LDRC Libel Defense Resource Center
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MEDIA TRIALS AT THE CLOSE OF THE CENTURY: CHALLENGE AND CHANGE

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INTRODUCTION

Things change. This is true of life and certainly true of trials. But how have they changed? And what can we expect as the new century begins? LDRC asked four noted trial lawyers for their views on how media trials have changed in the last two decades. In the following pages, Bob Vanderet, David Donaldson, Gary Bostwick and Sam Colville give their assessments of the evolution of the modern media trial.

Our authors tell us:

- Twenty years ago, jurors did not view the media as a monolithic intermeddler, poised to turn its prying eyes to them, as they apparently now do. In those happier days, on the heels of Woodward and Bernstein, the media were still seen by many as good guys, taking on the mighty on behalf of the less powerful.

- Buttressed by the relatively new constitutional dimension to defamation law and perhaps a similar sympathy for the press, judges were more protective and more willing to grant preliminary motions that made trials unnecessary.

- Plaintiffs' lawyers were less sophisticated, trials were simpler and verdicts smaller.

All of this has changed. As the authors describe, the modern defamation trial has become a far more challenging contest than it once was, and the challenge promises to grow even greater as we move into the next century.

SOME PERSONAL REFLECTIONS ON A QUARTER-CENTURY OF LIBEL LITIGATION

By Bob Vanderet*

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SOME PERSONAL REFLECTIONS ON A QUARTER-CENTURY OF LIBEL LITIGATION

At one time there may have been a market — or at least some use — for subjective reminiscences by aging lawyers of trends in libel trial practice. If so, the LDRC destroyed it. Through its meticulous tracking of media cases and its careful statistical analyses of results over the years, all of us now have an objective foundational basis on which to evaluate trends in a myriad of variables from success of motions to dismiss, to percentage of jury verdicts for defendants and size of awards, through reversals on appeal. It is in that body of hard work by the LDRC that the real story is to be found.

Nonetheless, LDRC has asked for my own subjective perspective on how litigating libel cases has changed over the last quarter century.

Twenty-five years ago, at least from my general perspective, we seemed to do better with judges and worse with juries than we seem to do today. Why is this so?

When I began litigating libel cases, fresh out of law school in the early 1970's, it was a heady time for "First Amendment lawyers." *New York Times v. Sullivan* was less than a decade old, and the lower federal and state courts had expansively applied its strong new message that the First Amendment trumped common law and state statutory libel principles in the intersection of news reporting and defamation. While the 1971 *Rosenbloom* decision seemed to signal an outer limit to the expansion of *Sullivan*, even the high court's 1974 decision in *Gertz v. Welch*, revitalizing the role of state law at least in private figure cases, provided new doctrinal weapons to media defense lawyers.

It was almost a religious canon among those of us representing mainstream media publications and broadcasters then that virtually every case could be won at the pleading stage, or certainly at least at the summary judgment stage. This aggressive optimism was perhaps best reflected in the litigation strategy that Harold Medina of the Cravath firm developed for the defense of Time Inc. libel cases in the early and mid 1970's. Under Medina's direction, an "editorial reference file" was quickly compiled that included all drafts of the challenged article and other materials relating to the support for the challenged statement, including affidavits from each of the correspondents, writers, fact-checkers and editors involved. Local counsel would receive these materials, along with a skeletal "Memorandum of Law" prepared by Medina, which would be used as a starting point for any motion to dismiss or for summary judgment. Sometimes, this entire packet of factual and legal materials would be sent to counsel for the plaintiff — who in those early days often was in fact unaware of the avalanche of pro-press case law that awaited those who filed defamation claims — accompanied by a strong message that the case was unwinnable from the plaintiff's standpoint, and that if it wasn't dismissed immediately, we would proceed quickly to the inevitably successful summary judgment.

And that aggressive optimism was generally vindicated in the results: In my own practice in the 1970's and indeed through much of the 1980's, it was a rare defamation case that was not disposed of on a motion to dismiss or demurrer. The most troublesome cases had to await a summary judgment motion, when the unchallenged — or unchallengeable — affidavits of editors, reporters and fact-checkers would provide the necessary evidence of lack of actual malice that mandated judgment as a matter of law under *Sullivan, St. Amant* and the other major principles in the canon.

Of course, in the unusual event that a case *did* make it to a jury, the press was in trouble, at least in the short run. Particularly in the 1970's, in my experience, juries as a general rule had an open and palpable hostility toward the press. In the both the midst and the immediate wake of the Vietnam War, the country was deeply divided. Many on both the political right, and in what Spiro Agnew would call the "silent majority," viewed the press with open hostility, as a biased liberal institution that had undermined the country's war effort, hounded a popular Republican president out of office, and allied itself with the unwashed anti-establishment younger generation. And many of those people ended up as jurors. While Nixon, the war and the press's role in Watergate would all undergo dramatic reevaluation in the public's mind over succeeding decades, in the 1970's and early 1980's, these factors spelled almost certain defeat for the media in the overwhelming majority of libel cases that were tried to juries. But if, as was expected in such cases (and as the early LDRC statistics bore out), the jury found for plaintiff at trial and awarded what would now seem a modest judgment for damages, the appellate courts could confidently be counted on to reverse the judgment in all but the most egregious of cases.

