



LDRC JUROR ATTITUDES STUDY III:
Private-Figure (Gross Irresponsibility)/Newspaper/Defense Win

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LDRC JUROR ATTITUDES STUDY III*:

Introduction

This is the Libel Defense Resource Center's third Juror Attitudes Study.

The first LDRC Jury Study dealt with a major newspaper defendant in a public figure's libel action. (See LDRC Bulletin No. 14 at 1-33.) That case was lost at trial and the jury awarded damages approaching one million dollars, based on an arithmetical compromise, 45% of which was denominated as compensatory damages and 55% of which was denominated as punitive damages. LDRC's Study of that case revealed that the jury considered the case to be one largely focused on the truth or falsity of the underlying allegations, even though the newspaper had previously retracted the erroneous portion of the subject article prior to any claim being made, acknowledged and expressed regret over what it said was an innocent mistake, and did not seek to defend the truth of that portion of the publication at trial. According to LDRC's findings, the jury in its very brief deliberations on the liability issue never really seemed to focus on the pivotal issue of actual malice, although the judge's instructions on this issue were excellent.

LDRC's second Jury Study also dealt with a case lost by the media, this one involving a major television defendant in a private figure's libel and false light privacy action. (See LDRC Bulletin No. 15 at 1-26.) In that case, LDRC found that at least half of the jurors (all of those interviewed) had begun their deliberations favoring the defendant. A lengthy and meticulous deliberation, focusing on the judge's instructions (the full text of which was given to the jury) and a special verdict form, led the jury unanimously to conclude that the law required a verdict for the plaintiff. (LDRC's Study concluded that aspects of the charge misled the jury and a subsequent appeal decided that the verdict was erroneous as a matter of law, reversed the judgment and dismissed the plaintiff's claims.) Having reached this conclusion as to liability, the jury in this bifurcated proceeding then in short order entered an award of \$1.25 million, \$250,000 in compensatory damages -- this despite the fact that the jury did not particularly sympathize with the plaintiff and did not feel he had been especially harmed financially over and above his legal costs -- and \$1 million in punitive damages -- despite the fact that the jury was

* LDRC gratefully acknowledges the invaluable assistance of Thomas A. Hartnett, second-year student at the New York University School of Law, in the preparation of LDRC Jury Attitudes Study III.

not particularly angry with the media defendant (at least half of them having initially favored defendant on the liability issue).

In this third Jury Study LDRC sought to select a case in which the media defendant had prevailed. The case ultimately chosen dealt with a newspaper defendant, this time in a private figure's libel action governed by a "gross irresponsibility" fault standard. As indicated below, although judgment was entered for the defendant based on a failure to establish the requisite degree of fault, even in this defense win the jury split its verdict, voting in favor of the plaintiff on the issue of falsity.

Methodology

LDRC followed the same basic methodology in this Study as it had in the previous two Jury Studies. Briefs, opinions, jury instructions and requests to charge, along with alternative versions of a special jury verdict form, plus portions of the trial transcript (including the opening and closing statements of both plaintiff and defense counsel) were reviewed to achieve an independent understanding of the issues, arguments and proofs in the case. In addition, LDRC interviewed one of defendant's "in-house" counsel, who had sat in on both trials in the case, and defense counsel retained for this trial. A list of the jurors' names and counties of residence was obtained from the information routinely provided to the attorneys by the court clerk's office. Then, using the limited information available, addresses and/or telephone numbers were located for all six jurors, and four of the six alternates. Letters were written to most of these jurors explaining the nature of the LDRC Study, asking for their voluntary cooperation and promising confidentiality.

Three of the regular jurors and two of the alternates agreed to meet with LDRC for detailed interviews. These face-to-face interviews lasted between 1-1/2 and 2-1/2 hours. A 23-page written script was loosely followed by the interviewer during these meetings. In addition, one other juror and one alternate were interviewed by telephone following a somewhat abbreviated version of the script. In sum, a total of seven of the twelve jurors were interviewed in the Study -- four out of the six regular jurors and three of the six alternates. In addition, the basic positions of the regular jurors who had not been interviewed, as to the three questions on the special verdict form, were revealed to some substantial extent by the four regular jurors who were interviewed. Finally, LDRC became indirectly aware of some of the specific views of the other three alternates. Of the five jurors not interviewed, one was spoken to by telephone but declined to be interviewed. Another scheduled an interview but did not appear, and LDRC was thereafter unable to contact her; another failed to respond to a

series of letters; and two jurors were never contacted due to insufficient information as to their place of residence. Although not every juror and alternate was interviewed, the jurors who did participate in the Study provided sufficient information such that it is confidently believed LDRC's understanding of the jury's basic attitudes and decision-making process in this case is essentially complete and accurate.

