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The Atlanta Journal-Constitution to Defy Order to Reveal Sources in Jewell Libel Suit

The Georgia state trial court hearing Richard Jewell's defamation claim against *The Atlanta Journal-Constitution* has ordered the newspaper to disclose the identity of confidential law enforcement sources used in the paper's reports on the investigation of Jewell's possible role in the Olympic Park bombing. *Jewell v. The Atlanta Journal-Constitution*, et al., No. 97-VSO122804-G (Ga. State Ct. April 29, 1998) (Mather, J.). Faced with this order, and the trial court's denial of a motion for immediate leave to appeal, the *Journal-Constitution*, through its lawyers, informed the court that it will not reveal the identities of its confidential sources even at the risk of sanctions. (Letter to the Court dated May 11, 1998.)

The decision ordering disclosure came in response to a motion by Jewell to compel discovery of confidential sources and other information. The newspaper's principal argument against disclosure of its confidential sources was that such information should be considered sensitive and thus discoverable under Georgia precedent only on a showing of compelling need. The

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Jewell Libel Suit

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trial court had already deemed as sensitive Jewell's tax returns, seized item property receipts, statements to investigators and settlement documents from cases brought against CNN and NBC. The court also deemed sensitive certain of the newspaper's personnel records.

The *Journal-Constitution* argued that the identity of confidential sources was likewise sensitive and that Jewell's failure to establish a compelling need for the information precluded discovery. Specifically, Jewell failed to show he could prove any of the alleged defamatory statements false. Furthermore, Jewell did not establish that he needed the information in light of the trial court's previous ruling that it could not compel law enforcement agents to testify (presumably the confidential sources at issue).

The court granted Jewell's motion. Without addressing the newspaper's principal arguments, the court granted discovery on the grounds that Georgia's shield law and the First Amendment create no privilege against disclosure. With regard to Georgia's shield law, the court ruled that by its terms the law only applies "where the one asserting the privilege is not a party." *Jewell*, slip op. at 2 (quoting O.C.G.A. §24-9-30). Therefore, the newspaper could not rely on this privilege. The court also rejected a constitutional First Amendment privilege under *Branzburg v. Hayes*, 408 U.S. 665 (1972). Reviewing *Branzburg* and Georgia appellate court interpretations of it, the court concluded that it provides no qualified privilege for the press. The court quoted with approval a passage from Justice White's plurality opinion in the case rejecting a qualified privilege, including Justice White's observation that "the existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press." *Jewell*, slip op. at 3 (quoting *Branzburg* at 698-99).

The decision also permits Jewell to take discovery in other areas, including inquiries into the newspaper's evaluation process and knowledge of alleged improper incidents by certain journalists; the number, length and participants in libel seminars conducted for newspaper employees; and information regarding the newspaper's use of prepublication review.

The alleged defamatory statements for which Jewell sought the confidential sources include newspaper reports that Jewell "is the focus of the federal investigation," that he "fits the profile of the lone bomber," that "since the bombing, Jewell has become the celebrity police believe he always wanted to be," and that police "believe he placed the 911 call himself." In its opposition to Jewell's motion to compel, the *Journal-Constitution* argued that each of these statements is true. Thus, regardless of whether or not a state or constitutional privilege applied, Jewell failed to provide any evidentiary basis of falsity for an order compelling identification.

Generally, the identity of a source would only be relevant if the alleged defamatory statements are inaccurate and the defendant's reliance on the source is at issue. The trial court's opinion does not address this objection and it appears to withhold from the press the ordinary protections afforded an ordinary civil litigant. The court's unusual decision may have resulted in part from its own earlier ruling to defer a decision on a motion to dismiss for failure to show falsity pending the completion of discovery.

Defendants sought leave to appeal the court's decision, which was denied. On May 11, the defendants sent a letter to the court "respectfully inform[ing] the Court that, on risk of sanctions, The Journal-Constitution will not reveal the identities of its confidential sources." The defendants indicated that they felt that this was the only route left them to obtain adequate review of the Court's decision. Plaintiffs lawyers have stated they will move for sanctions.

MICHIGAN SUPREME COURT ADOPTS "AP DEFENSE"

By Herschel P. Fink

The Michigan Supreme Court on May 15,1998 embraced the so-called AP, or wire service defense, bringing to a conclusion a marathon libel case against the Detroit Free Press by the father of cocaine-addicted former major league baseball pitcher Steve Howe that extended over almost 12 years, and may have set a longevity record for Michigan libel cases.

The case, *Virgil Howe v. Detroit Free Press* (Michigan Supreme Court No. 108360, 5/15/98), had twice before reached the state Supreme Court. There are two reported Court of Appeals decisions, and one earlier Supreme Court opinion. Although close to trial on several occasions since its filing in January, 1987, the case never went before a jury.

The suit arose from a 1986 story first published in *The San Jose Mercury News* and distributed on the Knight Ridder Tribune News Wire. In it, Steve Howe -- then in one of his multiple suspensions from baseball -- discussed his problem with cocaine addiction and attributed it to his own father's drinking problems. The story was republished in the *Detroit Free Press* because Steve Howe had grown up in the Detroit area, had been a star on the University of Michigan baseball team, and his father, Virgil Howe, still lived in Michigan.

The suit, filed in the Wayne County Circuit Court in Detroit by Virgil Howe, claimed that he had no drinking problems. It originally joined the Mercury News, but the California newspaper and its reporter were dismissed in 1993 because of the plaintiff's failure to satisfy the requirements of the California libel retraction statute. That dismissal was not appealed.

Defense counsel for the newspapers then moved to dismiss the *Free Press* under the AP or wire service defense, arguing that the *Free Press* had no duty to independently verify the accuracy of a news story received from a reputable news service. The trial court rejected the defense, which had never before been adopted by a Michigan court, although it has been followed in at least 13 jurisdictions since it was first formulated by the Florida Supreme Court more than 60 years ago. The Michigan Court of Appeals and Supreme Court refused to hear an interlocutory appeal at that time.

The *Free Press* later moved again for summary disposition, claiming that Virgil Howe -- who had often publicly commented on his son's problems -- was a limited purpose public figure, and the *Free Press* could not as a matter of law have entertained serious doubts as to the truth of a story it received from a reputable news service and published without further investigation.

The trial judge ruled that Virgil Howe was a limited purpose public figure, but in a bizarre turn of logic, she went on to rule that it was a jury question whether the *Free Press* published the wire story with actual malice. The newspaper had supported its motion with the affidavit of the editor who handled the story, saying that he believed the story was accurate because he had previously heard about Steve Howe's family problems, and the story was consistent with that prior knowledge. He also stated in the affidavit that he never entertained any doubts regarding the story's accuracy. The plaintiff presented no counter affidavit.

In one of the case's unusual twists, the trial judge's ruling struck the plaintiff's attorney as so indefensible that he stipulated that he could not establish actual malice, and agreed to the entry of an order dismissing the case, preserving his right to appeal the determination that Virgil Howe was a public figure.

On appeal, the *Free Press* cross appealed from the trial judge's earlier refusal to dismiss based upon the wire service defense. At argument, *Free Press* counsel chose to encourage the Court of Appeals to decide the case on the wire service defense, rather than the more legally uncertain public figure determination. The Court of Appeals did just that in a reported decision, 219 Mich App 150; 25 Media Law Rptr 1602 (1996).

The plaintiff then sought leave to appeal to the Michigan Supreme Court. In its May 15,1998 order, the Supreme Court, in lieu of granting leave to appeal, affirmed, writing:

* * * We agree with the Court of Appeals that:

"In the case at bar, defendant reproduced, with-

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MICHIGAN SUPREME COURT ADOPTS "AP DEFENSE"

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out substantial charge, an apparently accurate article released by a reputable news-gathering agency. There is no evidence or allegations that defendant knew the article contained falsities, and there is nothing in the content of the article itself that could reasonably have placed defendant on notice of potential inaccuracy. Under these circumstances, the wire-service defense is available, and defendant had no duty to independently verify the accuracy of the article. Summary disposition in favor of defendant was proper."

Six of the seven justices signed the order. One justice dissented, writing:

This is a case of first impression in Michigan. It presents an important legal issue. The Court of Appeals accepted the defendant's wire service defense, although it had yet to be recognized by this court. Because this is the first published Michigan case to address the matter, and because of the jurisprudential significance of the issue, I would grant leave to appeal.

Herschel P. Fink is a member of Honigman Miller Schwartz and Cohn, Detroit, Michigan, and represented the media defendants in this matter throughout the almost 12-year duration of the case.

In his article and in his brief, Herschel Fink refers to 13 states that have adopted a wire service defense or an analogous concept:

Alabama -- *Meisler v. Gannett Co. Inc.*, 21 Media L. Rep. 1206 (S.D. Ala. 1992), *aff'd*, 12 F.3d 1026 (11th Cir. 1994), *cert. denied*, 1145 S. Ct. 2712 (1994); *Ripps v. Gannett Co, Inc.*, 21 Media L. Rep. 1200 (N.D. Ala. 1993), *aff'd*, 24 F.3d 25 (11th Cir. 1994).

California -- *Masson v. The New Yorker Magazine*, 960 F.2d 896 (9th Cir. 1992)

District of Columbia -- *Winn v. United Press International*, 1996 WL 533592 (D. D.C. 1996); *Waskow v. Associated Press*, 462 F.2d 1173 (D.C. Cir. 1972).

Florida -- *Layne v. Tribune Co.*, 146 So. 234 (Fla. 1933); *Nelson v. Associated Press*, 667 F. Supp. 1468 (S.D. Fla. 1987).

Georgia -- *Brown v. Courier Herald Publishing Company Inc.*, 700 F. Supp. 534 (S.D.Ga. 1988)

Hawaii -- *Mehau v. Gannett Pacific*, 658 P.2d 312 (Haw. 1983)

Kentucky -- *O'Brien v. Williamson Daily News*, 735 F. Supp. 218 (E.D. Ky. 1990).

Massachusetts -- *Appleby v. Daily Hampshire Gazette*, 478 N.E.2d 721 (Mass. 1985).

Michigan -- *Howe v. Detroit Free Press, Inc.*, 219 Mich. App. 150 (1996), *aff'd* _ Mich. _ (1998)

New York -- *Rust Communications Group, Inc. v. 70 Street Travel Service*, 122 A.D.2d 584, 504 N.Y.S.2d 927 (1986); *Winn v. Associated Press*, 903 F.Supp. 575 (S.D.N.Y. 1995)

North Carolina -- *McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 393 S.E.2d 295 (1990), *review denied*, 327 N.C. 636, 399 S.E.2d 123 (1990)

Puerto Rico -- *Torres-Silva v. El Mundo*, 3 Media L. Rep. 1508 (PR 1977)

Wisconsin -- *Van Straten v. Milwaukee Journal*, 151 Wis.2d 905, 447 N.W.2d 105, 112 Wisc. App. (1989), *review denied*, 451 N.W.2d 297 (Wisc. 1989), *cert. denied*, 496 U.S. 929 (1990).

Virginia -- *Holden v. Clary*, 20 Media L. Rep. 1829 (E.D.Va. 1992)

Washington -- *Auvil v. CBS*, 140 F.R.D. 450 (E.D. Wash. 1991).

COURT FINDS PERSONAL ASSISTANT TO CELEBRITY TO BE A PUBLIC FIGURE

By Steve Contopulos and Brad Ellis

The general test for determining whether a libel plaintiff is a limited purpose public figure is a familiar one: (1) there must be a public controversy, (2) into which the plaintiff is drawn or thrusts herself, and (3) the scope of the controversy must encompass the allegedly libelous statements. The "public controversy" element is often defined as a matter of public concern, the resolution of which could reasonably be expected to affect an appreciable segment of the public other than the immediate participants.

This test works well when the statement concerns the operation of government or the affairs of state. But we live in an age where news (using its broadest definition) covers far more. Reports about the personal lives of celebrities -- addictions, affairs, arrests -- seem to saturate every medium, with few details of the lives of the famous going uncommented upon. If a defamation suit follows and the plaintiff is the celebrity, the media can expect almost automatically to have the protections of *Sullivan* through the all-purpose public figure test.

But stars often pull within their orbit people who, absent their connection to the celebrity, would go unnoticed by the public. When a report of some lurid detail about a celebrity's life mentions this otherwise anonymous celebrity friend, the limited purpose public figure test comes into play, and along with it, the vexing problem of defining the "public controversy."

A Wedding with Roseanne & Tom

This was the challenge U.S. District Court Judge Dean Pregerson faced in a recent libel case brought in the Central District of California involving Kim Silva, the personal assistant of Tom Arnold. *Silva v. The Hearst Corporation*, CV97-4142 DDP(BQRx). (3/18/98) The case arose out of the publication of an article in the October 1996 edition of *Cosmopolitan* titled "In Hollywood, Even Friends are Professional." The article included one paragraph that referred to Ms. Silva and her employment with the Arnolds. Judge Pregerson's decision recites that during that employment her activities with the Arnolds came to the notice of the public. Rumors began to circulate that Ms. Silva and Tom were having an affair. In response to these rumors, Tom and Roseanne staged a wedding ceremony where the two of them jointly married Silva. The staged wedding ceremony was aired behind the credits on the December 31, 1993 David Letterman show. The three of them also appeared briefly on *Arsenio*. The Arnolds later filed for divorce, and at one point in the divorce proceedings, Roseanne claimed that Tom was having an affair with Silva. In her defamation suit, both Tom and Silva denied the affair in sworn declarations. In addition, Ms. Silva contended that she did not want to participate in the appearances with her employer, but believed she had to or she would lose her job. Ms. Silva alleged that the article, which discussed her relationship with the Arnolds, was false and defamatory.

The Public Controversy

On these facts, Ms.Silva's voluntary conduct seemed clear, but where was the public controversy? Who besides Tom, Roseanne and Kim would be expected to feel the impact of their divorce? Even though, as Judge Kozinski of the Ninth Circuit has aptly observed, his court is the "Court of Appeals for the Hollywood Circuit," *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1520 (9th Cir. 1993)(Kozinski, J. dissenting), there is no Ninth Circuit opinion that directly addresses this issue. In fact, surprisingly absent from the published cases from all jurisdictions are cases where the libel plaintiff is the celebrity friend. (Notable exceptions include, *Wynberg v. National Enquirer, Inc.*, 564 F.Supp. 924, 929 (C.D.Cal. 1982)(ex-boyfriend of Elizabeth Taylor); *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238 (5th Cir. 1980)(former girlfriend of Elvis Presley); and *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976)(wife of Johnny Carson).) There is little guidance, then, for a court faced with deciding

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COURT FINDS PERSONAL ASSISTANT TO CELEBRITY TO BE A PUBLIC FIGURE

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whether such a plaintiff is a public figure because of involvement in a "public controversy" surrounding a celebrity.

Relying primarily on *Chuy v. Philadelphia Eagles Football Club*, 431 F.Supp. 254 (E.D. Pa. 1977), *aff'd* 595 F.2d 1265 (3d Cir. 1979), Judge Pregerson found the public controversy test broad enough to include controversies concerning the "private" lives of celebrities. In *Chuy*, the plaintiff was a professional football player who objected to articles that discussed his health and his fitness to play. In holding that he was a public figure, the Court made the following important observation, which Judge Pregerson cites in his decision:

> We obviously cannot say that the public's interest in professional football is important to the commonweal or to the operation of a democratic society in the same sense as are political and ideological matters. However, the fabric of our society is rich and variegated. . . . [I]nterest in professional football must be deemed an important incidence among many incidents, of a society founded upon a high regard for free expression.

Id. at 267.

Although not cited by Judge Pregerson, the *Chuy* court went on to note that"[s]ociety's interest inspires comment in the press and elsewhere. The greater the interest, the greater is the public's self-generating need for the facts. This is especially so in this case where the subject matter pertained to Donald Chuy's ability to continue playing professional football, a matter in which the sports loving public had a not insignificant interest." *Id.* The same applies to the world of entertainment. Just as the sports loving public would feel the impact of Chuy's ability to play, the loving fans of Tom and Roseanne would feel the impact of the state of their relationship.

Judge Pregerson also found support for his decision in *Barry v. Time, Inc.*, 584 F. Supp.1110, 1115 (N.D. Cal. 1984) and *Wynberg*, 564 F. Supp. at 929. In *Barry*, the court held that the coach of the University of San Francisco basketball team was a public figure in connection with statements concerning corruption in player recruiting. In so doing, the Court found a public controversy because the allegations affected the University's reputation which, in turn, would have been expected to have an impact on the University community. Without analysis, the court in *Wynberg* found plaintiff to be a public figure because he had a close personal relationship with Elizabeth Taylor for more than fourteen months.