During that period, settlement of defamation cases was close to heresy, at least among many major news organizations in whose cases I was privileged to be involved. Even those news organizations that were part of a larger corporate structure were by and large self-governing and respected internal entities who made their own principled decisions to defend most every libel case to the end, in the conviction that such a policy was a both journalistic responsibility to their reporters and to the profession, and was, as well, economically wisest in the long run. Those decisions were made by corporate executives who saw themselves primarily as journalists.

Nor was there much reason to consider settlement. Judges, both at the trial court and appellate levels, were then eager protectors of the press, almost irrespective of their own ideological biases. It wasn't hard to read the signals from both the federal and state high courts: First Amendment freedoms were "preferred" freedoms; allowing baseless libel litigation to continue beyond the pleading stage in itself created a palpable "chilling effect" on the press, and threatened these preferred freedoms; ergo, cases implicating press freedoms should be disposed of at the earliest possible stage.

Those doctrines — so familiar now as to be almost tired clichés — were new and fresh then, and had resiliency in briefs and in argument. Judges took them seriously.

How have things changed, and why?

I know that in my own practice, more cases now get past the pleading stage, either because of a decision not to make a motion to dismiss, or because such a motion is denied. And more of those cases are either settled or end up being tried. The reasons for this phenomenon are many: a more aggressive, intrusive style of reporting by segments of the press, including reporting on subjects that decades ago would have been considered too private or inappropriate for mainstream press coverage; the fact that most major news organizations are part of larger entertainment or other conglomerates, and the costs of litigation and settlement of libel and privacy cases are increasingly viewed through the same lens as other routine cases the parent company might face; and a change in the way the press, and press cases, are viewed by judges. In an alarmingly increasing number of forums, both at trial and appellate levels, media lawyers now face judges who have an open hostility toward the press, and who believe that it is more important for the judiciary to start curbing what they see as press abuses, than to worry about a "chilling effect" on press behavior. Even in forums where there is not outright judicial hostility, what I would term "judicial fatigue" is widespread.

Two vignettes at different points in my own practice best put the judicial fatigue factor in concrete terms for me. The first occurred in the 1970's. In the wake of *Gertz*'s holding that the states could not constitutionally impose liability without fault for defamation, at least in cases involving matters of public interest and concern, we brought a motion in a libel case for one of the networks that challenged the constitutionality of California's defamation statutes. We argued that since the statutes did not impose *any* fault standard, under *Gertz*, the California libel statutes were unconstitutional unless and until the state legislature amended them to include whatever fault standard it deemed appropriate, which was not a matter for judicial decision under state law. When we arrived for the hearing on the motion, the superior court trial judge to whom it was assigned announced that he was placing the matter at the end of the calendar so that he could give the motion all the time necessary for argument. And, as he called each of the other motions on calendar — many of which involved routine discovery disputes of the kind all judges abhor — he lectured the counsel involved on the contrast of their mundane motions with ours: "I have on calendar this morning a motion that challenges the constitutionality of California's libel laws! And you waste the court's time with these petty discovery disputes!" I had at least some sympathy for the lawyers before me whose boats were upset in the wake of our motion, one that the judge clearly was excited about and eager to wrestle with, notwithstanding the fact that he had a reputation (well-deserved) as a pro-plaintiff jurist. (After hearing argument for several hours, he denied the motion, as we thought he would likely do, though he declined to explain his reasoning other than to lament out loud that, "If I'm wrong about this, I hope the California Legislature acts quickly to correct this situation so that the people of California are not left unprotected against libel by the press!")

Some 15 to 20 years later, I found myself in the same courthouse, arguing a demurrer to a libel/privacy complaint on behalf of a national news magazine. The motion was before a respected superior court judge known to be mindful of constitutional concerns. I felt confident of our chances of getting the case dismissed on constitutional grounds. Yet when the case was called, and I stood to begin my argument, the judge interjected: "Before you go on, Mr. Vanderet," she said with a smile on her face but weariness in her voice, "I know that the Republic will fall, the First Amendment will be fatally wounded, and the liberties of all our citizens will be threatened if I don't

grant this demurrer. So why don't you skip that portion of your argument and get right to particular case law that addresses the more mundane issues of pleading before this court."

Even some of the most ardent pro-press judges have heard the familiar litany of "chilling effect" so often as to have become immunized to it. Few believe any longer that press freedoms are or will be in any way curtailed by allowing libel cases to proceed along to trial just like any other tort case. Their experience teaches them otherwise. And for those judges with an ideological axe to grind, the prospect of a "chilling effect" on the press is not a deterrent but an incentive. The end result is that libel cases are increasingly viewed by the judiciary — and by many of our clients — less as epic battles of constitutional principle, and more as tort cases with some constitutional overlay that has to be dealt with at some stage of the proceeding, often in form jury instructions. More libel and privacy cases consequently get past the pleading stage, past the summary judgment stage, and are either settled or tried to a jury. And in more of those that are tried to juries, the media actually wins, through good, old-fashion trial lawyering. (I have found less outright hostility toward the press on the part of jurors than was the case twenty-five years ago; the irony seems to be that as views of the press among the judiciary and the "intelligentsia" may have been worsening as a result of a belief that the press panders to mass appetite for gossip and trivia, many segments of the public may identify more with the press for the same reason. This is not to say that juries don't often still have a majority — or at least an influential vocal plurality — of jurors with negative attitudes toward the press, because they do; few media lawyers, myself included, would ever opt for a jury trial when given an alternative.) Thus, what was fast becoming, in the 1970's, almost exclusively a motion and appellate constitutional law practice, is now increasingly looking like a trial practice, or at least more like a routine civil litigation practice.