Background of the Case

The case arose out of a Pulitzer Prize-winning series of newspaper articles, later republished in book form, which investigated drug smuggling into the U.S. Plaintiff was a wealthy foreign businessman. Defendants were the newspaper which printed the articles, three of its reporters and its managing editor, and the publisher of the subsequent book based on the articles.

1. The Articles

The defendant newspaper had conducted a wide-ranging, investigative study of drug trafficking, from production centers abroad to the drugs' final destination in the U.S. The result was a long and detailed series of articles on the narcotics trade. Brief portions of two of those articles linked plaintiff to foreign drug trafficking, and depicted him as a profiteer who specialized in smuggling over a particular route. Three hundred other alleged drug traffickers were named in the article, but no one other than the plaintiff ever contacted the newspaper, or asserted a claim denying the allegations. The newspaper based its allegations against plaintiff on information it had received from two drug smugglers and an "underground chemist." In addition, defendant contended its allegations were reviewed and verified by three knowledgeable police officials in plaintiff's locale, and by a CIA agent stationed in the area. However, during the libel action the three police officials denied ever making the statements attributed to them by the reporters, and one of the three actually testified at trial on behalf of the plaintiff. Furthermore, the CIA agent was unavailable to testify on behalf of the reporters. Approximately a year after the articles were published, the newspaper authorized a paperback book version of the series to be printed and distributed by another publisher. The book essentially repeated the allegations made against plaintiff in the newspaper series. As noted, at the time of the paperback license no claim had been received from the plaintiff or from any other person mentioned in the articles.

2. Plaintiff's Claim

Ten months after the paperback republication, and over two years after the original newspaper series ran, plaintiff commenced the instant libel action. He asserted three causes of action for libel,

and included as defendants the newspaper, its managing editor, the reporters who prepared the articles, and the publisher of the book based on the articles as defendants. Recovery was sought for allegedly libelous statements in both the book and the newspaper series. Plaintiff argued the accusations against him were false, and that his reputation as a legitimate businessman in his homeland had been injured as a result of the defamatory statements about him.

3. Summary Judgment

Plaintiff's first cause of action, based on the original newspaper publication of the allegations, was initially dismissed because the applicable statute of limitations had expired. The other two causes of action, based on the republication of the allegations in book form, were treated as timely. Following discovery, all six named defendants moved for summary judgment, arguing that plaintiff had failed to produce evidence sufficient to defeat their qualified privilege as journalists under the "gross irresponsibility" standard applicable in the jurisdiction. The trial court ruled in favor of defendants and dismissed the complaint, holding that the quality of the reporting was sufficient to disprove a claim of gross irresponsibility. But an intermediate appellate court reversed, holding that an issue of fact existed as to whether or not the accusations were republished in "good faith." Finally, the state's highest appellate court, in a divided opinion, agreed with the trial court that dismissal was appropriate as to the reporters and the editor because they had not been involved in authorizing the republication, and the book publisher because that publisher had no knowledge of any alleged fault on behalf of the newspaper or its reporters and had a right to rely on the apparent care with which the newspaper series had been put together. However, a bare majority denied summary judgment as to the newspaper, holding that its corporate liability for any allegedly irresponsible conduct by its employees during the investigation would carry forward to any republication of that material, and finding material issues of disputed fact based on affidavits from the police officials denying that they had been sources for the charges against the plaintiff.

4. The Trial

When the case was originally tried it resulted in a mistrial. The mistrial came about after several weeks of trial, when delays in the trial process led to a number of jurors being excused for personal reasons. This left too few jurors to continue with the case. A new judge sat on the second trial and new defense counsel were retained. In that second trial both parties maintained the same basic positions they had held to in the first. The defense argued that the references to plaintiff in the book were true, and that in any event the defendant and its reporters had solid sources

for their information and had, in any event, not been grossly irresponsible in printing those allegations. The plaintiff's position was essentially that the newspaper's story was incorrect as to plaintiff and that despite its allegedly extensive investigation the newspaper had failed to check obvious sources that would have established the falsity of its information as to plaintiff. More specifically, plaintiff's counsel sought to demonstrate that defendants were lying about, or had fabricated, much of the information that allegedly formed the basis for their publication about plaintiff and that allegedly connected him to drug trafficking.

