did he try to shape public opinion. (*Khawar*, 95 D.A.R. at 6552). The court opinion made no mention at all of Khawar's prominence in the Morrow book and how that would, if at all, affect the analysis on public figure status. The court did note, however, that the passage of time since these events would serve to reduce any arguable public figure status of the plaintiff as a result of his

(Continued on page 16)

California Court of Appeal Fails to Adopt Neutral Reportage

(Continued from page 15)
involvement in the contemporaneous assassination investigation.

The appeals court indicated that, to its knowledge, no California reported decision had adopted neutral reportage. The panel agreed with the lower court's finding that Khawar was a private figure, and held that California would not extend the neutral reportage doctrine, were the state to adopt it at all, to private figures.[1]

The court cited to the discussion of the California Supreme Court in *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 257 Cal. Rptr. 708, 771 P.2d 406 (1989) in which the Supreme Court held that news reports to the general public regarding a private person were not privileged under the "public interest privilege" set out in the California Civil Code, section 47. The court found that an examination of the competing interests between private reputation and free press/free speech did not require such a privilege. Under the same analysis, the court here held that under California law, neutral reportage would not extend to reports about a private figure.

Purposeful Avoidance of the Truth

In addition to its finding on the neutral reportage doctrine, the appeals court held, in a disturbing analysis, that there was "substantial evidence" to support the jury's findings that the *Globe* acted with actual malice as well as negligence in its publication of the story.

On the issue of actual malice, the court found that the allegations in Morrow's book were so "glaringly false" -- "it makes assertions that on the surface seem extraordinarily improbable" -- that *Globe* editors must have purposely avoided the truth. With that as a premise, and with no explanation as to the basis for that premise, the court's analysis presupposes an obligation on the *Globe* to reinvestigate the assassination theories.

The court saw the reporter's failure to locate the person called "Ahmand," as evidence of actual malice, suggesting that a private investigator could have been used by the publication for this purpose at minimal cost. The court makes no note of the fact that the Morrow book suggests that Ahmand lives in Iran, not in Southern California as turned out to be the case. Similarly, the failure to interview key assassination sources and witnesses was evidence of malice. (*Khawar*, 95 D.A.R. at 6554). The court cites testimony of the managing editor that he failed to contact any of the 2300 people who were present on the night of the assassination as evidence supporting a finding that the *Globe* was purposefully avoiding the truth.

The *Globe* had contended that since it published a report about the book and not the book itself, the newspaper's attitude toward the truth of the allegations was irrelevant except to the extent that the *Globe* believed that the book's publication was newsworthy and accurately reported. (Combined Reply Brief and Cross-Respondent's Brief of Appellant *Globe* Intl., Inc., p. 23.) This attitude toward the truth, of course, was cited by the court as evidence of actual malice.

Negligence Based on Journalism Codes

On the issue of negligence, several experts testified at trial that the *Globe*'s conduct fell below the acceptable standard of care for journalism. Interestingly, the court cited as "reflective of this standard of care" two ethics codes: the Society of Professional Journalists' Code of Ethics, Articles IV and V, and The American Society of Newspaper Editors' Statement of Principles, Article VI. Both of these reflect global principles of truth and fairness, with specific notes on not communicating unofficial charges or accusations without giving the accused an opportunity to respond.

While the court notes that the Globe ultimately abandoned an initial position that the article in question was a book review, the court does not indicate whether it would have treated the issues before it differently if the article had been characterized differently.

The *Globe* plans to appeal the ruling on the issues of neutral reportage, private/public figure status and fault.

Endnote

1 *See LDRC Libel Letter*, March 1995 at p. 11 where Walter Allen, Pillsbury Madison & Sutro, San Francisco, writes on the trial court decision. Mr. Allen noted that the neutral reportage privilege has been favorably cited by California courts (*see Grillo v. Smith*, 144 Cal. App. 3d 868, 162 Cal. Rptr. 701 (1980); *Wingarten v. Block*, 102 Cal. App. 3d 129, 162 Cal. Rptr. 701 (1980), *cert. denied*, 449 U.S. 99 (1980); and *see Stockton Newspapers v. Superior Court*, 206 Cal. App. 3d 966, 254 Cal. Rptr. 389 (1989), *disapproved on other grounds*; *Brown v. Kelly Broadcasting Co.*, 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406 (1989)), and has been applied by federal district courts sitting in diversity in California (*see Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal. 1984); *Ward v. News Group Intern.*, 733 F. Supp. 83 (C.D. Cal. 1990)). But no California appellate court apparently has expressly adopted the doctrine.

If any LDRC member is interested in participating in an amicus effort in connection with the appeal, you should contact Michael Kahane, Globe Communications Corporation, Boca Raton, Florida, at 407-989-1225. It would appear that 2 to 4 amicus briefs may be submitted to the California Supreme Court in support of the Globe's efforts to get a hearing, and a reversal, from California's highest court.