Early on in my legal career in the 1970's; I had the great pleasure of working closely on many libel cases with Henry Dressel, a warm, witty, and seasoned New York practitioner, who always assisted the late Harold Medina of the Cravath firm on the investigative work when Time publications were sued for libel. Henry had a dim view of what Harold Medina would grandly call the "consitutionalization of libel law" — those protections for the media (many of which Medina himself helped develop) that helped insure that libel cases were disposed of early and cleanly on motion to dismiss or summary judgment, rather than tried in all their seamy factual glory, as was the case in common law days of old. "What they've really done," Dressel would say after recounting some colorful libel trial from the past to me, his awed young listener, "is taken the fun out of litigating libel cases."

Well, Henry, the fun may be back.

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dozens of libel and privacy cases including the successful 1998 jury trial of *Ferrara v. Time Magazine*, a libel claim brought by the girlfriend of Kato Kaelin arising out of *Time*'s reporting on the O.J. Simpson trial. Mr. Vanderet also successfully defended Dan Rather and *60 Minutes* in *Galloway v. CBS*, a jury trial of a libel claim brought by a doctor accused of involvement in an insurance scam. At present, Mr. Vanderet is representing *People Magazine* in a libel suit brought by actor David Carradine as well as Reuters News Service in a copyright infringement action arising over the use of videotape of the Reginald Denny beating during the Los Angeles riots. Both cases are scheduled to go to trial this summer.

LIBEL DEFENSE AT THE CLOSE OF THE CENTURY

By David H. Donaldson, Jr.*

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LIBEL DEFENSE AT THE CLOSE OF THE CENTURY

When LDRC asked me to reflect on how the defense of libel cases has changed over the last 20 years, the mundane things first came to mind. Twenty years ago my law firm did not have personal computers, and we had barely started using computerized typewriters. The making of photocopies of documents sent to clients had just barely replaced the use of carbon paper. Written communications were conducted by United States mail which then, as it does now, would take 2-4 days to reach the client or the opposing counsel. Federal Express delivery had not yet begun to play such an important part in the defense of these cases. The fax machine was not part of a law office operation (does anyone remember when Federal Express once tried to encourage people to use the plain paper fax machines they had at their offices as a method of instant delivery of documents?). My secretary (now my legal assistant), as did many others, became adept at cutting and taping together pages and photocopying them to make those final revisions of our briefs.[1] Trial courts still used 8½ x 14 paper for filing. We still filed discovery materials with the court. I am sure the list goes on.

These physical and technological changes that have taken place since 1980 help us view the changes in the libel practice in context. Just as the tools that we have in the office to express our thoughts and ideas on the defense of libel cases have changed, so too has the law, the courtroom, and our opponents.

The first case that I ever worked on as a brand new young lawyer was a libel case, which illustrates some of the development in the law of libel in 20 years. Rev. Lester Roloff, a radio preacher from Corpus Christi with a devoted following, was engaged in a major battle against the Attorney General of the State of Texas. Rev. Roloff was a pilot who flew his own plane to various churches throughout the South. He lived well from the donations to his ministry that he sought through his sermons and his radio ministry. Rev. Roloff had established, as part of his ministry, a home that took in children whose parents could no longer control them or children who had no parents, provided them religious training and discipline, and some education. The Texas Attorney General was intent on enforcing Texas laws that controlled the providing of education, and the type of discipline (mostly physical discipline) that Rev. Roloff's schools administered was also at issue.

The *Texas Observer*, an iconoclastic liberal Democratic monthly publication then run by Ronnie Duggins, featured a young woman writer named Molly Ivins, who wrote, in a style she has since made famous, a hilarious and sharply biting article discussing Rev. Roloff's difficulties with the State. In doing so, Ms. Ivins described Rev. Roloff in less than flattering terms.

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[1] I personally bought my secretary a personal computer and printer in 1984 to help keep up with the paperwork I was generating. The rest of the firm caught up about three years later and got computers (networked!) for the secretaries and lawyers.

Rev. Roloff took offense and brought suit in 1977. Three years earlier, in 1974, the Supreme Court had decided *Gertz v. Robert Welch, Inc.* Two years after that, in 1976, the Texas Supreme Court had decided *Foster v. Laredo Newspapers, Inc.*, which set out the standards for liability in libel cases in Texas. That, and a few Texas cases that had interpreted *New York Times v. Sullivan*, was pretty much all we had. We had no cases that had decided what the burden of proof was on the issue of truth (Texas statutory libel law said that truth was an affirmative defense). We did not have modern cases that gave fact-specific examples of the meaning of "substantial" truth. (We had to rely on substantial truth given the colorful language Ms. Ivins had used).[2] Because *Gertz* had contained the glowing language (later identified as dicta) that "there is no such thing as a false idea" we had the opinion defense that we could urge but no cases that had interpreted the statement of opinion versus fact issue. (Some of Ms. Ivins' language was so colorful we needed the opinion defense to support it). We had no fact-specific cases that had identified the criteria to decide if someone was a public figure other than what the U.S. and Texas Supreme Courts had told us they had in mind in the cases I noted above. (There were not many preacher-as-public-figure cases for us to fall back on. Now, a whole section of the Media Law Reporter could be devoted to them). We did not have cases that recognized constitutional limits on punitive damages. (We certainly hoped we wouldn't have to worry about this, but it was a threat we had to take seriously). And we had very little law we could use to segregate out actual damages claims where multiple publications had done similar stories but were not sued.