In the case of Tom and Roseanne, the Court found that "a reasonable person would have expected that people beyond those directly involved in the Silva/Arnold relationship would feel the impact of the publicity surrounding the relationship and the three-way marriage." Although not expressly mentioned by the Court, those people would include their fans, their employees, and even the inhabitants of Tom's hometown of Ottumwa, Iowa where the couple had become the "number one tourist attraction." The Arnolds were literally "Tom and Roseanne, Inc." and like the dissolution of any company, the end of their relationship could be expected to affect a great many people. The public controversy test had been satisfied, and the plaintiff held to be a public figure. Judge Pregerson's decision reaffirms that the public figure test is broad and flexible enough to include stories about the private lives of celebrities even when the "public controversy" involves matters that in other contexts would be considered private affairs.

Steve Contopulos and Brad Ellis are with the firm Sidley & Austin in Los Angeles, CA.

Massachusetts Supreme Court Reverses Decision Allowing Claim Against Malicious Truthful Speech

In late March, the Supreme Judicial Court of Massachusetts held that a Massachusetts statute (G.L.C. 231, § 92), which provides that "truth shall be a justification unless actual malice is proved," could not constitutionally be applied to any statement made about a matter of public concern. The decision overturned the district court's refusal to grant summary judgment in a private plaintiff suit even after finding the statements at issue were substantially true. The case had been taken up on direct appeal. *Shaari v. Harvard Student Agencies*, 5 Mass. L. Rptr. 623, 627 (Middlesex Cty. Superior Ct. 1996), *rev'd*, SJC-07479 (March 20, 1998).

Plaintiff, the owner of a youth hostel in Israel, sued after the *Let's Go* travel guide published derogatory statements concerning his hostel. The 1989 edition of the book said "[w]omen should not stay here, nor should men who don't want to encourage harassment. The manager Itzik, was being sued on sexual harassment charges by 3 different women during the summer of 1988." The 1990 edition opined, "*Let's Go* strongly recommends that travelers DO NOT stay here. Don't let the beautiful neighborhood and calm exterior fool you. If management changes, this could be a great hostel; check at the tourist office."

The defamation claim over1989 statements was dismissed for being time barred. After extensive discovery, the defendants moved for summary judgment as to the 1990 statement. A judge denied the motion, concluding that although the statement was substantially true, G.L.C. 231, § 92, dictates that truthfulness is not necessarily a defense to a private plaintiffs' libel claim. The statute provides that if a defendant acted with malice in making a defamatory statement, the plaintiff may recover -- even if the statement is true. The Supreme Judicial Court had already held the statute unconstitutional as applied in a case involving public figures. *Materia v. Huff*, 394 Mass. 328, 329 (1985). At the same time, however, it left open the statute's constitutionality as applied to private figures. *Id.* at 333, n. 5.

The court, in making its decision, compared the case to *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), where the Court held that, where a "newspaper published speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." *Id.* at 768-69. The Supreme Judicial Court found that, as in Hepps, the *Shaari* plaintiff is a private figure and the matter on which defendants wrote and published in their travel guide, namely, the existence of multiple sexual harassment claims against the proprietor of a youth hostel open to the general population, is one of public concern. *Shaari v. Harvard Student Agencies*, SJC-07479, slip op. at 6 (March 20, 1998). Plaintiff must, therefore, prove the allegedly defamatory statements are false.

Finally, before reversing the district court, the Supreme Judicial Court found that the defendants are "media defendants" as the Supreme Court uses the term in reviewing State libel law. "To be sure," said the court, "the defendants are not the prototypical members of the 'media,' such as the Boston Globe or Boston Herald. However, we perceive no difference of constitutional magnitude between a travel review published by the Boston Globe or Boston Herald, which would require a defamation plaintiff to prove falsity, and the article complained of here." *Id.* at 7.

Upon these findings, the Supreme Judicial Court concluded that to apply G.L.C, § 92, "to the defendants' truthful defamatory statement concerning a matter of public concern, even if the statement is malicious, violates the First Amendment." *Id.* at 9.

Lankenau Kovner Kurtz & Outten, LLP, New York, and Bingham Dana LLP, Boston, represented defendants on the matter

Defamation Via Cartoons: Differing Results in Florida and New York

A defamation lawsuit by the owners of a Florida car dealership against Tom Armstrong, creator of the nationally syndicated comic strip "Marvin," was thrown out by a Florida state court on a motion to dismiss. *Glauser v. Armstrong, et al.*, Case No. 97-7106-CA-01 (Cir. Ct. Sarasota April 22, 1998). The lawsuit was based on a week long series of the comic strip poking fun at car salesmen.

The complaint alleged that Armstrong used his comic strip to vent a personal vendetta against the dealership after he bought a car there and was dissatisfied with the dealership's service and fees. In a letter to the dealership airing his complaints, Armstrong wrote that the experience provided "fresh comedic material" that he would use in his comic strip. According to the complaint, this resulted in the portrayal of dealership manager Chad Glauser as having "a mental problem, to be a liar, to be a thief and to have no integrity in business dealings" and a portrayal of the dealership as a business that "sold shoddy cars."

Among other things, the cartoon portrayed a child named "Chad" who after stating that he wants to be a car salesman when he grows up is told by comic star Marvin "You know Chad, you can get special counseling for that low self-esteem problem of yours." Another day's strip had young Chad stating "When I grow up I'm going to run my daddy's dealership. Daddy say's I've already got the perfect qualifications for the job. I'm glib and I like to fib." One panel contained a sign reading "Gouger fancy cars."

In dismissing the suit, Judge Lee Haworth reasoned that most people regard comic strips as satirical or fictional and therefore Armstrong's comic was impossible of defaming a specific car dealer.

* * *

In contrast, in a non-media case, a New York trial court denied a defendants' motion for summary judgment, ruling that crude cartoon drawings created by an office co-worker portraying plaintiff in various sexual acts with people and animals and disparaging his ethnic heritage which were circulated by plaintiff's manager to co-workers and clients could form the basis for a defamation claim. *Nacinovich v. Tullet & Tokoyo Forex, Inc.*, NYLJ May 22, 1998 (Sup. Ct. N.Y. 1998). In a decidedly less humorous case than that involving *Marvin*, the disparaging cartoons in *Nacinovich* also supported plaintiff's employment discrimination claims against his former employer.

With regard to the defamation claim, the court recognized the general rule that "cartoons, by their very nature, are rhetorical hyperbole or exaggerated statements of opinion and are therefore rarely actionable." (citations omitted). However, the court added that this is not an absolute rule. Quoting from *Frank v. National Broadcasting Company*, 119 A.D.2d 252 (NY 2d Dept. 1986) Justice Lorraine Miller, reasoned that "humor and comedy are not and cannot be synonymous with the term opinion. . . . 'The principle is clear that a person shall not be allowed to murder another's reputation in jest.'" Thus, here the cartoons could be interpreted as stating actual facts about plaintiff.

Viewing the cartoons within the context of events surrounding their publication, namely their circulation by plaintiff's manager, the court concluded they were used as more than just a general attack against plaintiff. Cartoon depictions of plaintiff engaged in acts of homosexual sex were libelous per se. According to the court, "what separates remarks that are humorous from those that are both humorous and defamatory is whether the defamatory matter was intended to injure as well as amuse and whether it gives rise to an impression that the statements or characterizations are true." Here the court found sufficient evidence to conclude that the cartoons were published with the intent to injure plaintiff's reputation.

On another interesting point, the court found that the single publication rule did not apply to the interoffice circulation of the cartoons. This was not a media case involving mass distribution -- the type of case for which the rule was tailored where there may be repercussions from publication, even without republication, for years. Rather, defendants made a knowing and conspicuous effort to redisseminate the cartoons. Thus, plaintiff's defamation complaint was timely for statute of limitation purposes even though the first circulation of the cartoons occurred more than a year before he brought his action.

Appeal From Summary Judgment Denial Allowed Under Minnesota Anti-SLAPP Statute

By John Borger

The defendants in a defamation and trespass lawsuit have a right under Minnesota's anti-SLAPP statute to directly appeal a district court order denying their motions to dismiss the complaint and to grant summary judgment. (*Special Force Ministries v. WCCO Television*, No. CX-97-2220.)

In recognizing the right to appeal, the Minnesota Supreme Court directed the Minnesota Court of Appeals to consider the case on the merits. Minnesota procedure recognizes very few situations in which defendants who lose motions to dismiss or for summary judgment can bring an immediate appeal. Normally, defendants in that situation must proceed to trial, or at least engage in further discovery before possibly bringing a new motion for summary judgment.

The Supreme Court's recognition of a right of appeal under the statute therefore provides an important procedural advantage for defendants whose speech or conduct is, in the statutory language, "genuinely aimed in whole or in part at procuring favorable government action."

The particular case also presents important questions of state law under recently proposed tort theories to restrict newsgathering activities.

The operators of Special Force Family Ministries, a religiously oriented corporation in Waconia, Minnesota, that provided residential and recreational services to mentally retarded individuals sued a television station and its reporters. They claimed that a television producer who spent more than 100 hours as a volunteer at the facility committed fraud and trespass by recording activities at the facility with a hidden camera. They also claimed that statements in a November 1995 broadcast falsely defamed the operators.

The same day as the news broadcast, the Minnesota Department of Human Services searched the Waconia facility. A subsequent investigation concluded that Special Force had neglected and financially exploited mentally retarded residents. Special Force relocated to another state.

Special Force commenced suit within weeks of the multi-million dollar jury verdict in Food *Lion, Inc. v. Capital Cities/ABC, Inc.*, 25 Media L. Rptr. 2185, 2191-2198 (M.D.N.C. 1997), a hidden-camera action that did not involve any allegations of defamatory statements.

The defendants contended that the broadcast had been aimed in part at prompting the government to act on the situation, and that the state anti-SLAPP statute (Minn. Stat. A7 554.01 et seq.) applied to the case. The statute was enacted to protect certain political speech and conduct from the burden and expense of frivolous lawsuits. It provides for qualified immunity, a higher burden of proof on plaintiffs, attorneys' fees, and early motions to defeat the lawsuit. The statute also provides that "discovery must be suspended pending the final disposition of the motion, including any appeal."

Hennepin County District Court Judge Thomas Wexler agreed that the statute applied to the station's activities, but denied most of the defendants' motions to dismiss or to grant summary judgment on the plaintiffs' claims of trespass, fraud, and defamation. The defendants then appealed, citing the statutory language suspending discovery pending "any appeal."

The Minnesota Court of Appeals questioned whether appellate jurisdiction existed. After ordering briefing on that question, it dismissed the appeal in mid-January 1998, citing established law that "generally, an order denying a motion for summary judgment is not appealable" and stating that the anti-SLAPP statute did not authorize an appeal in all cases. Defendants asked the Minnesota Supreme Court to grant discretionary review of that order, and to permit appellate review of the legal issues before the parties engaged in extensive discovery.

In a one-paragraph order dated April 23, 1998, the Minnesota Supreme Court reinstated the defendants' appeal and directed the Minnesota Court of Appeals to consider the case on its merits. Its order reads in full: "IT IS HEREBY ORDERED that the petition of WCCO

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Direct Appeal Allowed Under Minnesota Anti-SLAPP Statute

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Television, et al. for further review of the Minnesota Court of Appeals order filed December 30, 1997, denying their motion for discretionary review and the order filed January 14, 1998, dismissing an appeal from an order of the district court be, and the same is, granted for the limited purpose of (a) vacating the January 14, 1998 order dismissing the appeal, and (b) remanding that case to the court of appeals for review of the appeal on the merits. Because petitioners have a right to directly appeal the order of the district court, there is no reason to address or decide whether, absent that right, the court of appeals' order denying discretionary review was an abuse of discretion. See Minn. Stat. A7 554.02, subd. 2(1)."

Briefing on the merits will be completed by mid-June. Oral argument in the Court of Appeals should occur sometime in mid-summer, with a decision by mid-fall 1998.

John Borger, a partner at Faegre & Benson LLP in Minneapolis, represents the defendants in the Special Force litigation.

Christie Brinkley Case Dismissed Against National Enquirer

Court Distinguishes "Obnoxious , Unsympathetic Portrayal" from Defamatory Statement

By Charles J. Glasser, Jr.

New York Supreme Court Justice Emily Goodman dismissed model Christie Brinkley's defamation suit against the *National Enquirer* in late April, on grounds that a series of *Enquirer* articles did not treat Brinkley in a manner "as to engender hatred contempt or aversion." *Brinkley v. National Enquirer, Inc.* (S.Ct. N.Y.Co. 4/28/98).

The suit arose from a series of articles in which the *Enquirer* described Brinkley as engaging in bizarre behavior engendered by stress, "cracking up" and having a "nervous breakdown," including details on an incident where Brinkley asked the police to shoot a cow that had wandered onto her property. The tabloid also reported that Brinkley sought to evict a caretaker from an apartment that she owned to make room for storage of her clothes; that Brinkley spent $30,000 in one day of shopping; complained about the noise of an ambulance that woke her, and that she still confides in her ex-husband, songwriter Billy Joel.

Reading the articles in their entirety, the court, in dismissing the four libel counts, found that while Brinkley was portrayed as "wealthy, powerful, determined to achieve her goals, un-selfconscious in the use of her money and even perhaps eccentric," she was not portrayed in a manner as to engender hated or contempt in the minds of a substantial number of the community. This was so despite the court's view that the articles were "truly obnoxious" and unsympathetic toward Brinkley. Brinkley failed to plead special damages on these claims.

Brinkley also brought claims for intentional infliction of emotional distress, claims which the court dismissed as falling "totally within the scope of the cause of action for libel." Interestingly, Brinkley also brought a claim based on a course of harassment by reason of the series of publications complained of in the previous claims. Examining possible interpretations of this "course of conduct" claim, the court rejected defamation and emotional distress claims, as well as an interpretation of the claim as one for prima facie tort. Because the writings were published for the legitimate purpose of profit and not for the purpose of interfering with Brinkley's commercial relations, held the court, a cause of action for prima facie tort would not lie.

Charles Glasser is an associate at Squadron, Ellenoff, Plesent & Sheinfeld, LLP in New York City. The National Enquirer was represented by Slade R. Metcalf, Dori Ann Hanswirth and Andrew L. Weinberg of that firm.

Agricultural Disparagement Laws Examined in LDRC's April Bulletin

LDRC's recently published April 1998 BULLETIN examines a troubling new source of liability for the media: agricultural disparagement laws. Brought to the nation's attention through the highly publicized lawsuit by a group of Texas cattlemen against Oprah Winfrey, these laws create an unconstitutional chilling effect on the discussion and reporting of food health and safety information.

Now on the books in 13 states, these laws create a boundless and often unforeseeable lot of potential plaintiffs. In addition, the burden of proving falsity — constitutionally placed on a plaintiff in a case where the speech is of public concern — is now generally shifted so that it is the defendant who must prove truth, even if the speech at issue is a scientific *opinion*. Many of the laws also attempt to lessen a plaintiff's burden by deflating the constitutionally mandated fault standard — actual malice — to negligence or even strict liability. Finally, in the area of damages, the laws permit punitive, sometimes treble damages, and attorneys' fees, all without benefit of the actual malice standard.

The aim of the BULLETIN is to understand and counter these laws. The BULLETIN begins with an examination of the common law tort of product disparagement, followed by a report on how the media victory in *Auvil v. CBS "60 Minutes"* led to the birth of the agriculture industry's movement for statutory protection. The BULLETIN then examines the anatomy of a statute fight, using North Dakota as the example. It then provides the legal arguments lawyers may wish to employ in defending lawsuits brought under these laws, first providing a broad view of the constitutional imperfections in the statutes and then analyzing the statutes issue by issue. An impressive collection of experienced litigators offer "clip and save" arguments for briefs on each of these issues.

Also included in the BULLETIN are practical arguments from the environmental lawyer who represented the Natural Resources Defense Council in *Auvil* and tales from the front by lawyers involved in combating suits brought under agricultural disparagement laws. In addition to a report on the lawsuit against Oprah Winfrey, the Bulletin contains reports on other recent targets of these new laws, including a public interest law group that sued an egg packager for consumer fraud and then discussed the lawsuit at a press conference and a turf agronomist who opined that a particular type of grass might not survive in a humid environment.

A concluding Appendix provides an extensive bibliography of recent articles, the text of the agricultural industry's model bill and the opinion of Idaho's attorney general arguing that Idaho's proposed veggie libel law was unconstitutional.