When the trial began the defense had some serious evidentiary problems with both of those positions. On the question of the truth or falsity of the references to plaintiff, the defense did not have any witnesses directly linking plaintiff to drug dealing. Those who had originally provided the reporters with the information regarding plaintiff were unavailable to testify, and the foreign police officials who defendant claimed had verified its story denied ever making those remarks. On the question of whether or not the reporters had acted in a grossly irresponsible manner, the trial judge made several important evidentiary rulings against the defense. The reporters had kept detailed contemporaneous notes of their investigative work, that were regularly transcribed into detailed memoranda, but the judge refused to admit those notes on the reporting process into evidence. His decision was based on the concept that their admission would be highly prejudicial to plaintiff in that the jury might tend to consider them with regard to the issue of truth rather than fault and that the written materials might also unduly "bolster" the reporters' testimony about their methods in preparing the investigative series. The judge also refused to allow any mention to be made of the fact that the series of articles had won the Pulitzer Prize.

During the trial the defense portrayed the journalists as hard-working, thorough professionals who had more than adequately checked their story. Defense counsel also attacked the one foreign police official who testified on behalf of plaintiff, and during cross-examination attempted to expose inconsistencies in his testimony. Several federal drug agents testified that plaintiff was suspected of being a drug smuggler. Also, with two weeks remaining in the trial, the defense found and produced a surprise witness. That witness was a former smuggler and U.S. government informant who testified that he had participated in a prior drug transaction with the plaintiff. This testimony was the only direct evidence produced by the defense to show that plaintiff was, in fact, a drug smuggler. Defense counsel's style seems to have been a consciously low-keyed one, preferring to build his case slowly through careful cross-examination rather than through impressing the jury with pyrotechnics. On a tactical level, defense counsel reports attempting to keep his objections to a minimum, since the presiding

judge had demonstrated some disposition to rule against an objecting party during the proceeding. While this low-keyed approach was ultimately successful, it did leave some of the jurors wondering, at least for a time, about the strength of counsel's case.

Conversely, plaintiff's counsel had a boisterous and argumentative style that impressed a number of the jurors, although to an extent it turned off some other jurors. Ultimately, plaintiff's counsel failed in his attempt to persuade the jury that not only had the reporters printed allegations regarding plaintiff without having adequately verified them, but that they had actually attempted to cover up their mistake by lying in claiming that their information had been corroborated by local police officials. Testimony to that effect by one of those police officers was the cornerstone of plaintiff's case. Plaintiff himself testified as to the legitimate nature of his business enterprises and his personal aversion to drugs of any kind. His daughter and son-in-law also testified to that effect, painting the plaintiff as a pillar of the community who had been unjustly libelled. On the question of gross irresponsibility, plaintiff's counsel portrayed the reporters as a group enjoying a foreign vacation, who were not acting in a professional manner. Counsel argued that the reporters were arrogant and cavalier in making serious and unsubstantiated allegations. He focused on the fact that the reporters had not confronted plaintiff with their allegations before printing the story as evidence of gross irresponsibility.

Plaintiff's counsel also attempted to point out inaccurate details in defendant's story as indicative of the reporters' capacity for error and of the obvious steps they could have taken, but did not take, to check their facts prior to publication. For example, the reporters had written that plaintiff owned a particular nightclub, but plaintiff claimed that in fact his brother owned the club. The reporters had also written that plaintiff owned "villas" in certain foreign cities, but plaintiff claimed they were not villas but "apartments." Finally, plaintiff testified concerning the damage that the allegedly libelous statements had done to him. He and his family testified in a general way as to damaged reputation and emotional distress. Plaintiff alleged no special damages and the court did not allow testimony on plaintiff's claim of lost business profits to be admitted. Plaintiff also claimed that he was in constant fear of being detained when he travelled internationally because of the smuggling allegations, but this claim was seriously hampered by the exclusion of evidence as to one such incident. Despite the lack of specific evidence of financial loss, plaintiff's counsel nonetheless, during his closing argument, asked the jury to award his client \$5 million.