Rev. Roloff claimed to have suffered a substantial drop in the revenues that his church enterprise had taken in. When we looked at the raw numbers, we could see a substantially lower figure for the year after the *Observer*'s story. Of course he did not blame it on the stories that had appeared at the same time in the *Houston Chronicle*, the *Houston Post*, the *Dallas Morning News*, the *Dallas Times-Herald*, the *San Antonio Express*, or the *San Antonio Light*. (Another change that has happened in the business is that now there is only one major newspaper in each of those towns). Instead it was the *Texas Observer*, circulation of maybe 1,000 or so, that had wrecked Rev. Roloff's enterprise.

Unfortunately for Rev. Roloff, however, when we reviewed his financial records we discovered that he had been comparing this drop in income to the previous year, when his organization had received a substantial ranch as a gift, all of which was counted in that previous year. When the effect of this huge, extraordinarily large one-time gift was eliminated, it showed that contributions to Rev. Roloff's enterprises had actually increased. In fact, Rev. Roloff's radio entreaties to his followers in the midst of his travails (which even included references to the deposition he had given that day in our case) had actually succeeded in increasing the contributions made to his cause. Shortly after that discovery the case settled very favorably.

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[2] One of the early lessons I got in defending libel cases was to study old libel cases that reflected the work of defense lawyers before the constitutionalization of libel law. There were many clever defense tactics to be learned in those old cases. We do not realize how easy we have it today compared to those times.

DEVELOPMENT OF LIBEL LAW

Those who have defended libel cases for the last twenty years have seen a steady development, with a few backward steps, of the law of libel in the United States under the influence of the First Amendment. In 1980 it was still uncertain whether it was the plaintiff or the defendant who had the obligation to tell the truth. While hints in other cases suggested that the burden would fall on the plaintiff, it was not until the Supreme Court decided *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) that we could be sure. Since 1980 the standard for judging summary judgments in federal court in libel cases, especially those involving actual malice, has gone from one extreme to the other. In *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979), Chief Justice Burger openly questioned whether summary judgment could ever be granted in a libel case where the issue was actual malice. (Proof of actual malice "calls defendant's state of mind into question" and "does not readily lend itself to summary disposition"). Then, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) the Supreme Court encouraged and supported summary judgment where the plaintiff lacked sufficient evidence to allow a jury to find actual malice with "convincing clarity."

The issue of who decides whether a plaintiff is a public figure or public official for a time was an undecided question in Texas. Some cases said it was the court, but some cases suggested that it was a fact issue that a jury might decide. The issue is resolved now — the judge makes the decision as a legal matter — but in at least one case it made a difference at trial. Jorge Rangel and I were representing the *Corpus Christi Caller-Times* in a case brought by a child protective services case worker who complained of an article that she took to mean she had failed to act to protect a child. The language of the article was unfortunate, with the reporter and the editor failing to see the false and defamatory implication of the language. If she was a public official, we win; if not, we would lose. The judge expressed serious doubts about whether she was a public official, so we convinced him that the issue should go to the jury. The jury agreed that she was a public official, and the Court of Appeals (while questioning whether the jury should have been allowed to decide the issue) agreed the jury made the right decision. *Villareal v. Harte Hanks Communications,* 787 S.W.2d 131 (Tex. App. — Corpus Christi 1990, writ denied). Now only the court gets to make those decisions.

And, of course, courts spent over 15 years trying to fashion a sensible test to judge whether a statement was one of fact or opinion, believing the Supreme Court meant what it said in *Gertz* in 1974 when it proclaimed "There is no such thing as a false idea." (I remember the entire en banc D.C. circuit court trying to wrestle with this issue in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984 (en banc), *cert. denied*, 471 U.S. 1127 (1985), and large groups of lawyers struggling to make sense of the *Ollman* court's "four part test"). Then, in 1990, the Supreme Court, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), backhanded all of those courts' efforts as "a mistaken reliance on the *Gertz* dictum" and put statements of opinion back into the game. The Court said a jury should be allowed to judge the implications or connotations of a claimed opinion to see if it implied statements of fact. We are still arguing about statements that are "pure opinion," but I miss the ringing clarity of the *Gertz* declaration.

In my state, Texas, we have gone from being summary judgment adverse in libel cases to early disposition friendly. Once the Texas Supreme Court declared that no reporter could get summary judgment in an actual malice case based on the reporter's statement of belief in the truth because the reporter was an "interested witness." *Beaumont Enterprise & Journal v. Smith*, 687 S.W.2d 729 (Tex. 1985). For four years we struggled with this burden, then a new Texas Supreme Court finally recognized the extreme unfairness of this approach, ("[S]ummary judgment becomes more difficult to obtain as the plaintiff's opportunity to prevail on the merits becomes more remote. Those actions with the least chance of success are those likely to be accorded a fair trial") and substantially liberalized summary judgment practice in this area. *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989).