Coalition Forms to Challenge Food Disparagement Laws

In late April, an alliance of 26 civil liberty, health, environmental, public interest, media, and law groups calling itself the "Foodspeak Coalition" announced that it will campaign to fight existing and proposed "veggie-libel" laws. The Coalition is being organized by the Center for Science in the Public Interest in Washington, D.C. Among its members are the American Civil Liberties Union, NRDC, Electronic Frontier Foundation, SPJ, People for the American Way, Public Citizen, and the United Farm Workers.

The coalition will be headed by Ronald Collins who, in a press release, pledged that the group "will work to repeal food-disparagement laws in thirteen states and will oppose similar laws being proposed in some dozen more states." The Coalition will support efforts to challenge such laws in federal and state courts, with the aim of getting all thirteen laws thus far passed repealed.

In conjunction with its announcement, the Foodspeak Coalition also launched a Web site aimed at raising public awareness about the threats posed by the agricultural disparagement laws. The site contains all of the existing and proposed product disparagement legislation, scholarly articles, and links to other activist organizations. The Web site's address is http://www.cspinet.org/foodspeak.

Absolute Privilege for Judicial Proceedings Extends to Expert's Opinion

A product manufacturer's defamation and trade libel claim against an expert witness who had given videotaped pretrial evidence in product liability suits against the manufacturer was dismissed on summary judgement on the ground that the absolute privilege for judicial proceedings extends to such evidence. *Aequitron Medical, Inc. v. Dyro and Biomedical Resources, Inc.*, 96-CV-2187 (JS) (E.D.N.Y. March 13, 1998).

This case is related to *Aequitron Medical Inc. v. CBS, Inc.*, No. 93 Civ. 950 (S.D.N.Y. March 25, 1997), reported on in the April 1997 *LDRC LibelLetter* at p. 5. There the same plaintiff brought a claim for tortious interference and deceptive trade practices against CBS. The court dismissed on the ground that libel rules applied to and barred plaintiff's claims. The claims were based on a 1989 "CBS This Morning" news segment that reported on a potential life-threatening problem with Aequitron's infant heart monitors. The segment included an interview with Joseph Dyro, the expert witness sued in the instant case.

As to the instant case, Dyro was retained as an expert in two products liability lawsuits brought against Aequitron. Both lawsuits alleged that Aequitron's infant heart rate respiration monitor Model 9200 was defective and caused the deaths of the infants in each case. After first testifying in a deposition that the monitor was working properly, Dyro later videotaped another test where he pronounced the monitor defective. Copies of the videotape were given to both products liability plaintiffs. Aequitron's lawsuit alleged that this videotaped evidence was false and misleading, as it failed to disclose the earlier favorable opinion.

In dismissing the claims, the court held that under New York law statements by parties, their attorneys and witness are absolutely privileged "if, by any view or under any circumstances, they are pertinent to the litigation." *Aequitron Medical, Inc. v. Dyro and Biomedical Resources, Inc.*, 96-CV-2187 (JS) (E.D.N.Y. March 13, 1998) slip op. at 7, 9. "Pertinency," according to the court, "is extremely broad and embraces anything that may possibly or plausibly be relevant." *Id.* at 7. In addition, the privilege applies not just to trial but to every step of the proceedings in question, including preliminary and investigatory phases.

Thus, "while Dyro's prior testing and deposition testimony would have been excellent fodder for cross-examination . . . , they do not form the basis of a defamation and trade libel claim under New York law as they are absolutely privileged." *Id.* at 10.

Faculty Sue University Over Link to Allegedly Defamatory Student Bulletin Board

The San Francisco Chronicle reported on May 1, 1998 that a group of the faculty at the City College of San Francisco is threatening to sue the College for its electronic links to a student bulletin board that posted anonymous instructor evaluations. According to the Chronicle, among the postings is a description of one faculty member as a "bigoted gay man," while another is described as a "mean old drunk." While the College contends that the bulletin board is not hosted by the College computers, it is reachable through a number of links from the College web site. The teachers contend that makes the College responsible. An Internet expert was quoted as saying that they had never seen a "libel-by-linking" claim. The College will undoubtedly seek immunity under the provisions of the Communications Decency Act, Section 230, the provision that protected AOL in the recent *Zeran v. AOL* and Blumenthal/Drudge litigations. The faculty members are not at this point suing or planning to sue the student who started and manages the bulletin board. He has received no regular support from the College for the club he started around the bulletin board, although the Chronicle reports that he received about $270 for pizza that he passed out on campus as a means of advertising his club.

UPDATES:

Cert. Denied in Surreptitious Taping Suit

Deteresa v. American Broadcasting Cos.,
66 U.S.L.W. 3756 (U.S. May 26, 1998) (No. 97-1566)

The Supreme Court of the United States denied certiorari this week on the petition of plaintiff, Beverly Deteresa, the American Airlines flight attendent who served O.J. Simpson on his infamous flight from L.A. to Chicago the night of the murder of his wife. *Deteresa v. American Broadcasting Companies Inc*, 66 U.S.L.W. 3756 (U.S. May 26, 1998) (No. 97-1566). Ms. Deteresa sued ABC after she was shown talking to an ABC producer on the steps of her home. She was taped and photographed surreptitiously, although she was aware that the individual with whom she was talking was an ABC News employee and she had not asked that her comments be kept confidential.

The lower courts dismissed her claims of violation of the California and Federal eavesdropping statutes, fraud, unfair business practices and common law invasion of privacy. See *LDRC LibelLetter*, August 1997, p. 21.

Supreme Court Leaves $50,000 Libel Verdict Intact

Little Rock Newspapers, Inc. v. Fitzhugh,
66 U.S.L.W. 3700 (U.S. April 28, 1998) (No. 97-1461)

The Supreme Court last month rejected the Arkansas Democrat-Gazette's petition for certiorari, leaving intact a $50,000 compensatory libel judgment won against the paper by former federal prosecutor J. Michael Fitzhugh, who sued after the paper mistakenly published his photograph with an article about a Whitewater defendant with the same last name. *Little Rock Newspapers Inc. v. Fitzhugh*, 66 U.S.L.W. 3700 (U.S. April 28, 1998) (No. 97-1461); See *LDRC LibelLetter* Dec. 1997, at p. 9.

The paper's petition had argued that the Arkansas state court should have treated Fitzhugh as either a general purpose or limited purpose public figure. Fitzhugh had served as a U.S. attorney based in Arkansas from November 1995 until he resigned in March 1993, during which time he had participated in several press conferences, had been named in a number of newspaper articles, had issued numerous press releases pertaining to investigations that his office was conducting, and had been featured in local news broadcasts that detailed his life and work in the local community.

The Arkansas state court found that despite Fitzhugh's public activities and even the fact that he had represented witnesses in the Whitewater investigation, Fitzhugh was not a limited purpose public figure for purposes of the Whitewater investigation. With that ruling, Fitzhugh had only to demonstrate that the paper had acted negligently in publishing his photograph.

Fifth Circuit Restriction on Post-Trial Juror Interviews Left Standing

In Re Capital City Press
66 U.S.L.W. 3598 (U.S. April 21, 1998) (No. 97-1369)

The Supreme Court recently denied certiorari in *In re Capital City Press*, leaving intact the Fifth Circuits's affirmance of a post-trial order prohibiting news organizations from conducting post-verdict interviews of jurors regarding any aspect of the jury's "deliberation" in the absence of a "special order" issued by the district court. *United States v. Cleveland*, No. 97-30756 (5th Cir. October 29, 1997); *petition for cert. denied sub nom, In re Capital City Press and Joe Gyan*, 66 U.S.L.W. 3598 (U.S. April 21, 1998) (No. 97-1369); *see also LDRC LibelLetter*, March 1998, p. 22.

According to the Fifth Circuit's panel, the district court order did not violate the First Amendment in part because the court interpreted the order as barring the press from interviewing jurors about their deliberations but not as limiting the jurors from discussing anything, including deliberations, "on their own initiative."

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UPDATES:

(Continued from page 13)

In the petition for certiorari, the petitioners had argued that the Fifth Circuit abandoned its duty to apply strict scrutiny analysis to post-trial orders restricting juror interviews, a standard set by *In re The Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982). In place of that standard, petitioners argued, the Fifth Circuit has adopted a loose, discretionary standard that conflicts with precedent set in the Fifth, Ninth and Tenth Circuits.

Tenth Circuit Upholds Dismissal in Business Week Case

Schuler v. The McGraw-Hill Companies, Inc. (10th Cir. 1998)

The U.S. Court of Appeals for the Tenth Circuit recently affirmed without oral argument, and without adding to the analysis, the district court's dismissal for failure to state a cause of action in *Schuler v. The McGraw-Hill Companies, Inc. et al.*, No. 97-2225 (D.C. No. Civ.-96 292-SC (D. N.M.) (10th Cir. April 22, 1998); *See LDRC LibelLetter*, July 1997, p. 16. Schuler, the president of a high-tech firm called Printron, sued for defamation and other torts after the publication of an article in *Business Week* magazine in September of 1994 that discussed the unhappy financial vicissitudes of Printron. In the course of the article, the plaintiff's status as a transsexual is revealed, as is her past trouble with the Securities and Exchange Commission (SEC).

Plaintiff filed the suit alleging defamation, invasion of privacy through false light, publication of private facts and intrusion, intentional infliction of emotional distress, interference with contractual and prospective business relations, and prima facie tort. She contended generally that the article defamed her by stating or implying that she was dishonest and deceptive, that she underwent her sex change to conceal her past, and that she concealed her sex change and prior SEC problems from the American Stock Exchange, investors, and the SEC.

The district court dismissed all of her causes of action, holding that the article did not include any false statements of fact on which to base the defamation or false light claims. The court then rejected plaintiff's claim for publication of private facts because her sex and name change had previously been discussed in magazine and newspaper articles. The court concluded also that the plaintiff had failed to state a cause of action for intentional infliction of emotional distress because the article did not contain defamatory falsehoods or other indications of outrageous conduct. The interference with business relations claims were dismissed because, the court concluded, since they were premised on her claims for defamation, invasion of privacy, and infliction of emotional distress that had failed, these claims too should fail. Finally, the court concluded that the plaintiff had abandoned her intrusion and prima facie tort claims, and that even if she had not, the allegations did not state valid claims.

The Tenth Circuit reviewed the case de novo and concluded that "for substantially the same reasons as stated by the district court, we affirm the district court's dismissal of her complaint." *Schuler*, No. 97-2225 (10th

Supreme Court Holds for the Press in Arkansas ETV Network Case

By Richard D. Marks

On May 18, 1998, the U.S. Supreme Court handed down its decision in *Arkansas Educational Television Commission v. Forbes* (No. 96-779). The Court reversed a 1996 decision of the Eighth Circuit that a candidates' debate on a state-owned public television network is a limited public forum to which a candidate, even a fringe candidate, cannot be denied access absent a compelling governmental reason. The Supreme Court's opinion decides a First Amendment question that has hung like a cloud over public radio and television for more than 25 years. Its holding is a ringing reaffirmation of the central importance of protecting the editorial discretion that is at the heart of the journalistic process.

The Arkansas Educational Television Commission, an agency of the state whose eight commissioners are appointed by the governor, operates a noncommercial educational ("public") television network ("AETN" or the "Network") of five stations that serve virtually all of the state. The Arkansas Educational Television Network operates under policies specifically designed to insulate the Network's Executive Director, Susan Howarth, and her staff from political pressure.

A Major Party Debate

In June of 1992, AETN invited the major party candidates for the U.S. Senate and House races to participate in televised debates that AETN would sponsor and broadcast. In August, Ralph P. Forbes, a perennial candidate, obtained 2,000 signatures on a petition and qualified for the ballot in Arkansas' 3rd congressional district. He promptly wrote to Ms. Howarth, asking to participate in the debate.

Ms. Howarth and her staff found the Forbes had no campaign headquarters or paid staff, appeared at no speeches or rallies, had raised only $10,000 (compared to about half a million dollars raised by each of the major party candidates), and was not being covered by the press. On this basis, and without evaluating Forbes' political platform, they concluded that he was not a "serious" candidate, and that the people of the 3rd district "lacked interest in his candidacy." Ms. Howarth wrote to Forbes, denying his request to be in the debate.

Although Forbes was denied a TRO and did not appear in the debate, the U.S. Court of Appeals for the Eighth Circuit held that Forbes could pursue a First Amendment claim of access (the Court of Appeals held Forbes had no claim under the Communications Act). The procedural history of the case is complicated, and will not be detailed here. In outline, Forbes lost in U.S. District Court, where a jury found that his exclusion was not based on his views and was not influenced in any way by political pressure on Ms. Howarth and her staff; the District Judge held that the debate was a non-public forum, and that AETN's exclusion of Forbes was reasonable and viewpoint-neutral.

The Eighth Circuit reversed. It held that the debate was a limited public forum, because AETN had opened the debate to a natural class, that is, all the candidates in the 3rd district who qualified for the ballot. AETN's intent to be selective in granting participation was not controlling. The Court of Appeals, applying strict scrutiny, held that AETN failed to prove a compelling, narrowly tailored reason for excluding Forbes.

6-3 By Kennedy, J.

The Supreme Court held, 6-3, that the Court of Appeals had misapplied forum doctrine. Writing for the majority, Justice Kennedy noted that the exercise of editorial discretion is fundamental to the operation of any press, including public television stations licensed by the FCC to a state entity. Generally, the Court held, public television programming is therefore not to be subjected to forum analysis. This is a striking new statement, a refinement of First Amendment doctrine recognizing Congress' preference that broadcast licensees be permitted - indeed, required - to exercise editorial judgment over all their programming.

In support of its conclusion, the court noted that the exercise of editorial discretion would, by its nature, be "particularly vulnerable" to claims of viewpoint discrimination. Broadcasters must often chose among speakers with varying viewpoints and that choice invariably could be ar-

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Arkansas ETV Network Case

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gued to promote one viewpoint over another. While Congress could impose neutral rules of access, the Court said, the First Amendment did not require them.

Debate is Nonpublic Forum

However, the Court held that candidate debates on state-licensed public stations are an exception to this general rule because they feature the speech of candidates, not of the broadcaster, and because debates are exceptionally important to the political process. Thus, forum analysis is appropriate.

Under forum doctrine, the Court found that AETN intended selective, not general, access in sponsoring the debates. Under familiar forum principles, the Court held that the debate was a nonpublic forum, rather than a limited public (or designated) forum, as the Eighth Circuit had found.

The Court emphasized the importance of the jury's findings, supported by consistent, cumulative, uncontradicted record evidence, that no political pressure was applied to Ms. Howarth or any other AETN staff, and that Ms. Howarth's editorial judgment was based, not on Forbes' views, but on the reasoned conclusion that he "had generated no appreciable public interest" and was not newsworthy. Justice Kennedy's opinion stresses the record evidence of AETN's good faith in making this decision.

The Court's emphasis on the absence of political pressure on AETN's editors should serve as a strong safeguard against state officials' potential resort to political pressure in the future that seek to influence any public broadcasting programming decision.

FEC Reg Vulnerable?

New ground in the majority's First Amendment interpretation is heightened by reading Justice Kennedy's opinion in juxtaposition to the dissent of Justice Stevens, who was joined by Justices Souter and Ginsburg. Justice Stevens also disagreed with the Court of Appeals' conclusion that all qualified candidates were entitled to access to the debate. However, he would have required a state-entity public broadcaster to adhere to pre-published, objective criteria in deciding which candidates would be invited to participate. Justice Stevens notes that regulations of the Federal Election Commission (11 CFR A7110.13(c)) require a private broadcaster to use "pre-established objective criteria" in selecting political debate participants. The reason for the rule is to prevent a corporate broadcaster from in effect making an illegal campaign contribution to a favorite candidate who is invited to a debate for reasons of favoritism.

There is now a constitutional cloud over this regulatory approach by the FEC. After all, similar safeguards are not required of a state-entity public broadcaster, because to do so would infringe on its editorial discretion. Does not that rationale apply with even greater force to private (i.e., non-state) broadcast licensees? How can the FEC justify requiring news organizations to straight-jacket private editors's news discretion? The FEC's rule freezes news criteria in time, so that debate participants cannot later be selected based on all the factors that editors believe in good faith are necessary to take account of developments occurring after the selection criteria are published. This Procrustean approach to private news organizations is now vulnerable to successful challenge using an Arkansas Network rationale.