At the conclusion of the trial the judge, in his instructions to the jury, clearly stated that the burden of proof rested on the plaintiff on both the question of whether the references to plaintiff

had been "substantially false," and of whether the defendant had acted in a "grossly irresponsible" manner. His other instructions on the central substantive elements of the case, although not models of clarity, were largely correct in their statement of the law. The judge also undertook to marshal the evidence presented for the jury. He expressly instructed the jurors that they were not to consider the accuracy of details written about plaintiff when determining whether what had been printed was "substantially false." He instructed the jury that the details he mentioned, specifically questions about the ownership of a nightclub and villas that had been explored at length by plaintiff's counsel during the trial, were only to be considered in the context of the defendant's alleged gross irresponsibility. On the issue of falsity, the judge instructed the jury to consider only the testimony of the plaintiff, the defendant's surprise witness, and the foreign police official testifying on plaintiff's behalf. Finally, the judge also instructed the jury that the reporters' elaborate overall investigative procedure was not the issue in this case, and that the only relevant issue was whether the reporters had acted in a grossly irresponsible manner in publishing the particular passages concerning the plaintiff. A special verdict form, with three interrogatories, was given to the jury to take into their deliberations. Question one dealt with the issue of truth or falsity; question two with gross irresponsibility; and question three, to be addressed only if the answers to questions one and two favored the plaintiff, dealt with compensatory damages. The issue of punitive damages was bifurcated at this stage.

The Jury's Verdict

1. The Deliberation Process

The jury was excused at approximately 3 p.m., after receiving the judge's instructions on the law with regard to libel. It deliberated until 6 p.m. on the first day. During that period the jurors returned to the courtroom, at their request, to have certain testimony of the foreign police official appearing on behalf of the plaintiff re-read. That testimony involved his confirmation of the drug activities of a long list of persons named in the book, but his vociferous denial that he had included plaintiff among them. On the second day, the jury deliberated until shortly after noon before reaching a verdict. During that second day the jurors had the judge's charge re-read "as to the weight of the evidence." The total time of deliberation was approximately six hours.

According to the special verdict form it completed, the jury unanimously found that the references in the book to plaintiff concerning his involvement in illegal drugs and drug trafficking were "substantially false." However, it also found that the

defendant newspaper, acting through its reporters, had not acted in a "grossly irresponsible" manner. It thus decided that plaintiff had failed to prove his libel case and, according to the special verdict form, the jury did not consider if, and to what extent, plaintiff had been damaged by the allegedly libellous statements. This seemingly straightforward split verdict belies the far more complex attitudes and beliefs which underlay the jury's final decision.

2. Truth/Falsity: Initial Vote

As noted, the jury answered yes to question one on the special verdict form: "Were the references to the plaintiff in the book, concerning his involvement in illegal drugs and drug trafficking, substantially false?" This decision would not in itself appear unusual except that at the time the final vote was taken on this question it now appears that as many as five of the six regular jurors did think that plaintiff was a drug smuggler, and the sixth felt he was at least "involved" in drug smuggling. All three alternates polled also felt plaintiff was a drug smuggler.* Half of the jury was convinced of this fact after only a couple of days of the more than four-week trial, because it concluded plaintiff and the foreign police official testifying on his behalf were lying. In concluding that plaintiff was in fact a drug smuggler, several of the jurors were strongly influenced by their perception that plaintiff had become wealthy in shipping and transport businesses involving the exporting, among other items, of fish and automobile tires. These jurors speculated that this could have provided plaintiff the means of smuggling drugs. No evidence suggesting that this was the case was introduced at trial, yet several jurors apparently reached this conclusion independently. Two other jurors were convinced by the appearance of the defendant's surprise witness near the end of the trial, and the final juror decided that plaintiff must have been involved after listening to the re-reading of the police official's testimony. The question then becomes, how could the jury have voted that the references to the plaintiff were

* As noted, in this Study four of the regular jurors were interviewed. References in this discussion of the deliberation process to the views of all six jurors is based on the consistent recollections of the four jurors interviewed regarding the views of the remaining two jurors. One of those jurors was consistently reported to have been strongly disposed against the plaintiff's position; the other was reported to have been among the group of jurors who, while they suspected plaintiff, felt that the newspaper had failed to prove these serious charges -- see discussions of truth/falsity herein; see also Juror Profiles section, infra. It cannot be known for certain to what extent those two jurors would now agree with these reports by the other jurors.

substantially false? The answer is not a simple one, since it was a convergence of several distinct circumstances and strains of thought which, as best can be determined after the fact, led to the decision on question one.