Now Texas has provided for interlocutory appeal of denials of summary judgment in libel cases, and the standards for summary judgment have been revised to adopt an approach similar to federal standards. Texas state courts have gone from being among the least friendly to summary judgment to the most friendly — at least by allowing appeals where trial courts deny summary judgment. Ironically, where most out-of-state libel defendants claimed for removal to federal court when sued in Texas, the advantages of the Texas state system mean that choice is no longer automatic and requires some careful thought before removal.

All of these developments have made a difference in the way libel cases are defended and tried. From my perspective the law of libel has matured in the last twenty years with the integration of constitutional principles with common law libel to develop a well-recognized and more easily accessible body of law. Many legal pitfalls still await an unwary plaintiff's lawyer, but the road is much more traveled and well-marked than it was when I started defending these cases. The cases in some ways are easier to defend, but in those cases with bad facts lawyers for libel plaintiffs can see a clear path to victory. That leads to one of the other big changes I have seen.

THE IMPROVING CALIBER OF LIBEL PLAINTIFF LAWYERS

When I started defending libel cases, it was rare to find a lawyer on the plaintiff's side who really understood libel law and who knew how to develop a plaintiff's libel case. Of course, many of us were feeling our way in the dark as the courts gradually explored what constitutionalization meant for libel law. But, for the most part the plaintiff's lawyers were not libel lawyers — they were the business's lawyer who was told to make a libel claim or a local plaintiff's personal injury lawyer who treated the case like any other fender-bender. Of course, there were good, effective plaintiff's lawyers who understood and could work with the libel law, but they were pretty rare.

Today we see major league lawyers from the plaintiff's bar as well as nationally-recognized, multi-lawyer law firms pursuing libel claims on behalf of individual and corporate clients. With libel law becoming more predictable, they can and do bring smart, effective, and libel-savvy resources to bear. Even the business lawyer or the plaintiff's personal injury lawyer who is brought in today to help a libel plaintiff can grasp the law and shape the facts to meet the legal standards.

Today's libel case, even the smaller cases, are not affording some of the cheap victories for the defense we used to enjoy.

CHANGES IN LIBEL TRIALS

We prepare for and try libel trials a lot differently today than we did 20 years ago. Then we would occasionally use a blow-up or write on a poster board, we would talk to our witnesses before a trial, we would have deposition segments we expected to read at trial, and we would have a series of themes we expected to develop at trial. Today virtually every trial, not just libel, is a much more elaborate affair. The science of trial has led to careful jury and focus group research before trial to find the most favorable juror demographics and hone the effective trial themes. We spend a lot more time today with our witnesses now preparing them for depositions and for trials, even using witness consultants to improve their confidence and their presentation.

Going into trial, we have colorful and effective graphics that capture the essence of our theme with well-chosen pictures. We highlight key documents with dramatic displays done with computer software. We do not read depositions anymore, we play them for the jury, sometimes with words scrolling along as well to maximize the impact. Today's trials are much more of a production.

Of course, part of the improving caliber of plaintiff's libel lawyers is that they have the same weapons, sometimes better ones. And it is not just the plaintiff's lawyers who understand the issues and what has to be proved — it is the trial consultant who knows what must be done to deliver a successful plaintiff's verdict. Sometimes the consultants may even have a contingency interest, which increases their incentive for maximum impact. A major libel trial with effective plaintiff's counsel and a vulnerable story is a very dangerous place to be today. It has always been difficult, but with the prevailing public mood about journalism today, the results can be unpredictable and devastating.

THE DECLINING IMAGE OF THE MEDIA

In the 1970's, with Watergate, the resignation of Richard Nixon, and *All the President's Men*, journalism was at its zenith in the eyes of the public.[3] It has been downhill ever since. Even in libel trials in the 80's and early 90's we used to have at least some significant percentage of people in our jury panel who were neutral about the press. When we look out on those faces today, those people are rare. We start out way behind. These people do not even know us, yet they do not like us. I know that LDRC's statistics say that, at least when measured by likelihood of winning at trial, it has

[3] I had just finished my first year of law school when Nixon resigned, and I could imagine nothing more noble or fulfilling than getting to represent guys like Robert Redford and Dustin Hoffman — Woodward and Bernstein in the movie "All the President's Men." Since then, however, I have found that few journalists (well, maybe some of the TV people) look like those guys.

always been like that. But having looked on those faces and talked to those jurors, I know it has gotten worse. Our clients' low esteem in the eyes of the public make jurors willing to believe that journalists are opinionated, unfair, overly ambitious, and cruel. Of course, this is usually the plaintiff's theme. Our challenge (as well as our client's) is to reverse, or at least neutralize, this public perception.

WHAT WILL THE NEW MILLENNIUM HOLD?

The cases are going to get harder, the competition is going to get better, the juries will still be hostile, and the verdicts are going to keep coming. But what has not changed and will not change is fundamental common sense and the deeply-ingrained American idea that people should be free to speak their minds and the press should be able to report the news.

The true challenge at trial, shorn of all the legal baggage, is to tap into that common sense and American belief in free speech to dissipate the prejudice and predisposition of jurors. We have to make them look to facts and the heart of the people who lived the story and reported the story. Two years ago (See how time flies? We are still bragging about this case), Oprah Winfrey scored an outstanding victory in the middle of cattle country because those jurors heard that call to their common sense and basic American beliefs. We must continue to evoke those beliefs in defending the libel cases of the 21st Century.