As lawyers, we were fortuate in being able to develop themes at trial, even ones that appeared unprecedented to the trial court, that proved pivotal to the ultimate rational on review. The District Judge stated on the record, for example, that he could find no cases to support AETN's request for a jury instruction that there was no political pressure applied to Ms. Howarth in her decision to exclude Forbes from the debate. Yet the judge granted AETN's request for an interrogatory to the jury on this point, and the jury's finding of no political interference eventually proved pivotal in the Supreme Court.

As we approach a new election cycle, and anticipate claims of demands by third party and fringe candidates to be included in debates on public and commercial radio and television, the Arkansas Network case offers new, solid protection for editors' good faith journalistic judgments, and for the freedom of those judgments from second-guessing by governmental agencies such as the FEC or by the judiciary.

Richard Marks, of Vinson & Elkins, L.L.P., Washington, D.C., represented Arkansas Educational Television Commission in this matter.

INCITEMENT POST-*PALADIN*

Louisiana Court of Appeal Reverses Trial Court Decision to Dismiss Suit Alleging Violence Inspired by film *Natural Born Killers*

By Jack M. Weiss and Amy L. Neuhardt

On May 15, 1998, the Louisiana Court of Appeal for the First Circuit reversed a trial court decision to dismiss a negligence and intentional tort claim filed against Time-Warner Entertainment Company, director Oliver Stone, and others involved in the making of the film *Natural Born Killers* (collectively, "the Warner Defendants"). *Byers v. Edmondson*, No. 97-CA-0831 (La. App. 1st Cir., May 15, 1998). According to the panel opinion, the plaintiffs' petition pleaded a cognizable cause of action against the Warner Defendants under Louisiana law. Relying heavily on the recent United States Fourth Circuit opinion in the *Hit Man* case,[1] the panel also held that neither the United States or Louisiana Constitutions barred the plaintiffs from pursuing the action.

The Plaintiff, Patsy Ann Byers,[2] was shot and seriously wounded during an armed robbery of a convenience store in Ponchatoula, Louisiana on March 8, 1995. Byers sued the alleged shooter, Sarah Edmondson; her boyfriend, Benjamin Darrus; their parents and insurers. On March 6, 1996, Byers amended her action to add claims against the Warner Defendants. According to Byers' amended lawsuit, Edmondson and Darrus were inspired to commit violence by viewing the movie *Natural Born Killers* shortly before their alleged crime spree. The amended petition asked that the Warner Defendants be held jointly liable with Edmondson and Darrus for the latter's intentional criminal acts.

"Knew" and "Intended" to Incite

Specifically, the plaintiff alleges that the Warner Defendants are liable for producing and distributing a film they "knew, intended, were substantially certain, or should have known would cause or incite persons such as" Edmondson and Darrus "to begin, shortly after repeated viewing" of the film, "crime sprees such as that which led to the shooting of Patsy Ann Byers." The petition further alleges that the Warner Defendants "negligently or recklessly" failed to "*minimize* [the] violent content" of the film or to "minimize glorification of senselessly violent acts" and that they negligently and/or recklessly failed to warn viewers" of the nature of the film.[3]

On September 25, 1996, the Warner Defendants filed a peremptory exception of no cause of action (the Louisiana equivalent of a motion to dismiss for failure to state a cause of action) seeking dismissal of the lawsuit based on the allegations of the petition. The Warner Defendants argued that, under Louisiana tort law, they owed no duty to the plaintiff to ensure that none of the millions of viewers of the movie would decide to imitate actions depicted in the fictional film. The Warner Defendants further argued that for state law to impose such a duty would violate the First Amendment to the United States Constitution and Article I, Section 7 of the Louisiana Constitution.

Trial Court Dismissal

By judgment dated January 23, 1997, the trial court maintained the Warner Defendants' exception, thus dismissing the plaintiff's claims against the Warner Defendants. The trial court noted that contentions identical to the plaintiff's:

> . . . have been almost universally rejected as stating causes of action in this country. The basis for this position is surely in part the almost impossible task of where a line is drawn and what standards would be applied. Further, such analyses are juxtaposed with constitutional free speech provisions protected under the United States and Louisiana Constitutions.

The plaintiff timely appealed.

The Appeal

On appeal, the plaintiff argued that her petition properly states a cause of action against the Warner Defendants, and pleads facts that, if true, give rise to a duty owed by the Warner Defendants to Byers to protect her from the harm inflicted by Edmondson and Darrus. Byers argued that her injuries were foreseeable to the Warner defendants, and that

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Natural Born Killers

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a defendant can be held liable for the intervening acts of a third party when that defendant's own action "directly creates" an unreasonable and foreseeable risk that a third party might harm the plaintiff, a concept the plaintiff termed "misfeasance." The plaintiff further asserted that the United States and Louisiana Constitutions did not bar her action. She argued that *Natural Born Killers* is unprotected speech both because the violent content of the film renders it legally obscene, and also because the film allegedly incites imminent lawless activity.

In response, the Warner Defendants argued that no court in America ever has imposed a duty on filmmakers to predict and prevent audience imitation of fictional films, as to do so would create an unmanageable and virtually limitless burden on storytellers and communicators. Further, the Warner Defendants argued that, despite the plaintiff's theory of "misfeasance," under Louisiana law, a defendant has no duty to prevent harm inflicted by others absent a "special relationship" obligating the defendant to protect the plaintiff from such harm, and no such "special relationship" existed here.

In addition, the Warner Defendants argued that the First Amendment and the analogous provision of the Louisiana Constitution bar imposition of liability in this case, because to do so would cast a "pall of fear and timidity" over creative expression and "dampen the vigor and limit... the variety" of such expression. The Warner Defendants argued that the film does not fall within the exception to First Amendment protection for "obscene" material, as federal constitutional law and state statutory law limit "obscenity" to depictions of sexual, not violent, activities. The Warner Defendants further argued that the film also does not fall within the exception for First Amendment protection for speech that is directed to inciting imminently lawless activity. That exception is limited to speech that directly encourages *immediate* lawless action, and had never been applied to printed or recorded speech.

Claim of Misfeasance?

The First Circuit Court of Appeal heard oral argument on the case on April 8, 1998. On May 15, 1998, the Court of Appeal reversed the trial court's decision. The court first found that, under the allegations of the petition, the Warner Defendants owed a duty to Byers to protect her from the intentional criminal acts of Edmondson and Darrus. The court acknowledged that in Louisiana a defendant generally does not owe a duty to protect a person from the criminal acts of third parties absent a "special relationship" that would obligate the defendant to protect the plaintiff from such harm, and that the plaintiff had not, and could not, allege the existence of such a special relationship. Nonetheless, the court concluded that, according to the plaintiff's allegations, the Warner Defendants could be held liable "as a result of their misfeasance in that they produced and released a film containing violent imagery which was **intended** to cause its viewers to imitate the violent imagery." (emphasis in original). The court cited no authority for its adoption of the "misfeasance" theory of recovery, but generally cited the rationale of *Weirum v. RKO General, Inc,* 539 P.2d 36 (Cal. 1975). According to the court, Byers' allegation that the Warner Defendants *intended* that third parties would imitate scenes from *Natural Born Killers* was analogous to the *Weirum* court's finding that the defendant radio station in that case had *directly urged* listeners to immediately speed to a destination if they wanted to receive a prize. Accordingly, the court found that the facts alleged in the petition, accepted as true for purposes of the exception, stated a cause of action against the Warner Defendants under Louisiana law.

The court acknowledged the many cases that have refused to impose a duty on artists for imitative violence, but distinguished these cases on the ground that most of them had been decided on summary judgment. The court observed without explanation that the parties in those cases had the opportunity to conduct discovery prior to dismissal.[4] The court further distinguished two similar cases that were decided on the pleadings,[5] one because the plaintiff failed to allege intentional conduct by the defendants, and the other because the court had the opportunity to review the entire artistic work at issue. The court noted that the trial court in this case had not reviewed the film because the film was not attached to the plaintiff's petition and was not properly before the court on an exception of no cause of action.

The court then found that the United States and Louisiana

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Natural Born Killers

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Constitutions did not prohibit Louisiana tort law from imposing a duty on the Warner Defendants. Relying extensively on *Rice v. Paladin Enterprises*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, _ S. Ct._, 66 U.S.LW. 3686 (1998), the court found that under the allegations of the plaintiff's petition, *Natural Born Killers* falls within the *Brandenburg* exception for speech directed to inciting or producing imminent lawless action. The court reasoned that the parties in *Paladin* had stipulated that the publisher of *Hit Man*, the book at issue in that case, had *intended* to provide assistance to murderers and would-be murderers, and that the Fourth Circuit had found that the *Brandenburg* exception did not apply in such a case. According to the court, because Byers *alleged* what the court deemed to be intent similar to that *stipulated to* in *Paladin*, the First Amendment did not require dismissal at this stage of the litigation.

Although the court concluded that Byers' action could not be dismissed on the allegations of the pleadings, the court emphasized:

> . . . in holding that plaintiff's allegations of intent state a cause of action, we do not address the issue of whether the Warner defendants may later invoke the protection of the First Amendment guarantee of free speech to bar Byers' claim after discovery has taken place. It is only by accepting the allegations in Byers' petition as true that we conclude that the film falls into the incitement to imminent lawless activity exception to the First Amendment. We agree with *Rice v. Paladin*, that the mere foreseeability or knowledge that the publication might be misused for a criminal purpose is not sufficient for liability. Proof of intent necessary for liability in such cases as the instant one will be remote and even rare, but at this stage of the proceeding we find that Byers' cause of action is not barred by the First Amendment.

The Warner Defendants will file an application for writs seeking immediate review of the decision by the Louisiana Supreme Court. Review is discretionary, although the Louisiana Supreme Court often has granted writ applications to consider the denial of dispositive motions in cases that raise important First Amendment issues.

Jack M. Weiss is a partner and Amy L. Neuhardt is an associate at Correro Fishman Haygood Phelps Weiss Walmsley & Casteix, L.L.P. in New Orleans, Louisiana. With Jim George, Peter Kennedy, and Jim Hemphill of George Donaldson & Ford, L.L.P., of Austin, Texas, and Alton B. Lewis of Cashe, Lewis, Moody & Coudrain, L.L.P. of Hammond, Louisiana, Weiss, Neuhardt and Mark B. Holton of Correro Fishman represent Time Warner Entertainment Company, L.P., Alcor Film & TV GMBH & Co. Produktions KG, Jane & Don Productions, Inc., and Oliver Stone in this litigation.

Endnotes

1 *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, _ S. Ct._, 66. U.S.L.W. 3686 (1998).

2 Originally there were five named plaintiffs in the action, including Patsy Ann Byers, her husband and her three children. For the sake of convenience, "Plaintiff" or "Byers" will be used to refer to all plaintiffs. Mrs. Byers died of cancer in November 1997. As of this writing, there has been no substitution of parties plaintiff in the appeal.

3 The plaintiff also claimed that the film contained unspecified "subliminal messages" that encouraged individuals such as Byers and Edmondson to commit violence. The plaintiff later acknowledged, however, that no subliminal messages were present in the film, and abandoned this claim on appeal.

4 Slip opinion at 11, *distinguishing Way v. Boy Scouts of America*, 856 S.W.2d 230 (Tex. App. 5th Dist. 1993); *Yakubowicz v. Paramount Pictures Corporation*, 536 N.E. 2d 1067 (Mass. 1989); *Bill v. Superior Court of the City and County of San Francisco*, 187 Cal. Rptr 625 (Cal. App. 1st Dist. 1982); *DeFillipo v. NBC*, 446 A.2d 1036 (R.I. 1982); *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981); *Olivia N. v. NBC*, 178 Cal. Rptr. 888 (Cal. App. 1st Dist. 1981).

5 *Id. at* 12, *distinguishing Zamora v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979) and *McCollum v. CBS*, 249 Cal. Rptr. 187 (Cal. App. 2d Dist. 1988).

PRIVACY

FOURTH CIRCUIT EN BANC FINDS OFFICERS ENTITLED TO QUALIFIED IMMUNITY FOR 1992 RIDE ALONGS

You may wish to note a case decided in April, and reported in recent Media Law Reporter advance sheets, from an *en banc* Fourth Circuit reversing a panel decision and finding that a decision by Federal Marshals to allow a newspaper reporter and photographer to ride along on the execution of a warrant in 1992 was entitled to qualified immunity. *Wilson v. Layne*, 26 Media L. Rep. 1545 (4th Cir. 1998)(en banc) In a 6-5 decision, the Court of Appeals found that at the time of the search, April 1992, it was not clearly established in the law of the Supreme Court, the Fourth Circuit, or the Supreme Court of the state at issue -- the relevant bodies of law for this purpose -- that permitting media to accompany law enforcement officers into a private residence to observe and photograph the execution of an arrest warrant would violate the homeowner's constitutional rights. The court does not address "whether the officers' conduct was constitutional or appropriate." *Id.* at 1551.

While five of the six-judge majority offer support for the proposition that law enforcement might find ride alongs served legitimate law enforcement functions, the close vote suggests that the issue may continue to give the media a sense of insecurity. The sixth judge in the majority filed a separate concurrence stating that the conclusion -- "that reasonable law enforcement officers could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related to the execution of the warrant" -- was not a question before the Court and that he was reluctant to express an advisory opinion upon it. *Id.* at 1548.

The majority catalogues and then rejects the negative authority from other circuits as inappropriate to its decision. It finds that not only were most decided after the action at issue in this case, but that the authority was sparse and was irrelevant to a determination as to whether the matter was clearly established in the 4th circuit.

While not a majority, nonetheless interesting is the Court's willingness to look at and, indeed, accept the proposition put forward by the defendants that law enforcement could have had legitimate reasons for establishing ride alongs. Rejecting the minority's narrow demand that the press either be there to help effect or assist in the actual execution of the warrant, the majority notes that law enforcement might conclude that permitting media coverage reduced the possibility that the target would resist arrest knowing that his actions were being recorded, thereby improving the safety for the officers, or that coverage improves public oversight of law enforcement activities. The minority characterized these rationales as post hoc rationalizations.

In a lengthy dissent, the judges tore into the analysis of the majority, not so much or so effectively on the position that the relevant law was clearly established, but that the majority's view that allowing the press to view only what the officers were entitled to view did not exceed the scope of the warrant and that picture-taking was not a "seizure," a "meaningful interference with an individual's possessory interests in . . . property." *Id.* at 1548. Like the Ninth Circuit panel in *Berger v. Hanlon*, 129 F.3d 505, 25 Med. L. Rep. 2505 (9th Cir. 1997), the dissent gave no weight (or even modest acknowledgment) to any First Amendment/public right to know arguments or rationales for the press covering the execution of warrants. It viewed the newspaper's coverage as no more than a commercial venture for commercial purposes.

Media defendants in *Berger v. Hanlon* have asked the Supreme Court of the United States to review the decision against them on this and the related *Bivens* issue.

Congressional Panel Considers Anti-Paparazzi Bills

PRIVACY

On May 21, the House Judiciary Committee convened to hear testimony on the merits of two privacy bills aimed at the paparazzi. Chairman of the committee, Henry Hyde, R-Ill., has indicated his support of federal legislation on the matter, but has also suggested concern about not inhibiting or punishing legitimate First Amendment activities.

The panel heard from stars Paul Reiser and Michael J. Fox, both of whom told paparazzi "horror stories" and urged the panel to take steps to curb the excesses of the press. Also testifying was Ellen Levin, mother of murder victim Jennifer Levin of New York City's highly publicized "preppie murder" case in 1986. The panel also heard from advocates for the press -- who included Paul McMasters of The Freedom Forum and Barbara Cochran, president of Radio-Television News Directors Association -- who argued that state and local laws already offer adequate protections against invasion of privacy, trespass, and harassment. These advocates also noted that the proposed legislation is too vague and overbroad, and that it will damage the ability of the press to cover crime and disaster scenes and to investigate government and private sector corruption.

The two bills currently under consideration are H.R. 3224, "The Privacy Protection Act of 1998," and H.R. 2448, "Protection from Personal Intrusion Act." Mary Bono, the widow of Sonny, is the sponsor of H.R. 2448, a bill which her husband sponsored before being killed in a skiing accident earlier this year. The Bono bill would make it a criminal offense to "harass" a person, which is defined as "persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to insure that privacy, for the purpose of capturing by a camera or sound recording instrument of any type a visual image, sound recording, or other physical impression of the victim for profit." *See LDRC LibelLetter*, September 1997, p. 7.