Clearly, the root of the problem lay in the judge's instructions and interrogatories as reflected on the special verdict form given to the jury. In the proposed interrogatories defense counsel submitted to the court, its question on truth/falsity read, "Has plaintiff proved by a preponderance of the evidence that the statement in the book that he was a drug smuggler was false?" However, in the final interrogatory submitted by the court to the jury that construction was altered in three important respects. First, the reference to the plaintiff's burden of proof was omitted. Second, the specific focus on "drug smuggl[ing]" was replaced with a far less definite formulation regarding "references ... in the book ... concerning ... illegal drugs and drug trafficking." And finally, "falsity" was changed to "substantial falsity". These seemingly innocuous changes worked in tandem with certain events during the course of the deliberations to change the jury's vote on question one in this surprising manner.

Once in the jury room, the jurors spent some time examining the exhibits given them by the court. Immediately afterward, they took a vote on question one. Most of the jurors were surprised when the vote ended in a 3-3 tie. Three jurors focused on a statement in the judge's instructions asking the jurors to apply their "common sense" and, having concluded that plaintiff was a drug smuggler, they voted "no" on question one -- i.e., that the references to plaintiff were not substantially false. The other three jurors voted "yes" on question one -- that the references to plaintiff were substantially false -- for two distinctly different reasons.

Two of those three jurors voted "yes" on question one, despite their suspicions regarding his involvement in drug smuggling, because they felt that defendant had not proven that plaintiff was a drug smuggler. They were thus apparently confused as to the burden of proof, and apparently none of the other jurors focused on this confusion as to burden in attempting to convince these jurors to shift their vote on question one. Indeed, it appears the jurors never discussed the burden of proof, as such, during the deliberations. In fact, only one of the regular jurors interviewed correctly recalled all aspects of the judge's instructions on burden of proof.

This misapplication of the burden of proof may have been partially a result of prior experience some of the jurors had had with criminal trials. The severity of allegations of drug smuggling may have led these jurors to conclude that such allegations cannot be made without "concrete" proof of their truth. During LDRC's

interviews, several jurors expressed their belief that "you can't just go around calling someone a drug smuggler without evidence to back that up." Apparently, defendant's effort to demonstrate that it had sufficiently verified its allegations did not satisfy these jurors.

It therefore becomes apparent that, had a reminder that the burden of proof rests on the plaintiff been retained in the interrogatory, a great deal of confusion might have been avoided. A correct instruction on the burden of proof was included in the judge's charge to the jury; however, that instruction was buried in the middle of a 39-page charge and most of the jurors were unable to remember exactly what the judge had stated on this point. The jurors did not have a copy of the judge's instructions in the jury room during their deliberations.

The other juror who initially voted "yes" on question one was the only one of the regular jurors who realized the burden of proof rested on the plaintiff on both questions one and two in this case. Thus, her decision to vote "yes" on the question was the result of a very different analytical process than that undertaken by the other two jurors initially voting "yes". This juror was confused by the words "substantially false" in the first question on the special verdict form. She interpreted these words as meaning that details printed in the passage -- such as whether or not plaintiff owned a particular nightclub, owned a villa, or smuggled on the particular route mentioned in the book -- were relevant in deciding whether the plaintiff had been libelled. A definition of what constitutes "substantial falsity," and an admonition that the truth or falsity of details in the passage referring to the plaintiff were irrelevant in deciding question one, was contained in the court's charge. However, once again information was lost on a juror amidst the mass of information presented by the judge. This same juror believed that plaintiff had met his burden of proof with regard to the falsity of the aforementioned details. Therefore, when defendant did not come forward with evidence to refute that put forward by the plaintiff on the inaccuracy of details in the allegations, she ultimately concluded that the law compelled her to vote that the references to plaintiff were substantially false.

3. Truth/Falsity: Vote Swing

The jury in this case spent the vast majority of its deliberation time attempting to answer question one. After the initial vote, the jurors began explaining their positions to one another in an attempt to reach a consensus on the question. Those jurors who had initially voted "no" on question one -- i.e., that the publication was not substantially false -- knowing that their fellow jurors also believed that the plaintiff was in fact a drug smuggler, questioned the consistency of the position that the

references were substantially false. Basically, those jurors retorted that defendant had failed to prove that the references were true, and that one could not accuse someone of such a serious crime without proof. Two or three more votes on the question were taken and, despite some wavering by two of the jurors who had voted "yes" on question one, the jury apparently remained deadlocked at 3-3. At this point the discussion took on a rancorous tone, as both sides became frustrated at the impasse in the deliberations. Shouting and heated arguments began to take place among some of the jurors. As the jurors went home at 6 p.m. on the first day of the deliberations, no progress had been made in resolving the deadlock on question one.