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THE INSIDERS OUT

By Gary L. Bostwick*

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THE INSIDERS OUT

I was asked to reflect upon how trying media trials in the 90's differed from the 80's and how that most athletic of activities might feel in the decade to come. My first reaction was to question the premise in its entirety. Were there any differences, I thought, or are there just differences among all trials, each unique, but with no discernible pattern? I quickly discarded that hypothesis. Yes, media trials changed along several trend lines over the course of the 80's and the 90's, even though no cleft resembling a continental divide occurred precisely on December 31, 1989. The most important trend was that the media began to be considered as much like Big Brother as the State itself, as much like the power elite as public officials, as much like insiders with a reason to be feared as lawyers who hold the keys to the judicial system.

Let us look at the 80's in their infancy. As the American hostages languished in Tehran (one of them, unbeknownst to me, to become a client before many weeks had passed), libel law had settled into a relatively calm province, and privacy was an exotic backwater town that only legal anthropologists on a fact-finding mission ever visited. As for "newsgathering torts," they were not even in the travelers' dictionary.

Preconceptions that citizens brought to the jury box at the end of Jimmy Carter's term favored honest media defendants in a libel matter. To a great extent, I found that jurors looked at the press and broadcasters as being outside the established power structure of the nation. The role of the press in their recent memory had been positive and informative and even noble, reporting unflinchingly on the Vietnam War and Watergate scandals. Those two stories and their fallout dominated public attention more than any other events of the 1970's, and in them the Fourth Estate had played the role classically assigned to it by the popular conception of First Amendment theory about proper governance of a society. The media had acted as a watchdog, a proxy for the American public, its champion. People largely believed everything that they read and heard in the media. Even in large cities, newspapers were local. Broadcast news was avuncular. Media was an honorable calling, and, most important, it did its reporting about *others*, not about the jurors.

Consequently, as the 80's began, it was still possible to defend a media client by hearkening to positive images like the founding fathers, Woodward and Bernstein and the Pentagon papers, or negative images such as Nazi book burning and the Iron Curtain censorship of dissidents. Media behavior was not a personal matter, it was abstract, and it was either helpful or benign. Further, media did not seem like a monster out of control. There was no Internet, World Wide Web, satellite TV nor hundreds of cable channels. The public had not been saturated yet . . . nor disgusted.

Inside the law library, the 70's had brought greater certainty in media law. As the decade ended, we felt that our jurisprudence was proceeding along the incremental but sometimes bumpy path that the law should follow, and, by and large, it was keeping up with the world around it. As the hostages boarded a plane in Tehran for Germany, we had at least some comfortable solid ground under our feet as lawyers. In the ten years before, the mayor of a city who had claimed that a local

newspaper had defamed him asserted that he was not a public official. Wrong, the law said.[1] *Gertz* had been decided in mid-1974.[2] The Supreme Court had held that malice could not be defined in common-law terms.[3] In 1976, Mary Alice Firestone was not a public figure[4] and, most importantly, as 1980 was ushered in, all of us began to learn to live with something that now is as commonplace as Jay Leno: the First Amendment does not bar all inquiry into editorial processes and the state of mind of publishers who write or broadcast about public figures.[5]

Although large media companies trod the earth in those days, behemoths of the size and shape of those we see today were unimagined. In the 80's, our neighbors on juries were not so hardened and jaded toward all things institutional, and crusading investigative journalist was still a role of some heroic and quixotic proportions. Citizens could imagine journalists as their ally.

Then, in 1981, Sydney Pollack's film, *Absence of Malice*, starring Paul Newman and Sally Field, opened. Whether films are a reflection or a harbinger, I leave to others. I merely point out that in that film, the newspaperwoman, the editor, the media lawyer and the prosecutors all came out looking bad. The hero, played by America's blue-eyed idol, was the son and nephew of mobsters. Any media defense lawyer sitting in the dark shuddered when he or she contemplated leaving the theater. And sometime during that decade, national television news, led by the example of *60 Minutes*, and following bad news proved that it wasn't just a fuddy-duddy encyclopedia, but could attract viewers and make money.

Still, change was not explosive. Throughout much of the 80's, juries could be depended upon to show some balance and not to automatically assume that the press had taken advantage of the subject of its investigations. They still believed largely what they read and saw and Walter Cronkite continued to be one of the most respected men in the country.

Significantly, a libel case in the 1980's brought a new challenge mostly because discovery now revealed much of the mental processes of defendants. Creative plaintiffs' lawyers focused much of their examination on circumstantial evidence of the state of mind of the defendants. Defendants' counsel now spent more and more time demonstrating the innocent nature of the mental process of the reporters, broadcasters, editors and producers that they represented. The focus of cases felt more like Sherlock Holmes with an overlay of Sigmund Freud than they ever had before.

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[1] Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 91 S. Ct. 628, 28 L. Ed. 2d. 57, 1 Media L. Rep. 1624 (1971).

[2] Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 789, 1 Media L. Rep. 1633 (1974).

[3] Old Dominion Branch No. 496, Nat. Ass'n of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed.2d 745 (1974).

[4] Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154, 1 Media L. Rep. 1665 (1976).

[5] Herbert v. Lando, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115, 4 Media L. Rep. 2575 (1979).