H.R. 3224 is sponsored by Representative Elton Gallegly, R-Calif. His bill would allow prosecution of anyone who "persistently follows or chases any individual . . . for the purpose of obtaining a visual image, sound recording, or other physical impression . . . [if] the image, recording, or impression was intended to be, or was in fact, sold, published or transmitted in interstate or foreign commerce." His bill is expressly limited to attempts to obtain an image, recording, or other impression for commercial purposes, and it requires that the individual had a "reasonable fear that death or bodily injury will result" from the following or chasing. It requires too that the victim "had a reasonable expectation of privacy" at the time the harassment occurred, and that the person had taken reasonable steps to ensure that privacy. There is express provision for civil suits as well, affording attorneys fees to the prevailing party.

Both bills limit sanctions to the person present when the offense was committed and do not sweep in their employers or others. Neither make the sale or use in any manner a criminal or civil offense.

FEDERAL COURT REJECTS EAVESDROPPING CLAIM AGAINST *DETROIT FREE PRESS*

By Herschel P. Fink

A Detroit judge whose repeated and gratuitous racist and anti-semitic statements were captured in tape recordings made by her former husband, has lost her "$100 million" eavesdropping lawsuit against the Detroit Free Press, which published excerpts of the conversations in February, 1997. *Ferrara v. Detroit Free Press*, Civil Action No. 97-CV-71136-DT (e.d. Mich. 5/6/98)

As a result of the newspaper's revelations, the judge has been temporarily suspended from office by the Michigan Supreme Court, and the state's Judicial Tenure Commission has recommended to the Supreme Court that she be permanently removed.

A U.S. District Court judge in Detroit dismissed the suit by Wayne County Circuit Court Judge Andrea Ferrara on May 6, 1998, finding that the newspaper and its reporter were not shown to have known, nor to have had reason to know, that the tapes were made by the judge's former husband "for the purpose of committing any criminal or tortious act" as required by 18 USC § 2511(2)(d).

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FEDERAL COURT REJECTS EAVESDROPPING CLAIM AGAINST *DETROIT FREE PRESS*

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The case was ordered to continue to trial against the former husband to determine whether he had such a purpose.

The newspaper was approached by the former husband, Howard Tarjeft, with the tapes of his own conversations with Judge Ferrara early in 1997. After considerable internal debate, the Free Press decided to publish a report of the conversations, explaining to readers "why we published this story":

> The Free Press does not typically delve into what public officials say in private conversations. And the newspaper's reporters are not allowed to tape-record people without their knowledge except in rare justifiable instances.
>
> But the newspaper decided to publish this account of Judge Andrea Ferrara's taped comments because her conduct raises serious questions about a sitting judge's ability to render fair and impartial decisions. Using racial slurs is a violation of the code by which judges and judicial candidates are supposed to conduct themselves.
>
> Another factor in deciding to publish was the large number of slurs and the casual way in which Ferrara used them.

The newspaper further explained that judges have a diminished expectation of privacy, citing Canon 2A of the Michigan Code of Judicial Conduct, which states that "a judge must avoid all impropriety and appearance of impropriety," and "must expect to be the subject of constant public scrutiny."

In her lawsuit, Judge Ferrara claimed that Tarjeft had attempted to blackmail her by threatening to release the tapes unless she agreed to concessions involving child support and custody for the couple's two sons. She claimed that the Free Press should have known of the alleged improper purpose. Tarjeft, for his part, denied the blackmail allegation, claiming that he only sought to "level the playing field" in their court battles by releasing the tapes in the hope that she would be removed from office. A judge appointed to preside over Judge Ferrara's removal proceeding said that the couple's post-marital battles "makes 'The War of the Roses' look like a bed of roses in comparison."

The Free Press in its summary judgment motion relied principally on *Smith v Cincinnati Post & Times-Star*, 475 F2d 740 (6th Cir 1973), in which the Sixth Circuit held that "there is no 'interception' or 'eavesdropping' when a party to a conversation or a third person acting with the consent of one of the parties to the conversation, records that conversation." The holding was later cited with approval by the Sixth Circuit in *United States v Meriwether*, 917 F2d 955 (6th Cir 1990).

But U.S. District Court Judge Patrick J. Duggan, in his 18-page opinion, declined to follow the *Smith* case. Citing two other Sixth Circuit cases that he said either criticized or were at odds with *Smith*, he held:

> Based on *Stockler* [*Stockler v. Garratt*, 893, F2d 856 (6th Cir 1990)] and the plain language of § 2511(2)(d), the Court believes that, if squarely faced with this issue, the Sixth Circuit would follow the *Boddie [Boddie v. American Broadcasting Companies, Inc.*, 731 F2d 333 (6th Cir 1984)] decision and rule that a party to a communication is not privileged to "intercept it if he does so "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." § 2511(2)(d).

The Court went on, however, to reject Judge Ferrara's claimed evidence that the Free Press and its reporter had "reason to know" that Tarjeft had made the tapes impermissibly, including rejecting a letter sent to the newspaper in advance of publication by her lawyer in which he claimed that Tarjeft had threatened to destroy Judge Ferrara. The Court held in ruling in favor of the Free Press:

> Based on the evidence presented by Ferrara, the Court concludes that a rational trier of fact could not conclude that Ashenfelter [the Free Press reporter] knew "sufficient facts concerning the cir-

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FEDERAL COURT REJECTS EAVESDROPPING CLAIM AGAINST *DETROIT FREE PRESS*

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cumstances of the interception such that [he] could . . . determine that the interception was prohibited by Title III."

The Court also dismissed claims of invasion of privacy, Michigan eavesdropping statute violations, and that the defendants tortiously interfered with Ferrara's employment.

The Free Press has also sought sanctions against Ferrara and her lawyers under Fed. R. Civ. P. 11(b). The Court rejected the request, finding that, because there was a genuine issue of fact regarding Ferrara's federal wiretap act claim against her former husband, "the Court does not believe that her complaint was filed frivolously . . . . (and) so devoid of merit as to be sanctionable."

The media defendants were represented by Herschel P. Fink of Honigman Miller Schwartz and Cohn, Detroit.

A Further Note on *Ferrara*

Ferrara represents the first opinion where a court has ruled on presentation of evidence that, despite the demonstrated unlawfulness of a recording, a journalist receiving and publishing its contents is not liable under the Federal Wiretap Statute because he did not have knowledge or reason to know that the recording was made in violation of the statute. Unlike the *Peavy* case in Texas last year, there was no intervening, official action placing the recording in the public domain, which would implicate *Smith v. Daily Mail*, *Florida Star*, or *Cox Broadcasting v. Cohn.*

- - Stuart F. Pierson

Stuart Pierson prepares an annual "Survey of Federal Law on Electronic Eavesdropping" for the LDRC 50-State Survey on Media Privacy and Related Law.

FOOD LION APPEAL TO DECIDE WHETHER PROPERTY AND EMPLOYMENT TORTS PROVIDE ALTERNATIVE TO LIBEL ACTION

By Paul M. Smith and Michelle B. Goodman

On June 4, 1998, the Fourth Circuit will hear oral argument on the appeal of *Food Lion v. Capital Cities/ABC*. The case arose from an undercover news investigation by ABC and the resulting November 1992 *PrimeTime Live* broadcast of a report documenting unsanitary food handling practices, consumer deception, and labor law violations by Food Lion. Unable to dispute the truth of the broadcast, and therefore unable to bring a libel action, Food Lion instead sought a way around the constitutional prerequisites to defamation claims by bringing suit under state tort law, claiming that the ABC undercover reporters who obtained jobs at Food Lion to investigate the company violated state tort laws barring fraud, trespass, breach of an employee's duty of loyalty, and unfair trade practices. In the district court, Food Lion was awarded compensatory and punitive damages, but was not permitted to recover for publication damages flowing from the public's reaction to the content of the broadcast.

The focus of ABC's appeal is its argument that the district court erroneously expanded state tort law to punish the undercover newsgathering activities that resulted in the unflattering *PrimeTime Live* broadcast, and its contention that the trial court incorrectly held that these claims need not be subjected to any level of First Amendment scrutiny. Food Lion has filed a cross-appeal challenging the district court's rejection of its publication damages claim.

State Law Torts

Food Lion's fraud claim is premised on the job applications filled out by ABC's undercover reporters. ABC contends that, because injury is a necessary element of

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fraud, the district court should have rejected Food Lion's fraud claim as Food Lion did not establish it suffered any non-speculative injury proximately caused by its reliance on any misrepresentation by ABC's undercover reporters on their Food Lion job applications. Food Lion's position is that it suffered injury because it entered into an employment relationship with the reporters it would not have entered into had it known their true identities and that it paid the reporters wages for services it says were inadequate, and incurred administrative expenses in hiring them it would not otherwise have incurred. ABC argues that no evidence was presented that the reporters inadequately performed their duties and that Food Lion had no legitimate expectation that the reporters would work for any set period of time because Food Lion chose to hire them on the express understanding that they were at-will employees who could quit at any time, and because they made no representations about the length of time they would remain Food Lion employees.

ABC also challenges the district court's expansion of an employee's "duty of loyalty." The court ruled that by working on the ABC investigation while they were employed by Food Lion, without more, the reporters breached this duty of loyalty. Food Lion defends the court's holding, contending that employees owe a general duty of loyalty to their employers that includes a duty not to serve another employer's interests by committing acts that cause harm to their employer, and that the reporters breached this duty by serving ABC's adverse interests while employed by Food Lion. While agreeing that employees do owe some duty of loyalty to their employer, ABC argues that the duty of loyalty only precludes employees from directly competing with their employer or from misappropriating their employer's profits or business opportunities. Otherwise, ABC points out, any employee who was moonlighting could be subjected to tort liability if the employee's job performance suffered as a result.

Food Lion's trespass claim is based on the reporters' entry onto the store's property. The district court ruled that although Food Lion consented to the reporters' entry, that consent was nullified by the reporters' misrepresentations and that the reporters exceeded the scope of Food Lion's consent when they breached the duty of loyalty. On appeal, ABC argues that this interpretation of state trespass law is unprecedented and erroneous. Noting that the interest underlying the tort of trespass is protecting an owner's property interests, ABC argues that treating a person who is hired as an employee as a trespasser simply because her job application misrepresented her prior experience, or because she performed her duties disloyally, does nothing to vindicate the owner's property interests. In both cases, the owner's expectations regarding the extent of the employee's intrusion on its property have not been violated. Food Lion defends the district court's decision, asserting that it would not have consented to the reporters' presence if it knew they were ABC employees conducting an undercover investigation.

The First Amendment

Although recognizing that newsgathering is an activity protected by the First Amendment, the district court, relying on *Cohen v. Cowles Media Co.*, refused to apply any First Amendment scrutiny to Food Lion's claims because those claims were based on generally applicable laws. ABC asserts that this was error on several grounds. First, ABC argues that the court should have applied strict scrutiny because, although Food Lion's claims are in form generally applicable, employers do not ordinarily sue low-level employees for resume fraud, breach of the duty of loyalty, or trespass for conduct comparable to that at issue in this case. Thus, there is a significant danger that these facially general tort laws will be used to target the press, and the circumstances of this case suggest that this is precisely what happened. ABC therefore argues that cases such as *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue* require strict First Amendment scrutiny to be applied.

Food Lion counters that the Supreme Court's decision in *Cohen v. Cowles Media* demonstrates that ABC does

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not possess a special First Amendment immunity from generally applicable tort laws and that the district court was right not to subject Food Lion's claim to any First Amendment scrutiny. Food Lion also challenges ABC's claim that its commission of acts found to constitute fraud, trespass, and breach of the duty of loyalty was expressive activity because ABC's purpose was to gather information in anticipation of engaging in expressive activity. To Food Lion, the proper focus is not on whether the enforcement of the law burdens the press disproportionately, as ABC argues, but on whether the law in question is generally applicable on its face. If the law is facially nondiscriminatory, strict scrutiny is inappropriate.

Even if the court rejects strict scrutiny, ABC claims that at a minimum, the district court was wrong to insulate these claims from any First Amendment scrutiny. ABC contends that well-established law, such as *United States v. O'Brien* and *Barnes v. Glen Theatre, Inc.*, require courts to apply intermediate scrutiny whenever enforcement of a law will have a significant impact on expression or on conduct intimately related to expression regardless of whether the law is one of general applicability. To ABC, the Supreme Court's decision in *Cowles Media* did no more than establish that when the press voluntarily enters into a contractual, business agreement, the First Amendment is no defense to the enforcement of that business promise.

Emphasizing the importance of undercover reporting to obtaining information of vital concern to the public, ABC argues that if tort law were expanded to proscribe the conduct at issue in this case, many forms of undercover reporting, including information given to reporters by whistleblower employees, would be prohibited. Under either strict or intermediate scrutiny, the state interest in protecting Food Lion from economic harm is insufficient to justify such a significant impact on protected First Amendment activity and the public interest in obtaining information. Furthermore, ABC contends, at the very least the First Amendment should bar the award of punitive damages because the additional burden on newsgathering and reporting caused by the threat of giving juries unfettered discretion to award massive punitive damages greatly outweighs any state interest in awarding more than compensatory relief.

Food Lion contends that the state not only has an interest in protecting companies from economic harm but also in protecting the public from the consequences of having employees obtaining food handling jobs by misrepresentation. Food Lion argues that under intermediate scrutiny, these state interests are unrelated to the suppression of expression and outweigh ABC's speculative claim that undercover reporting will be substantially chilled. And as to ABC's claim that punitive damages must be barred because of the possibility that the jury may punish ABC because it disagreed with the newsgathering techniques ABC used, Food Lion noted that the court carefully circumscribed the jury's discretion, instructing that punitive damages may be awarded only for conduct the jury found to constitute fraud, trespass, or breach of the duty of loyalty.

Food Lion's Cross-Appeal -- Publication Damages

Food Lion has cross-appealed the district court's rejection of its claim for damages alleged to have been caused by the *PrimeTime Live* broadcast. Although Food Lion did not sue for libel, it nevertheless sought publication damages of up to $2.5 billion. Initially, the district court held that the First Amendment prohibited Food Lion from recovering reputational damages allegedly caused by the broadcast, but declined to decide what damages fell within that category. Food Lion claimed that none of its publication damages were reputational, but the court held that, in any event, no publication damages could be awarded because none of the injuries asserted by Food Lion were proximately caused by ABC's conduct and because the independent acts of Food Lion employees broke the chain of causation between ABC's tortious conduct and the ultimate harm. On appeal, Food Lion argues that the issue of proximate cause is a factual issue that should have been presented to the jury. Food Lion also contends that the doctrines of foreseeability and intervening cause are inapplicable, and that, in any event, the damage to Food Lion was foreseeable to ABC when it authorized the investigation, and there

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was no unpredictable subsequent intervening cause that broke the chain of causation.

ABC argues that Food Lion was not entitled to recover compensation for the injury caused by the public revelation of its own conduct. Any tortious conduct preceding that revelation, ABC asserts, was not the proximate cause of the injury because the most direct cause was Food Lion's food handling practices themselves. Permitting compensation for injury caused by truthful publication as an element of damages for tortious newsgathering would lead to absurd results, ABC notes, because doing so would grant to the worst malefactors the largest damages awards. In any event, ABC argues, *Hustler Magazine v. Falwell* makes clear that the First Amendment prohibits Food Lion from collecting compensation for the revelation of Food Lion's own misconduct without satisfying the constitutional prerequisites to a defamation action because allowing such recovery would amount to punishment of truthful expression on a matter of public concern on the basis of the public's reaction to its content.

Paul M. Smith and Michelle B. Goodman are attorneys at Jenner & Block, Washington D.C., which is representing Capital Cities/ABC in the Food Lion appeal.

FCC Renews Licenses in Denver

Late last month the Federal Communications Commission (FCC) renewed the licenses of four Denver TV stations, rejecting on First Amendment grounds the argument that the stations should have their licenses revoked for allegedly covering too many violent stories on their evening news programs.

The complaint was filed by an activist group called Rocky Mountain Media Watch. According to published reports, in the complaint the group accused ABC affiliate KMGH-TV, CBS affiliate KCNC-TV, NBC affiliate KUSA-TV, and Tribune Broadcasting's KWGN-TV of devoting up to 55 percent of their newscasts to violent subjects.

In rejecting the group's complaint, the FCC issued a letter in which, several publications report, it stated "[b]ecause journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's free-press guarantee, licensees are entitled to the widest latitude of journalistic discretion in this regard."