On the second day of the deliberations, the jury began to search for new approaches so as to break its deadlock. It asked for, and received, a re-reading of the charge as to the weight of the evidence. Following this re-reading the perspectives of the jurors changed to such an extent that, within a short period of time, they reached a unanimous decision that the references to plaintiff were substantially false and, therefore, that question one should be answered in the affirmative. It is difficult to say precisely why this occurred. There is seemingly nothing in that portion of the court's charge which was re-read which should necessarily have broken the jurors' impasse on this question. No mention was made in the re-reading of the burden of proof, the definition of substantial falsity or the irrelevance of the truth or falsity of certain details reported in the book. One juror focused on the judge's re-reading of the instruction that the jurors should determine which side had presented the "preponderance" of the evidence, and favor that party. Since she believed the plaintiff had presented more relevant evidence than the defendant, particularly with regard to the "details," she voted in his favor on question one. It is not clear whether or not this passage in the re-read instructions may have similarly influenced other jurors as well.

Two accounts of how the jury achieved unanimity on question one have emerged, neither of which provides a fully satisfying explanation for the unanimous answer to question one and the process by which it was achieved. In the first account, which most of the jurors adhere to, the key is that after the re-reading the jurors focused on what was actually written in the passage at issue, rather than their personal beliefs regarding the underlying question of plaintiff's drug dealing. Consequently, the three jurors who had originally voted "no" on question one decided that insufficient evidence had been presented by the defendant to prove the specific allegations in the passage -- presumably focusing significantly on the "details" rather than the basic charge of drug trafficking. In so doing these jurors also implicitly accepted the misapplication of the burden of proof propounded by two of the three jurors who had originally voted "yes" on question one. It is clear that when the

deliberations began, five of the six jurors were convinced plaintiff was a drug smuggler, and the sixth ultimately accepted the fact that plaintiff was "involved" after the foreign police official's testimony was re-read. It therefore seems safe to say that the vote swing which occurred was not a result of any juror changing his or her mind on that factual issue, but merely of the manner in which the legal question was ultimately approached. As one juror who changed his vote stated, "When the judge re-read the law, it seemed we couldn't come out and say he was legally guilty, according to the law, even though in our hearts we knew he was guilty."

The other account by one juror of the manner in which a decision was reached on question one described the vote swing as the product of a pure compromise. This juror, who was the last to accept plaintiff's involvement in drug smuggling, suggested to the forelady that they decide that what was printed in the book wasn't true, but that the reporters weren't grossly irresponsible. "We made a deal," she said. The other jurors denied that an outright compromise had been made on the verdict, but this juror's suggestion did provide a method for those jurors favoring the defense to break the impasse on the first question without hurting the defendant financially. It may well be that three jurors changed their votes shortly after the re-reading of the judge's instructions on the weight of the evidence because they genuinely concluded that they were approaching the analysis of question one in the wrong manner. On the other hand, it may also be the case that the re-reading provided a convenient excuse for the implementation of an implicit compromise that hurt neither side while enabling the jury to go home. This conflict in the jurors' accounts must remain unanswered, although there may be some element of truth to both explanations.

4. Gross Irresponsibility

Once the jurors had completed their deliberations on the truth/falsity question, they reached a decision on whether or not the defendant had acted in a grossly irresponsible manner almost immediately. They determined that it had not acted with gross irresponsibility. In a sense, plaintiff's counsel never really attempted to make a case on the issue of gross irresponsibility. He chose instead to build plaintiff's case on a theory of deliberate lies and falsification. This strategy was perhaps unavoidable since from the outset of the case the defense claimed to have had numerous sources for their accusations against the plaintiff, including high government officials. If this defense claim were accepted, proof of gross irresponsibility would presumably be impossible. Plaintiff on the other hand, had successfully resisted summary judgment because these government officials, for whatever reasons, subsequently denied that they had given plaintiff's name to the reporters and in some cases that they had even met with the reporters. It was therefore perhaps inevitable that the trial would center around the resolution

of this stark conflict in the testimony rather than around a more abstruse consideration of quantum of journalistic fault under the rubric "gross irresponsibility." There was no expert testimony presented on behalf of either side on this issue and plaintiff's case regarding fault centered on the contention that defendant's reporters had been careless in their investigation and had then sought to cover up their errors by lying about their sources. When plaintiff lost the fundamental battle of credibility as to these basic contentions there was perhaps little question but that a jury thus predisposed would not find the defendant "grossly irresponsible."