The concept of actual malice became more and more defined. Opinions abounded in which clear and convincing evidence was the burden imposed upon plaintiffs. The law was becoming more protective.[6] Whereas for the first half of the decade, it was uncertain who bore the burden of proof on the issue of truth, in the spring of 1986 plaintiffs' counsel faced a future with higher hurdles when the Supreme Court held that even private figure plaintiffs alleging defamation had the burden of proving falsity of a media defendant's speech on matters of public concern.[7] Defense lawyers applauded the development, too long in coming from their point of view. A few months later defendants made further advances when the Supreme Court decided that a motion for summary judgment or directed verdict necessarily required the same substantive evidentiary standard of proof that would apply at a trial on the merits.[8] From that year forward, dispositive motions before trial were to become the rule rather than the exception in libel cases. Every defendant made the motion and every plaintiff feared it. Now plaintiffs were less and less sure of being able to get to a jury to make the impassioned argument that the growing cynicism of the public would reward.

And last, in 1988, the Supreme Court cut off a development that was causing increasing concern for defense lawyers: the use of other tort causes of action to recover damages for publications or broadcasts.[9] As the decade drew to a close, the defense bar also took comfort in the decision that public figure libel cases are not governed by a professional standards rule, that a publisher's motives and deviation from standards standing alone were not enough to support a finding of actual malice, that the failure to investigate did not support a finding of actual malice, and that only purposeful avoidance of the truth supported a finding of reckless disregard.[10] You could tell juries that the media could not be called reckless unless it turned its back on the truth that was staring it in the face.

Then along came the 90's. The 90's brought the Internet, the World Wide Web, so many cable channels that you couldn't surf them all in a day, and increasing media mergers. But most of all, it brought battling talk shows, O.J. Simpson and Princess Diana. Media saturation of major tragedies made the public talk out of both sides of its mouth. It slavered over the coverage, but did not respect the press on the morning after. Newsgathering torts were the complaint of choice. In the courtroom during any media jury trial, defendants were portrayed as embattled, giant, unfeeling, and prying. Woodward and Bernstein were forgotten. Jerry Springer and Jenny Jones and the journalists who had followed Princess Diana into the tunnel were on jurors' minds. The only cases decided by

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[6] Bose Corp. v. Consumers Union of U.S., Inc. 366 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502, 10 Media L. Rep. 1625 (1984).

[7] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S. Ct. 1558, 89 L. Ed. 2d 783, 12 Media L. Rep. 1977 (1986).

[8] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202, 12 Media L. Rep. 2297 (1986).

[9] Hustler Magazine v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41, 14 Media L. Rep. 2281 (1988).

[10] Harte-Hanks Communications Inc. v. Connaughton, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562, 16 Media L. Rep. 1881 (1989).

the Supreme Court in the 90's were bad for defendants, forcing newspapers between a rock and a hard place on promises of confidentiality[11] and emphasizing the concept that the First Amendment did not give license to break laws of general applicability, and cutting back on lower courts' tendency to grant summary judgment, at least where quoted words were at issue.[12]

Cynicism about government in the 90's increased as well, caused by seemingly unceasing scandal at the highest and lowest levels. As the decade wore on, the image of decent plaintiffs who were set upon by the greedy media replaced heroic investigative reporters as the archetypical image of the media trial in jurors' minds. Jurors began to fear that each of them would be the next person in the plaintiff's chair. Plaintiffs' counsel were feeling more passion.

A contrary parallel development was occurring. More and more plaintiffs, at least in California, were faced with the increasing strength of anti-SLAPP laws.[13] In California, anti-SLAPP protection was extended to media companies, and the economic disparity between the plaintiff alleging defamation and the defendants was no longer a dispositive point. Anti-SLAPP statutes have been adopted elsewhere in the United States.[14] The phenomenon may change the way plaintiffs and defendants look at their cases from the beginning, even though it did not change anything about the way suits were tried.

In the 90's, suits had to be tried more and more on the assumption that almost any plaintiff would make an appealing party when compared to a large media organization that had been accused of interfering with the privacy or reputation of the plaintiff. Walter Cronkite was not around. Edward R. Murrow, Upton Sinclair, Nelly Bly and Benjamin Franklin had no ratings value. More and more, in the 90's, people began to place themselves in the shoes of the plaintiff because it was more and more likely that they could imagine themselves being in the same situation. Whereas the 80's appeared to be full of cases where celebrities or authority figures, not common folks, were complaining of alleged media excesses, more and more situations involving matters on the Internet and in the abundance of television and print involved private people, as far as the jury was concerned, just like them. First Amendment principles no longer echoed with those juries.

In the 90's, defendants had to face the fact that many jurors viewed them as being insiders arrayed against the common man and woman, and not as outsiders acting as Jiminey Crickets watching over government. The parallel development of the increased difficulty faced by plaintiffs in proving constitutional actual malice joined with this attitudinal evolution to spawn newsgathering

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[11] Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586, 18 Media L. Rep. 2273 (1991).

[12] Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447, 18 Media L. Rep. 2241 (1991).