ACCESS

NEW YORK "SON OF SAM" LAW APPLIES ONLY TO N.Y. CRIMES

Statute Does Not Reach Federal Criminal Acts

A New York State trial judge dismissed a suit by the New York State Crime Victims Board against an author, his publisher and related corporations under the New York State "Son of Sam" law because the profits of federal law felons is outside the reach of the statute. *New York State Crime Victims Board v. T.J.M. Productions, Inc.*, (S.Ct.N.Y.Co. 4/22/98) et al., Index No. 401695/97 (N.Y. Sup. Ct. February 22, 1998). The court dismissed claims for failure to notify the Board and for "schemes" to avoid the Son of Sam Law through various corporate structures, when it found that the underlying criminal conduct of Salvatore Gravano, a former Mafia figure who came to public prominence after testifying against his former associates, including boss John Gotti, was not within the scope of the law.

Gravano cooperated with author Peter Maas in a book on Gravano's life entitled *Underboss* which was sold by TJM Productions, Inc., a corporation set up by Maas, through ICM,Inc. to HarperCollins Inc.. The court refused to reach the question of the constitutionality of the statute once it concluded that the statute only applied to criminal charges or convictions pursuant to the Penal Law of New York State and not to charges or convictions based on the criminal laws of other jurisdictions.

The HarperCollins and Fox defendants (which own the movie rights) were represented by Squadron, Ellenoff, Plesent & Sheinfeld, LLP in New York, and ICM by Lankenau Kovner Kurtz & Outten, LLP in New York.

D.C. CIRCUIT: NO CONSTITUTIONAL RIGHT OF ACCESS TO HEARINGS ON GRAND JURY MATTER

In ruling on various press motions made in connection with the Ken Starr/Whitewater/Lewinsky grand jury proceedings, the D.C. Circuit Court of Appeals rejected a First Amendment right of access of any significance for the press to hearings "ancillary" to grand jury proceedings or to documents filed in connection with those proceedings. *In re: Motions of Dow Jones & Company, Inc., et al.*, No. 98-3033 and 98-3034 (5/5/98). The Court rejected as well any common law right of access, but found in the alternative that if such a right existed, it had been supplanted by Rule 6(e) of the Federal Rules of Criminal Procedure guaranteeing grand jury secrecy.

The ruling came in press appeals from denials of access to hearings on the motion to quash of Francis Carter, former lawyer to Monica Lewinsky, and on the contempt motion filed by President Clinton against Starr for alleged violations of grand jury secrecy. In each instance, the press sought access to transcripts of the hearings to the extent they had already taken place. The press also moved for the establishment of "procedures relating to public access to judicial proceedings and records" in connection with the Starr grand jury proceedings, which the district court denied as well.

Motion Seeking Procedural Rights

Taking the procedures request first, the press had asked for notice of hearings, an opportunity to be heard prior to closure, and a requirement that all filings in the grand jury proceeding be docketed. The district court judge, Chief Judge Norma Johnson, refused to grant any such procedures including the minimal approach of docketing.

Federal Rule of Criminal Procedure 6(e) provides that government attorneys, stenographers, and similar personnel are bound to confidentiality with respect to what occurs before the grand jury, and it authorizes the holding

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of closed hearings and the sealing of records, orders and subpoenas relating to grand jury proceedings to the extent necessary to prevent disclosure of matters occurring before a grand jury. The Rule presumes, and the court concurred, that there was no constitutional right of access to ancillary proceedings related to a grand jury matter.

The Court found that the Local Rule of the District, Rule 302, which provides that any papers, orders, transcripts of hearings can be made public by the Court on a finding that continued secrecy is not necessary, provides all that the press could obtain under its First Amendment claim. The absence of First Amendment rights of access meant that the press was also not entitled to a hearing on the propriety of sealing or to hearings on closure.

"[I]f the Chief Judge can allow some public access [to ancillary proceedings] without risking disclosure of grand jury matters . . . Rule 6(e)(5) contemplates this shall be done. But it will be done because the Federal Rules of Criminal Procedure confer this authority on district courts, not because the First Amendment demands it." Slip op. at 18.

The Court of Appeals upheld the district court's judgment that all hearings should initially be closed because of the ever-present danger of revealing grand jury matter at such proceedings. The Court agreed with the district court that recognizing a First Amendment right of access to force these hearings to be conducted without reference to grand jury matters was a practical nightmare and, the Court noted, without strong tradition or history.

The Court rejected as well the press argument that at least with respect to disputes about executive privilege, in which the court understood the press was interested, there was a tradition of openness for hearings regarding executive privilege. While acknowledging that Judge Sirica held an open hearing on President Nixon's public refusal to comply with a grand jury subpoena, the Court finds that there have been too few such hearings for a tradition or history to have developed.

Remand Re Docketing and Redacted Transcripts

The Court did agree with the press, however, that if the docket failed to reveal that any proceeding had and would take place, the press could not invoke what rights it might have under Rule 302. While recognizing that a description of the docketed material might reveal grand jury matters, the Court sent back to the district court judge for reconsideration why a designation on the docket as oblique as "In re Grand Jury Proceedings" followed by a miscellaneous number might not be acceptable.

Also remanded for reconsideration to the district court was its decision to deny access to the redacted transcripts of the hearings regarding the subpoena to Francis Carter. While finding that the identity of a grand jury witness might be protectable, the identity here had been revealed many times over by Mr. Carter and his counsel. The purpose of denying access to a redacted transcript was not apparent to the Court of Appeals.

And finding that the press may have failed to specifically request a *redacted* transcript, as against the entire transcript, of the hearing on the President's motion to show cause with respect the allegations of leaks from the Independent Prosecutor's Office, the Court sent this back as well to the district court indicating that it was sure that she would provide redacted transcripts in the future if that was sought.

Still Pending...

Still pending before the district court is a renewed motion to unseal the order relating to assertions of executive privilege, a motion to unseal the ruling and papers filed in connection with Monica Lewinsky's claim that she was granted immunity from the Independent Prosecutor, and a motion to unseal documents relating to a motion reportedly filed on or about May 5, 1998 relating to alleged leaks of the court's executive privilege order. The motion asking for access to the hearing on the protective function of the secret service was granted.

LDRC Forum on English Libel and Privacy Law

The aim of LDRC's London Forum held on May 11 & 12, 1998 was, in broad terms, to explore the practical aspects of English libel and privacy laws, to reflect on whether and how recent and ongoing legislative initiatives in the UK may modify or influence these laws and to achieve a dialogue between American and English lawyers on these issues and on the concerns English law raises for American and other foreign media.

London was, of course, a natural setting for such an exploration, not only because of its reputation as the "libel capital of the world," but also because the setting allowed the Forum to feature a distinguished array of English media lawyers, members of the press, government and judiciary. At the same time, the Forum allowed the visiting American contingent the opportunity to offer their perspectives on these media law issues -- perspectives which collectively put forward a case for greater protection of expression, especially as the globalization of the media obliterates boundaries between nations and makes publication truly international.

The Forum was a two-day event. The first day's program was held at the Freedom Forum European Centre, opposite Hyde Park; the second day's program, at the Law Society, England's leading bar association, located in the heart of "legal London" next to the Royal Courts of Justice. Participation in the Forum exceeded expectations. Forty North Americans (or more precisely 39 from the States and 1 Canadian) traveled to London for the Forum, joined by over 60 English (and Scottish and Dutch) lawyers, journalists and government officials.

May 11th

The day began with an address by Geoffrey Robertson QC, one of England's premiere barristers, who has not only litigated media cases, but has written books on civil liberties and media law (the latter with Andrew Nicol, also a Forum participant and colleague of Geoffrey Robertson's at Doughty Street Chambers). He gave an introduction to the English law of libel, including a review of its historical, philosophical and political origins. We hope to get a copy of the text of his address which we will make available to LDRC members.

The program then shifted to informal "break out" style sessions -- drawn from the format used with such success at the Reston Conference -- on four general subject areas -- prepublication review, jurisdiction, the European Court and trial practices. Each session was moderated by both an American and an English lawyer who worked from the center of the tables around which the participants sat. The program was conducted under what the English call "Chatham House Rules," that is, off-the-record, in order to allow an open exchange of ideas between the assembled. Without compromising this directive, the subjects covered in general terms are set out here.

The prepublication session, moderated by Adam Liptak (*The New York Times*) and Mark Stephens, (Stephens Innocent Solicitors) covered, among other questions, the legal issues surrounding the use of hidden cameras, the extent to which American lawyers review publications with an eye toward England's restrictive libel laws, and the types of potential plaintiffs with which English and American prepublication lawyers are particularly concerned.

The session on jurisdiction, moderated by Lee Levine (Levine Pierson Sullivan & Koch) and Mark Stephens, discussed enforcing UK libel judgements with specific reference to *Bachchan v. India Abroad Publications* and *Telnikoff v. Matusevich*, the two U.S. state court decisions that refused to enforce English libel judgements on the grounds that the judgements were repugnant to U.S. law. The session also covered enforcing judgments within European Union countries, the recent cases of *Berezovsky* and *Wyatt* wherein English courts dismissed libel actions brought by nonresident plaintiffs against American publishers on the grounds of forum non conveniens, jurisdiction issues raised by Internet publication, and the application of choice of law principles to libel claims in the U.S. and in the UK.

The session on the European Court discussed the practical aspects involved in appealing a UK court decision to the European Court, as well as the practical and theoretical implications the pending UK Human Rights Bill, which will incorporate the European Convention on Human Rights into UK law, will have on media and privacy laws. The session was moderated by Bruce Johnson (Davis Wright Tremaine)

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and Kier Starmer (Barrister, Doughty Street Chambers). Kier produced a short paper on the convention and its impact on libel. Anyone wishing a copy should contact LDRC.

The trial practices session, moderated by David Bodney (Steptoe & Johnson) and Tom Crone (News International), discussed the differences in U.S. and UK law with regard to discovery, jury trial and jury selection, damages, and legal costs with reference to specific cases and litigation experiences.

May 12th

The second day of the Forum featured moderated roundtable discussions on English libel law and English privacy law with distinguished media lawyers, members of the press and the British government, as well as a lunch time address from Lord Williams of Mostyn QC, Parliamentary Under-Secretary of State at the Home Office. The roundtable discussions were "on the record" and are described in greater detail herein. The aim of these roundtable discussions was to focus in on substantive areas of concern with panel members, particularly with regard to policy issues, as well as to receive input from the attendees.

Libel Roundtable

The members of the Libel Roundtable were:

* Sir Louis Blom-Cooper QC, a leading lawyer in the public law field, chairman of numerous UK government inquiries, and a former head of the Press Council;

* Siobhain Butterworth, Head of Legal Affairs for Guardian Newspapers Limited, publisher of *The Guardian* and *Observer* newspapers;

* Peter Carter-Ruck, a media lawyer and founder of the solicitors firm of Peter Carter-Ruck and Partners;

* Patrick Moloney QC, a Barrister at Brick Court specializing in media law cases;

* Alisdair Palmer, public affairs editor for the *Sunday Telegraph* newspaper and formerly a documentary and docudrama producer;

* Heather Rogers, a Barrister at Raymond Street Chambers specializing in media law;

* Jan Tomalin, Head of Legal Compliance for Channel 4 Television; and

* Jack Weiss, a media lawyer with the firm of Correro Fishman in New Orleans.

The panel was moderated by Laura Handman of Lankenau, Kovner, Kurtz & Outten, LLP and Andrew Nicol QC, a Barrister at Doughty Street Chambers specializing in media law issues.

The Burden of Proving Truth

The starting point for the libel panel was a discussion of the differences between English and American libel law with regard to bearing the burden of proving falsity. After a discussion of the contrast, English law requiring the defendant to prove truth and U.S. law requiring plaintiffs to prove the falsity of the alleged libel, the moderators focused in on the normative questions surrounding this allocation. Peter Carter-Ruck, who represents both libel plaintiffs and the media, argued that it is fair that a libel defendant bears the burden of proving truth because an accuser should have the onus of proving the truth of the accusation. Patrick Moloney, who argues cases on behalf of libel plaintiffs and in defense of the media, commented that as a practical matter lawyers representing libel plaintiffs want their clients to be able to prove the falsity of the alleged libel in cases where the media pleads justification (defends on the grounds of truth).

The role of the judge and jury trial also figured into the mix on this point. Heather Rogers saw a jury trial as a factor to balance out the defendant's disadvantage of proving truth. Sir Louis Blom-Cooper countered that the burden on defendant is less important when there is a non-jury trial, especially when the judge must issue a reasoned decision. He noted that a jury often makes a decision based on preconceptions of the witnesses.

Criticisms of the English rule came from Alisdair Palmer, who noted that placing the burden of proving truth on a defendant has an enormous impact on the media and

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that such a burden discounts the public interest in the affected speech. Mr. Carter-Ruck advises potential libel plaintiffs to proceed with caution when a defendant will plead justification and that in such cases clients will usually not sue. Jack Weiss asked whether certain values may be higher than a plaintiffs interest in reputation. And while Mr. Carter-Ruck agreed that freedom of speech must come first, in his opinion, if you attack someone, you must be able to justify it.

US v. UK Fault Requirements

The moderators explored the extent to which the English rule affects what is published. Steve Fuzesi of Newsweek noted that stories based on confidential sources that are published in the U.S. may not be published in the UK. Marcus Partington of Mirror Group Newspapers stated that his paper won't run some stories. Even when the journalist has sources and believes in the truth of the story, a legal question arises as to what evidence is available to be put on at trial to prove truth. According to Partington, UK prepublication lawyers want to know whether a story can be proved at trial not whether the story is true.

A striking contrast between the US fault requirements with the UK strict liability system is in the area of distributor liability. Patrick Moloney observed that only under recent law, news agents, printers and distributors can avoid liability if they can prove they did not know material was defamatory. He is litigating this issue against Geoffrey Robertson in a case involving distributor liability for the first issue of a new magazine. Robertson is arguing that a distributor cannot know whether the first issue of a new magazine contains defamatory allegations. Moloney is arguing that the distributor should have known of the risk because of the reputation and track record of the magazine publisher, and should take special precautions with regard to a first issue. Heather Rogers explained that distributors may require what is known as a "libel clearance" -- a vetting letter from a lawyer -- before distributing a magazine. Andrew Nicol noted that some small magazines will not be distributed unless they secure a libel clearance, thus putting the lawyer in the role of censor.

Geoffrey Hodgson of Reuters took issue with Peter Carter-Ruck on whether plaintiffs sue over true allegations. Hodgson noted that Robert Maxwell brought cases to silence critics and he cited other examples of plaintiffs suing over true stories. He opined that England lacks a First Amendment climate and thus there seems to be an attitude that there is no public purpose to making allegations against people, or in other words, don't publish anything that someone doesn't want published.

Jan Tomalin agreed with Peter Carter-Ruck that publishers ought to be able to prove the truth of what they publish, but added that there should be tinkering at the edges, such as defendants benefiting from showing they exercised diligence in the preparation of their story. Alisdair Palmer disagreed, observing that lawsuits most often come from an area you did not expect. Thus the burden of proof is very important. He commended the US practice of vetting pieces with a prepublication lawyer, showing that you've done your work properly and have sources, notes, etc. In the UK, according to Palmer, these issues of journalistic practices do not come up.

Republication

Related concerns were expressed about relying on previously published material. A journalist cannot prove the truth of every previously published piece he relies on; yet under English law he can be liable for citing the previously published piece.

Adam Liptak of *The New York Times* discussed the American rule on republishing defamatory statements and the ameliorating rules of fair comment, opinion and neutral reportage -- the privilege to report charges and countercharges without being held to have endorsed what is said. Patrick Moloney addressed whether these concepts should be adopted in the UK. He noted the general rule that you start with what an article means. If a story has balance, giving both sides' account, the newspaper shows it is not taking sides. This is not a privilege, but the meaning of the publication. However, he noted that two recent Court of Appeal decisions seemed to have the ridiculous result that the defendant has to prove the truth of what both sides say in the dispute. These cases did not go to the House of

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Lords, as hoped. This point remains unsettled in English law.

Questions & Comments from Attendees

David Korzenik commented on UK libel laws and truth, finding the UK standard of proof a serious imposition on journalists trying to investigate complicated issues. He noted that plaintiffs are often more concerned with suppressing true allegations, citing Maxwell as the classic example. Following on this point, Hugh Corrie, previously in-house counsel to the Daily Mirror, cited a case brought against the *Spectator* magazine for publishing a story that three Labour MP's were drunk in Venice. The editor testified that he was told this story and that he was justified in republishing the story. The judge rejected this claim and the politicians got substantial damages. Later, the plaintiffs all admitted that the story was completely true.