[13] SLAPP = Strategic Litigation Against Public Participation

[14] The latest unofficial reports show that fourteen states other than California have anti-SLAPP laws, and six other states are in the process of deliberating.

torts. The emblem of the traditional media trial as the 90's ended was the innocent citizen who alleged that he was imposed upon by a media interested only in titillation, sensationalism and money. To most jurors, the media was so much in control of their lives and so much out of control itself that it was impossible to frame final arguments in the noble terms sung in the early part of the 1980's. Added to that, constitutional actual malice was generally not a protective standard against newsgathering torts. Altogether, if plaintiffs could get by a pretrial motion, ready and willing ears could be found in the jury box.

The outsiders, the jurors, seemed to be poised frequently to punish the insiders, the media, when they got a chance, and to ignore the First Amendment virtues and safeguards as being irrelevant to their lives. Juries were stacked with prejudices that could not be overlooked. Each case had to be tried based on an unknown standard that seemed to ignore the First Amendment. Exceptions to the rule also held a lesson. If the defense case was honest and forthright, jurors reacted positively, almost as if the Latin American concept of "personalismo" (the power of personality) was in play. Oprah proved this point. Of course, not everyone is Oprah. Defense lawyers had to work creatively to make the First Amendment come alive and seem relevant on a personal, practical level.

And the century ended.

I was also asked to speculate as to where this would lead us in the ten years to come. I think none of us is equipped to make this prediction. The most helpful prediction that I can make is that conditions *will* change over the course of the next ten years. Be alert. Unless we are attuned to those changes that arise out of world events to mold and shape the preconceptions of jurors and judges, we will always be five to ten years behind. The French General Staff learned a lesson in World War I, then forgot it before World War II. No case or war can be won like the last one. One thing I am sure of: my description of trying cases in the 90's will be passé before three or four years have passed.

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THEN AND NOW

By Sam L. Colville*

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THEN AND NOW

What's the difference about trying a libel case today than in the early 1980's? The hardest part in answering that question is remembering the 1980's. I know they were different, but how?

Perhaps the biggest change would be in attitude, mine, the judge's, the juror's and my opponent's. In the early 1980's, I would have felt I had the moral high ground going into a trial, almost without regard to the facts of the case. After all, I was the defender of our most cherished freedom (with no apologies to Second Amendment advocates); I represented the sole industry recognized and protected by our Constitution. The law wasn't ambiguous and it was strongly in my favor. My clients were people of principle and the fact that they had a measure of celebrity wouldn't hurt either. If the jury was not to be persuaded by these qualities, they were not lost on my judge. I did not sully my hands with base pursuits like my opponent, who was only interested in money; I was there to preserve the very cornerstone of our republic. If I'm preparing for trial, the judge simply didn't understand my summary judgement motion. Even if my clients had screwed up, it was somehow plaintiff's fault. He should have granted my clients an interview, opened his books or house, better accounted for himself/his business practices. If he didn't have anything to hide, why had he not done so?

Even though the judge didn't grant my motion, he was still more likely to be my ally than that of my opponent. Perhaps he is feeling a bit guilty for not having had the courage to have done the right thing. Both he and I know that the *real* reason he did not dismiss the case is because it is the most interesting thing on his docket for the entire term. My opponent does not understand this only because he really doesn't understand libel law; he thinks this is just another tort case, he expects a last minute settlement offer. He had never heard of *Gertz* until he read my motion. Obviously he doesn't have a clue because in his opposing brief he cited *Firestone* and also repeated the words "conscious disregard" three or four times. Only the judge (especially if I've gotten this case into federal court) and I know we're talking about the Constitution. Motions in limine can be more philosophical, less specific. They are likely to be successful in reining in my opponent; in keeping his likely unwarranted and unprofessional excesses in check. I have never figured out how to use voir dire to get jurors who love the First Amendment. But in the early 80's, if the jurors weren't to be impressed by my clients' nobility, at least I could argue professionalism. And, if things still went wrong with the jury, I had a reasonable shot at a directed verdict and an almost certain reversal on appeal.

Today, most of that confidence would be unjustified. The playing field has been leveled in lots of places. Over the years, my clients and their fellow travelers have tested the limits of their privileged status and too often received the criticism of their colleagues, the public and the courts in return. Basic distinctions such as *per se* and *per quod* have been discarded, replaced only with a requirement that the plaintiff have suffered actual damages, what ever that means. Now my motion is denied because the law is ambiguous, there is lots of bad law supporting plaintiff's case. This is

not my opponent's first libel case and he can talk-the-talk almost as well as can I. My trial judge is fed up with what he regards as media excesses, like those involved in this case. Where juries use to be simply convinced my clients had a liberal (albeit honest) bias, now they outright dislike the media going in. Once I would have started thinking about mock trials, forum groups and juror profiling only after a failed motion for summary judgement. Today serious consideration to or plan for that given from the outset.

Related to changes in attitude are at least two other major changes: my client's and its insurers interest in a "reasonable" settlement and the expense of litigation. Those two weren't always connected. Once the media typically defended as a matter of principle, regardless of cost. Now the "cost of defense" is a factor in early settlement negotiations. I concede my own and my colleagues' contributions to that development.

Are things worse today than they were in the early 80's? Insofar as the strong recognition of First Amendment principals are concerned, certainly they are. Then again, before 1964 the First Amendment played little role in a libel case. We media defense lawyers are substantially better off today than we were then. So are our clients! So is our Nation! Today the law presents more challenges and, from my perspective, the cases are more interesting. That may not be why I became a media lawyer but does it have something to do with why I became a lawyer?

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