Peter Carter-Ruck noted that he represented the *Spectator* and its editor and was told that if defendants fought the case the evidence of Italian waiters would not be preferred over the word of the Members of Parliament.

Carter-Ruck noted a 1965 committee recommended that there should be a defense of public interest where what is published is in the public interest and the evidence on which the report was based is reasonably believed to be true. This was not adopted and it is a hole in UK law.

Andrew Nicol followed up, asking Lee Levine to comment on the extent to which *New York Times v. Sullivan* put American lawyers into the journalistic process. Levine observed that US lawyers have concerns about interjecting themselves into the process as editors. Most journalists resent lawyers' review and feel fettered by such prepublication review, as well as the prospect in litigation of having their state of mind examined. He noted that sitting for a deposition can be a grueling, humiliating experience. In addition, with legal costs not recoverable under the US system, a plaintiff can penalize the media just by suing.

Sir Louis Blom-Cooper reflecting on the benefits of U.S. law commented that in England there is no great belief in freedom of speech. Judges and lawyers do not start with a First Amendment attitude.

Developing a Media Defense Bar

Bob Hawley raised a new point on the issue of English media lawyers representing both plaintiffs and defendants. Noting that in the U.S. there is a distinct media defense bar to promote media interests, he asked whether such a development in England should not be encouraged as a vehicle for reform. Louis Hayman of the *Independent* newspaper observed that in practice this occurs and that she hires solicitors who are sympathetic to free speech arguments. Tony Wales of *The Economist* agreed and added that insurance carriers are also concerned with obtaining sympathetic counsel.

Patrick Moloney explained the barrister/solicitor distinction and the ethic of doing the best for each client that appears to you (the cab rank rule) and not letting clients with money dictate what cases are taken. He and Harvey Kass of the Associated Newspapers also defended the English approach on the grounds that representing plaintiffs is extremely helpful experience in defending cases.

Harvey Kass posed the question of which side (US or UK) is truly better off, since although he would like First Amendment protections, there are 10 national newspapers in England, lower damage awards and recovery of legal costs. Members of the panel and audience reflected on the relative merits, especially on the recovery of costs in England. Mark Stephens pointed out that Americans should not so easily accept the loser pays system because you have to win your case first, citing to Carter-Ruck's remark that he wins most of his cases for plaintiffs.

The dialogue turned to questions regarding self-regulation of the newspaper press (through the Press Complaints Commission), and government regulation of broadcasters in the UK (through the Broadcasting Standards Commission). Sir Louis Blom Cooper noted that these provide important remedies to people -- a type of ADR through regulatory bodies. Jan Tomalin added that the Broadcasting Standards Commission (BSC) is in operation a fairness and privacy tribunal for people and companies and that it is now a convenient and cheap way to

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resolve disputes. Potential plaintiffs do not waive their right to sue and can still sue after an adjudication but this is rare. She added that the BSC is taken seriously by broadcasters. Alisdair Palmer agreed that the Press Complaints Commission (PCC) and BSC can provide an effective forum for satisfying injured parties -- and to point the finger at poor journalism.

Tom Welsh, editor of *Media Lawyer*, asked why English journalists did not push for a statutory privilege to report fairly on matters of public concern to be included in the 1996 Defamation Act. Harvey Kass answered that the media did lobby for changes but said it was a question of recognizing what is achievable and focusing on that. This led to a dialogue on qualified privilege. Laura Handman asked why in the UK fair comment is defeated by malice, citing the *Falwell* case where the defendant certainly had ill will toward the plaintiff. Heather Rogers observed that no UK court would accept Flynt's remarks about Falwell as fair comment, adding that there is no real parody defense. The question would go to a jury. Andrew Nicol noted, though, that political cartoons do not bring lawsuits, although good ones are often by opinionated cartoonists.

The panel concluded with comments on the English public's attitude toward the press, particularly whether there is hostility toward the press. Siobhain Butterworth, of *The Guardian* and *Observer* newspapers, noted that this depends on the case, the particular judge and which media defendant is on trial. Patrick Moloney added that one benefit of England's tough libel laws is that people believe the British press and regard the press as reliable. What the public does not like, according to Moloney, are invasions of privacy.

Keynote Address by Lord Williams of Mostyn QC

As Parliamentary Under-Secretary of State, Lord Williams plays a key role in the House of Lords in terms of shepherding through that body the Labour Government's proposed legislation on Data Protection and Human Rights. In his address, he commented on both these initiatives and how both serve the government's commitment to freedom of the press. His comments were also interesting background to some of the substantive issues discussed in the afternoon by the Privacy Panel.

According to Lord Williams, the Data Protection Act of 1984 treats the media like any other data controller and does not safeguard the press. Under EU rules, the UK is obligated to implement further data protection as part of a view of personal privacy. In this sense, the UK already has privacy law. The Labour Government held dialogues with national and regional newspapers and broadcasters to address their concerns and the 1998 Data Protection bill now contains a media exemption. This is the first time UK law has recognized the importance of the media. And he opined that the press agrees that the government has met press concerns.

With regard to incorporating the European Convention on Human Rights through the government's proposed Human Rights bill, Lord Williams opined that in the future incorporation will be viewed as revolutionary, akin to the adoption of the National Health Service in Britain in 1948. For the first time in UK law, people will be able to use a law against public authorities. Press concerns over the privacy provisions of the European Convention are met with the fact that Article 10 on free expression trumps privacy rights. He recommended that Article 10 "ought to be seized upon by a confident media" and that it will protect the press even when it is inaccurate.

Lord Williams added that problems have also arisen because of press excesses, citing the publication of a story in a U.S. tabloid revealing that a celebrity's child was dying of AIDS. This publication was in his opinion "warped, obscene and prurient" and of no public interest. The press should recognize that its interests are not utterly paramount. He reflected on recent books by Ben Bradlee and Katherine Graham where both discuss the question of how publishers should behave. These questions ought to be in the mind of every journalist and media lawyer. The more the press improves its standards, the more powerful it will be. Even the attitude of judges, which has been skeptical of the press, is changing.

He concluded by saying that the next big step forward will be a freedom of information bill. And he predicted that 1997 to 1999 will be remembered as an era of revolutionary change.

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Privacy Roundtable

The privacy roundtable, in broad terms, focused on the role government should play in the areas of fairness, privacy, decency and taste. Besides the market forces that influence these areas, what will government tolerate in these areas? The panel explored three particular areas:

1) Data Protection legislation which will regulate holders and processors of personal data information, including, in certain circumstances, the media;

2) the use of self-regulatory and government regulatory bodies of the media on these issues; and

3) the Human Rights Bill which will incorporate into UK law the European Convention on Human Rights.

The panelists were

* Professor Eric Barendt of University College London, co-author of the recently published book *Libel and the Media: The Chilling Effect*;

* Alistair Bonnington, the BBC's in-house Solicitor based in Scotland;

* Elizabeth France, the UK's Data Protection Registrar;

* David Banks, Director of Information for Mirror Group Newspapers and a former editor at both the *New York Daily News* and *New York Post*;

* Alan Rusbridger, the Editor of *The Guardian*;

* Clive Soley, Member of Parliament and a sponsor of media legislation;

* Kier Starmer, a Barrister at Doughty Street Chambers specializing in E.C. and media law; and

* Stephen Whittle, a member of the Broadcasting Standards Commission.

Professor Monroe Price of the Benjamin N. Cardozo School of Law, New York, moderated the panel.

Professor Price began a dialogue with Data Protection Registrar Elizabeth France on the proposed UK legislation to implement the EU Data Protection Directive into UK law and how the new law will affect the media. By way of background, Ms. France acknowledged that her position is a strange one to Americans but stated that she has counterparts in all other European countries, Hong Kong, New Zealand etc. The capacity of mainframe computers and ideas of "big brother" led to EU concerns over holding data on individuals. Britain's 1984 Data Protection Law was not thought to apply to the media and it contains no exemptions for the media. With the penetration of information technology into journalism, e.g., searchable databases and video files, web sites, etc., the media is now caught by the Data Protection Act -- although the government did not think to use this fact to control the media.

Data Holders Must Register

Under the 1984 Act and the proposed legislation, any legal person who processes information must register with Ms. France's office. She estimated that 200,000 entities had registered, about half of those who ought to have registered. The media is required to register and all major UK newspapers and broadcasters have registered with her office. Even if an entity is not registered it must comply with the law.

In broad terms, the law will allow people, so-called "data subjects," to have access to the data held on them by any public or private entity including information as to the source of the data. The proposed 1998 law contains a broad exemption for the media for prepublication material, described as "material being held for publication." After publication, if a complainant alleges a breach of data protection, her office would investigate. The grounds for breach include that the data was obtained unfairly or unlawfully, that the data is inaccurate and not up-to-date, that it is excessive for purpose, and that it is not held securely. The most likely complaint, according to Ms. France, would be that personal information is inaccurate. Clause 11 of the proposed law allows complainants to seek compensation for breaches.

Alan Rusbridger, editor of *The Guardian*, stated that he is not alarmed so far at the proposed law, but that it highlights the conflict between privacy interests and free expression. As for the transfer of data from Europe to the U.S., Ms. France noted that the EU puts a burden on members to prevent the

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export of data to nations without adequate data safeguards. In the commercial context, this has been dealt with through contract provisions about the handling of data. But she opined that the media exemption would probably not apply where a U.S. media entity seeks data from a U.K. media entity without consent of the data subject.

David Banks of the *Sunday Telegraph* remarked that data protection terrifies him and that it is privacy law by the back door. Interestingly, Ms. France revealed that she wanted the bill to be called a privacy law and that it is a law about social policy and privacy. In fact, although she has not had occasion to enforce the 1984 data protection law, she has felt it would have been cheaper for many complainants against the media to have come to her office.

Applying Data Protection

Monroe Price explored several hypotheticals under the proposed law, revealing to many Americans at least the uncertainties in the legislation. The duty to correct mistakes would not be applied "Stalinistically" to rewrite published articles, but Ms. France did see a possible role for publishing notices of correction.

The exemption for data held for publication is clearly a "gray area." She opined that one could always claim the information is held for an obituary. As for not holding information longer than necessary, she expressed surprise that giving over a file harms free expression.

Although the exemption only applies to "journalistic and artistic" purposes, the law does not specifically define these terms. She expressed concern that people could hide behind the exemption. Not every publisher should be considered a journalist. Also discussed, not answered, was how the law would apply to archival services, such as Lexis/Nexis, and errors held in their databases.

With regard to newsgathering, Ms. France gave a scenario indicating that the media would not be in breach of the Act if it received information from a source who did violate the law -- e.g., an airline employee who turned over a passenger list to the media would violate the law, but the journalist receiving the information would not. She did not directly address how the requirement that information be fairly obtained applied in this example. With regard to crime reporting, the police would need the consent of a crime victim before giving out the victim's name to the media. The police would also need the consent of traffic accident victims before releasing their names to the media unless there is an overriding public interest. Clive Soley MP questioned Ms. France about a recent *Daily Mirror* article on the "Yorkshire Ripper." The article also published a copy of the prisoner's bill from a prison shop purchase. Ms. France agreed that this leak would be covered by the Act and that the leaker, not the media, would be held to have violated the Act. Under present law there is no public interest exemption. In fact, the Data Registrar could investigate matters on its own initiative without a complainant. As for the scope of coverage of the Act, it would cover not just electronic data, but any "well organized" collection of data.

Clive Soley has looked at whether Data Protection could be used by people as an alternative to libel law. Because there is no defense of media freedom, he is nervous about going down the privacy road. He believed that inaccuracy was the first concern of Data Protection and that the fairness vel non of acquiring the information was secondary. Professor Barendt agreed that the focus of Data Protection is accuracy of information. It is not a restraint on publication as such and would not conflict with the European Convention protection of free expression.

Other hypotheticals teased out uncertainties in the proposed Act. According to Ms. France, information on race, sex, marital status, and union membership has been identified as sensitive information. If held by a media entity for publication, such information would be under the exemption. But the exemption should not spread to commercial advantage, such as any re-sales of data. Commercial trade interests are also leading to data protection interest in other world bodies, e.g., the World Trade Organization. American companies have expressed concern about doing business under the law, but this will be handled by contract provisions. She concluded that the focus of her office is on "fairness" as a requirement of treating personal data and that consent of the subject of the data is a key idea in defining fairness.

Jane Kirtley of the Reporters Committee for Freedom of the Press replied that data protection is a big problem from the U.S. perspective. It highlights a difference of perspective between the U.S. and European views-- the European view being

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that government will protect civil liberties. Registration of media entities and government authority over who is a member of the press is contrary to the First Amendment. That the Data Registrar has so far not used her power against the media is no guarantee that future regulators will not try to use power against the media.

BSC and PCC: Regulatory Bodies

The panel next explored the role and effect of the Broadcasting Standards Commission (BSC) and the Press Complaints Commission (PCC) in the area of privacy law. The BSC has statutory authority while the PCC is a print media, self-regulatory body which enforces a code of conduct. Stephen Whittle of the BSC explained that the BSC had its origins in the BBC. In the late 1970s the BBC established an in-house unit to handle complaints from people mentioned in broadcasts. In the 1980s the government made it an independent statutory body to regulate all TV broadcasters and it developed its own sort of case law. In 1996 (pursuant to the Broadcasting Act 1996) the government folded into the BSC the Broadcasting Standards Council which oversaw questions of taste and decency. The House of Lords wanted an even stronger body with more powers to address questions of bias and political partiality. The then-Conservative government instead required the BSC to produce a broadcasting code addressing fairness and privacy. The code applies only to complaints after broadcast. The BSC can examine complaints of unfair treatment of a person or corporation, or an invasion of privacy. The interest in privacy is overridden by public interest and the code gives examples of a public interest test. The public interest exception applies to revealing crime, matters of public health and safety, incompetence in public office, exposing fraud. The BSC's ultimate sanction is embarrassment to a broadcaster through a requirement that they broadcast the BSC's findings on-air.

Alistair Bonnington, BBC Scotland, observed that as a practical matter the PCC and BSC are different. He expected to win before the PCC and to lose before the BSC. Privacy, though, is not defined in the BSC legislation. It is a "moveable feast." Privacy under the PCC code is probably not the same. For example, public filming at a public event -- a car show -- was held to be a breach of privacy. Another decision involving hidden camera filming at an electronics store was also held to be a breach of privacy. He has concerns about how the BSC interprets privacy.

The BBC is in a different position than the commercial channels. The BBC has an internal code covering privacy. Commercial channels are governed by the Independent Television Commission, a licensing and regulatory body. Mr. Bonnington noted that ultimately there should be some unity between regulatory and statutory privacy rights.

Professor Eric Barendt noted that the lack of a remedy against the press for invasion of privacy is the subject of lively debate in Britain. The fact that the BSC already enforces privacy rights in the area of television is not mentioned in the debate, and he finds it hard to justify different regulations for broadcasters versus the press. Whether the regulation of television has a chilling effect is not clear. According to Barendt, while broadcasters complain that the BSC is "irksome," he cannot point to shows that were not made because of BSC regulation.

Tying Privacy to Libel Reform

Kier Starmer suggested that the debate on privacy revolves on two questions. What is the private sphere, and how far can the media go into this? If the media crosses the line, how can their actions be justified? (How will the law define public interest?). Alan Rusbridger, editor of *The Guardian*, noted that Article 8 of the European Convention will bring a right of privacy to the UK. He expressed concern that same judges who have rendered awful libel decisions -- with no concern for free speech -- will be interpreting the scope of privacy. In addition, the application of Article 8 and its privacy rights to media is unclear. Kier Starmer drafted on behalf of *The Guardian* a proposed law to clarify the right of privacy, with added protections in libel as well.

These points led to a dialogue on whether the adoption of privacy law may be a trade off to get better libel laws. Clive Soley was generally opposed to a privacy law that is not balanced against the rights of press freedom, although he cited a recent case of tabloid abuse of privacy in publishing photos of a child. He supports a law that would first defend press freedom and then address privacy and accuracy issues. Mr. Rusbridger was convinced that a bargain was struck, observing

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that many press editors do not speak anymore about libel laws but about privacy law which may impact their commercial interest. Editors do not seem to care about getting better libel laws that would protect good journalism. David Banks, expressing surprise and outrage, called the Data Protection regime a gross intrusion on freedom and remarked on his country's "pathetic" reliance on government to do right in this area, citing the advance praise for a freedom of information bill which may not provide much.

Professor Barendt opined that had the Princess Diana gym photo case not settled, the House of Lords would likely have created a privacy tort and that this would have been a good thing. The press arguments against privacy law remind him of the arguments of trade unions in the 1970s that they were not subject to the law. He believes that judges will use Article 8 to develop a law of privacy but is not worried about the effect on the media because privacy will have to be balanced against Article 10's protection of expression. Alan Rusbridger was less confident, noting that the same judges who have ruled against public interest privileges in libel will be interpreting privacy.

This point was continued in a dialogue on whether libel and privacy laws are both politically and organically linked. Rusbridger agreed they are and that the idea of public interest is the organic link between the two, citing a libel claim against *The Guardian* brought by police officers who were not identified in *The Guardian* story. Kier Starmer agreed, noting that the press ought to be able to invade privacy and reputation in certain situations. Citing *Food Lion*, Laura Handman noted that the idea of trading privacy for libel reform should be approached with caution, as creative plaintiffs can use privacy claims instead of libel.

Concerns About Data Protection

The concluding questions and comments to the panel focused mainly on the concerns about Data Protection legislation. Highlighting areas of serious concern in the bill, Tom Welsh, editor of *Media Lawyer*, confirmed that current data protection law is an imposition on press ability to obtain newsworthy information, noting, as an example, that police will no longer give out accident information. Ms. France defended the right of people involved in accidents not to be identified or have their location and companion revealed. On the matter of a subject's access to files and information kept on him, she opined that as written the legislation makes it difficult to prove the press exemption does not apply prior to publication. But she added that this would have to be tested in court and that the bill allows people to go to court on their claims -- an ominous prospect to the litigious American perspective. Also troubling was her final comment on whether after publication a journalist might be required to turn over all notes, drafts, scripts etc., to the subject of the story. This is something her office will need to look at and rhetorically she asked "Why are you still holding it?"

THE MILLENNIUM BUG IN ENGLAND: A Forum on English Libel and Privacy Law

By Kevin Goering

Tabloids in the United Kingdom may have more than one "Year 2000 problem." A century after Warren and Brandeis authored their landmark Harvard Law Review article, England still has no general right of privacy. All of that will likely change in the new millennium, as the European Convention on Human Rights is implemented in that country. This issue was one of many debated in the LDRC's Forum on English Libel and Privacy Law held in London on May 11-12. Over 100 experts attended the conference, including 40 from the former British colonies.

Day One of the Forum featured an inspiring introductory address by Geoffrey Robertson, QC, followed by a series of open discussions on prepublication review, jurisdiction, the European Court and trial practices. Each session was moderated by two leading media lawyers, one each from the U.S. and the U.K.

The discussions were animated and extremely fast-paced, thanks to the expertise of the moderators and the broad participation of a highly sophisticated audience. Stateside counsel learned about significant developments

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THE MILLENNIUM BUG IN ENGLAND

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in the "libel capital of the world," including recent successes in sending out-of-state- plaintiffs back to their home countries based upon *forum non conveniens* arguments. Our British counterparts were somewhat dismayed to hear that American courts have refused to enforce libel judgments from their courts on the grounds that English libel law is "repugnant" to U.S. public policy and the First Amendment.

European law experts predicted the coming revolution to be wrought by the European Convention on Human Rights which, via Article 8, will probably result in the development overnight of a new and unpredictable right of privacy. The good news, however, is that the free expression clause of Article 10 of the Convention could well lead to the recognition of a qualified public interest privilege in English libel law. After a lively discussion of contrasting trial strategies in the vastly different procedural systems, the participants adjourned to a reception in the "Large Pension Room" at Gray's Inn sponsored by Stephens Innocent Solicitors and Biddle.

The opulent setting for Day Two of the Forum was the Common Room at The Law Society's Hall. The format differed significantly from the first day, as two impressive roundtable panels comprised primarily of English law luminaries discussed defamation and privacy law under the able direction of moderators Laura Handman, Andrew Nicol, QC and Professor Monroe Price. The principal theme of the defamation discussion was a spiritual debate of the wisdom of placing the burden of proof on truth on the defendant in England, as contrasted with the constitutional requirements on the other side of the Atlantic. According to leading plaintiff's libel counsel Peter Carter-Ruck, the English system is only fair because it requires those who have made defamatory charges to justify them. Others, including English editors, gave many examples of self-censorship which result from the existence of that rule.

The luncheon keynote address by Lord Williams of Mostyn, Parliamentary Under-Secretary of State at the Home Office, addressed recent and forthcoming legislative developments in the mother country and was followed by a fascinating discussion of privacy law. Unlike the first day's focus on the European Convention, this roundtable explored primarily the European Community's Data Protection Directive, the English Data Protection Act of 1984, and the recently proposed Data Protection Act of 1998. Many American observers were shocked to hear of the registration requirements for those who collect and store information, including the media, and of the requirement that such information be divulged to the subject of it, at least where it is not being "held for publication."

In the end, the Forum seems to have achieved the goals of its planners and participants to exchange information, to develop strategies for dealing with difficult libel litigation in England and to express the concerns of lawyers and editors on both sides of the Atlantic about possible reforms, both positive and negative, in the laws of England. The Forum adjourned with a recognition that the Year 2000 may produce a revolution in English law emanating from Strasbourg, the home of the European Court of Human Rights. The venue for the next conference may well be that city, but all agreed not to book flights there until after January 1, 2000.

Kevin Goering is a partner at Coudert Brothers in New York City. He is a co-chair, with Richard Winfield, Rogers & Wells, and Robert Hawley, The Hearst Corporation, of the LDRC International Law Committee and the LDRC U.S. Forum Planning Committee.

Systems on Trial

By Amber Melville-Brown

The US and the UK have been described as divided not only by our common language but also by our common law. This was never more apparent than at last week's Forum on English Libel and Privacy Law, organised by the New York-based Libel Defense Resource Center, with cooperation from Wolfson College.

Fifty leading US libel defence lawyers joined their UK counterparts, judiciary, parliamentarians and media representatives for a candid trading of ideas and information, the sharing of thoughts on procedure and practice and the discussion of recent decisions and developments. And there was a little bit of arguing along the lines of "Our law's better than yours!"?

No one was left in any doubt at the end of the Forum that there are many differences in the libel laws of the UK and the US. The Americans look with envy at the UK's "loser pays" cost rule as parties to an action in the US must meet their own costs whatever the result. In the light of the largest ever libel damages award of $222.7 million (reduced on post-trial motion to $22.7 million but still one of the highest US damages awards made) against the US news agency Dow Jones (*MMAR Group, Inc v. Dow Jones & Co*), they covet the relatively recent British developments which have effectively capped libel damages at £150-175,000 (*Elton John v. MGN Ltd*). On this side of the Atlantic, lawyers like the idea of the US depositions where the parties are able to get at the truth early on in the proceedings during interviews under oath. And UK lawyers generally agree that it would be helpful to have some say in the composition of the jury.

Although UK and US lawyers might wish to adopt various elements of the other's system, would they be prepared to swap in total their system for that of their counterparts?

A fundamental difference between the systems is the burden of proof in a libel action. It has long been lamented by the UK press that they have to prove their stories are true. British journalists argue that plaintiffs should prove that what is allegedly defamatory is *not* true. Anything else, they say, leads to the locking away in the editor's safe of well-researched stories of public interest which they fear - for reasons of confidentiality of sources, the ability to compel witnesses to give evidence - they would not be able to prove to the satisfaction of the jury. Although eventually exposed as a liar, Jonathan Aitken might well have had the blood of *The* Guardian on his "sword of truth" had the newspaper not fiercely and tenaciously defended its position to the 11th hour.

In the US, the burden of proof rests squarely on the plaintiff, giving the US press a much freer hand in publishing stories of public interest. The "fault rule" requires any plaintiff, be they public figure or private individual, to prove that the defendant knew of or was reckless as to a libel published in the public interest.

Concluding last week's Forum was a UK v. US debate which pitted Michael Beloff QC and George Carman QC against US lawyers P. Cameron DeVore and Victor Kovner. It was proposed that the US Public Figure Defence, provided for in the case of *New York Times v. Sullivan*, should remain in the former American colonies. Public figures and officials are prohibited in the US from recovering damages for libels published in stories of public interest in the absence of actual malice. The rationale is that their activities should be under scrutiny and freely discussed in the press, without fear of reprisal through the courts. The opposing view submitted by the UK team was that this is simply *"a freedom to peddle untruths without redress"*. Said Mr Beloff: *"Not even Casanova has slept with as many people as Bill Clinton is said by the Press to have done, yet he [Clinton] could not sue under Sullivan."*

The Americans find the UK's plaintiff-friendly libel laws, in which the plaintiff need only show that the words have been published, refer to the plaintiff and are defamatory, at odds with freedom of expression and against the public interest. Cameron DeVore only half-joked when he said *"the only burden of proof on the English libel plaintiff is to prove that he is still alive when the matter comes to trial."*

Most UK media defendants would agree that the reversal of the burden of proof would make their lives easier. But there is a residual doubt in *some* British minds that we should adopt this stance as the current heavy burden placed

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Systems on Trial

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upon the press *may* lead to higher standards of investigative journalism.

As George Carman said in the debate: "*If you have a press which cannot in normal circumstances defend the truth of what it publishes, is it really a press worth having?*" The US team won the debate overwhelmingly.

The balance between freedom of expression of the press and the right to privacy of the individual is finely balanced. Perhaps neither side has it exactly right and it remains to be seen, both by UK lawyers and the US media defendants who are being subjected to more actions in the UK as a result of "forum shopping", whether the proposed Data Protection Act and the incorporation of the European Convention on Human Rights will affect that balance in the UK.

Amber Melville-Brown is a solicitor at the London law firm Stephens Innocent.

WITH MALICE TOWARD NONE

By David J. Bodney

The moment the Honourable Michael J. Beloff QC began to speak, the Americans knew this would be no ordinary debate.

For Michael Beloff is the rare breed of orator whose performance conjures images of the prizefighter Muhammad ("float like a butterfly, sting like a bee") Ali at his theatrical best.

The opening speaker at the evening debate, Mr. Beloff rose to the occasion by first disarming his opponents with humor.

Bobbing and weaving, he veritably encircled his prey with a mixture of jest, wit and swaying histrionics that dazzled the hundred or so who had gathered at the Law Society's Hall in London to witness this historic squaring-off.

The crowd of lawyers, journalists and government officials had assembled to witness four distinguished advocates – two American, two British – debate a novel issue of libel law in the form of the following resolution: "This House believes the public figure defense should be confined to the former American colonies."

Advancing the British view, Mr. Beloff basked in the every advantage of speaking "for" the resolution (and therefore against the adoption of a public figure defense in British libel cases). As President of Oxford's Trinity College, Mr. Beloff surely did not object to the ground rules of an Oxford-style debate. Indeed, he seemed as comfortable as Olivier in Henry V, leading "we few, we happy few, we band of brothers . . ." into battle on Saint Crispin's Day. Only this time, it wasn't Henry on foreign soil at Agincourt, but Michael on Chancery Lane with home court advantage.

As the concluding event of this two-day conference on English libel and privacy law, the debate focused on an article of faith for the American media lawyers in attendance – the actual malice standard from *New York Times v. Sullivan*.

Where Mr. Beloff punched at the issue with great panache, P. Cameron DeVore – the distinguished American media lawyer from Seattle – stood tall to such blandishments. Reciting the language of Supreme Court jurists in support of "uninhibited, robust, and wide-open" speech, Mr. DeVore provided a serious rationale for the constitutional protection. Noting that *Sullivan* provided a moderate approach to protect the informed debate of public issues, Mr. DeVore reminded his British adversaries that three members of the Supreme Court who concurred in the *Sullivan* decision believed in an absolute privilege of the press to report on official activities, not the qualified privilege at the heart of Justice Brennan's majority opinion in the landmark case.

Just as the American view began to seem clear and persuasive, George Carman QC took the floor to rain on the Yankee parade. If Mr. DeVore spoke with all the idealism of Jimmy Stewart in Mr. Smith Goes to Washington, then his British counterpart, Mr. Carman, returned the discussion to the realities of a harsh old world in which public officials would be "chilled" from ever suing to protect their good names. Deftly, Mr. Carman counterpunched with characteristic dignity and charm, rounding out a British debate team of the highest calibre and distinction.

Last to speak was one of America's finest defenders of the First Amendment, Victor Kovner of New York City. He matched wits with Messrs. Beloff and Carman, joking about London – "libel capital of the world" – and the unlimited

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WITH MALICE TOWARD NONE

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forum-shopping possibilities upon which it might capitalize by erecting a libel "theme park" to celebrate the millennium. The long, tall lawyer then put the debate in historical perspective, as if Honest Abe Lincoln had returned to bind the wounds not only of his countrymen but of their mother country as well.

For Mr. Kovner did not rest his argument on good-natured satire alone. Rather, he politely reminded his old world hosts of their old world ways, and the corollary costs of censorship to a free society. No American in the audience could listen to Mr. Kovner speak of James Madison and his constitutional premise – namely, a government under which "[t]he people, not the government, possess the absolute sovereignty" – without hearing strains of "America the Beautiful" and getting all misty about the Fourth of July.

Evidently, the mostly British audience heard the same background score, or else took pity on their naive visitors from across the Atlantic. When Sir Michael Davies QC, acting as chair of the debate, permitted the audience members to take hold of the microphones and share their views, the speakers from the audience – save for a Royalist or two – endorsed the Yankee view with great fervor. Sir Michael called for a vote (underscoring his desire for decisiveness, lest a recount be in order), and the people spoke loud and clear.

The resolution was defeated, the American side prevailed, and the "public figure defense" was at long last liberated from the confines of the former American colonies. Whether the European Convention on Human Rights should adopt the defense was a question left for another day – or for another evening, perhaps in America, when such fine English hospitality could be reciprocated.

David J. Bodney is a partner in the Phoenix office of Steptoe & Johnson LLP, where he practices media and constitutional law. He served as a member of the LDRC's Forum Planning Committee and co-moderated a session on trial practices at the Forum.

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AND AN EXECUTIVE DIRECTOR'S NOTE:

I think it is fair to say that the LDRC Forum on English Libel and Privacy Law was a success. Indeed, it exceeded our expectations, I think, both because of the depth of the substantive discussions on each subject on each day and because of the sheer pleasure in meeting so many interesting and experienced media counsel, government officials and jurists in such a stimulating environment. By the time the vote came in on the debate on Tuesday evening -- at that point with approximately 200 in the audience -- the sense of accomplishment was enormous.

The moderators of the sessions were uniformly excellent. They are to be thanked for all of the preparation they put in to their roles. The sessions were so rich because of that effort. But appreciation must be noted as well for all of the participants from both sides of the Atlantic who not only gave of their time, but were so generous with their expertise. It is difficult to convey how knowledgeable and articulate this group was overall, and the dialogue that was generated was remarkable.

The efforts of the U.S. and U.K. planning committees certainly were evident. **Kevin Goering (Coudert), Bob Hawley (Hearst), and Dick Winfield (Rogers & Wells),** U.S. co-chairs, and **Mark Stephens (Stephens Innocent),** U.K. chair, deserve our undying gratitude. **Mark Stephens** and his firm offered advice and assistance on everything from the speakers to the situs for Sunday's opening dinner (it was Indian food and absolutely wonderful!). **Mark Rebein (Media/Professional)** and his colleagues provided much needed administrative assistance. **Christine Kings (Doughty Street Chambers)** gave needed assistance on many fronts. **David Heller** of LDRC produced a much praised bibliography for the event, as well as shepherding months worth of necessary details.

Jan Tomalin and Channel Four provided video equipment. The **Freedom Forum European Centre** hosted Monday. **Wolfson College, Oxford University, Media and Cultural Law Programme** cooperated in the development of the Forum.

Doughty Street Chambers and **The Law Society's Gazette** sponsored the Tuesday night debate.

Don Christopher (Carlton Television) underwrote a congratulatory dinner for the debaters, the chairs, and more.

Biddle and **Stephens Innocent Solicitors** sponsored a reception on Monday night.

Media/Professional Insurance, Inc.,Guardian Newspapers Limited, and **Vinson & Elkins L.L.P.** provided overall sponsorship of the Forum.

There was talk as we left of "next year in Strasbourg" -- site of the European Court of Human Rights, a court likely to factor more heavily in English legal thinking after the incorporation of the European Convention on Human Rights into English law. I received several emails on my return with advice and offers of assistance. But whether or not LDRC travels abroad again anytime in the near future, it was a pleasure and a privilege for me to participate in this Forum. Thank you to all who planned, who came, who participated, and who supported this event.

-- *Sandra S. Baron*