In fact, there was little discussion in the jury room of the fault issue (question two), and no one during the deliberations ever attempted carefully to evaluate the concept of fault based on a standard of gross irresponsibility. Given plaintiff's trial strategy, this is entirely understandable. Indeed, when the deliberations began, only one juror thought that the defendant had been grossly irresponsible. She felt the newspaper had been grossly irresponsible "in what it was saying and the picture it tried to give" of the plaintiff, because she believed defendant reported incorrect information and didn't check it and because its reporters lied to cover up their mistakes. However, because she was the juror who believed a compromise verdict had been struck, she voted with the majority on question two without demanding any significant substantive discussion regarding the resolution of that question.

During LDRC's interviews the other jurors were firm in their view that the reporters had not acted in a grossly irresponsible manner, although most felt the reporters had to a greater or lesser extent been sloppy regarding details in the case. Nonetheless, most of the jurors felt that the reporters had done a basically responsible job under dangerous circumstances. And regardless of whether they felt that what was printed was actually or, as one juror put it, "legally" true, almost all of the jurors did believe that the defendant's reporters had received information about the plaintiff's involvement in drug trafficking and that the information received had been verified by foreign police officials. As to the jurors' reactions to specific reporters, one reporter who was subjected to a particularly intense cross-examination by plaintiff's counsel, nonetheless impressed the jurors LDRC interviewed as basically believable. Another, however, a the weak impression on the jury. One juror referred to him as pompous and condescending; another thought he was too defensive on the stand; while a third got the impression that his testimony was too "rehearsed" and, therefore, not entirely credible. The one juror LDRC interviewed who was impressed with this reporter, nonetheless concluded that he knew how to "play tricks with words." In sum, despite the fact that the jurors were not entirely disposed against all of the reporters and did not find credible the most extreme of plaintiff's charges

about lying and falsification, it is fair to say that the reporters as a group certainly did not convince the jury that their investigative reporting, however extensive or elaborate, was beyond question in terms either of methods or results.

Plaintiff argued that the reporters could have and should have gone abroad again, once this suit was initiated, to collect more evidence supporting their charges. This argument met with mixed success. Four jurors thought the reporters should have gone back, although only one of the four thought a failure to do so supported a finding of gross irresponsibility on the defendant's part. Likewise, the jurors were almost evenly split on whether the reporters should have confronted the plaintiff with their allegations. Some felt it would be too dangerous. Several jurors compared confronting the plaintiff to personally accusing a Mafia figure of committing crimes, and rhetorically asked, "Would you do that?" The vote on gross irresponsibility, as opposed to the raised-hand votes on truth/falsity, was taken by verbal acclamation.

5. Damages

Because on question two of the special verdict form the jury found that the defendant had not been grossly irresponsible, it was not required to consider the question of damages. However, if it had, it seems clear that the plaintiff would not have fared well on that issue. All but one of the jurors interviewed believed that the plaintiff had not been damaged by the book, and consequently they were not prepared to award him any damages. The jurors didn't believe that anyone in Turkey had read the book, and they were unwilling to accept plaintiff's argument that he was nervous when travelling internationally because of its publication. Plaintiff's inability to introduce any evidence of alleged financial loss due to the book thus virtually denied him the possibility of recovering significant compensatory damages. The only mention of damages in the jury room occurred when one of the jurors suggested that they award plaintiff one dollar and send him home. The judge had instructed the jurors that they could award the plaintiff nominal damages, but this suggestion was apparently treated as a rebuke and not as any acceptance of plaintiff's claims of injury or damage. Another factor which appears strongly to have influenced the jury's attitude towards plaintiff's request for damages was the jurors' perception that plaintiff was a wealthy man. Although specific evidence as to the extent of plaintiff's wealth was not admitted, the jurors were aware that plaintiff had a rather luxurious lifestyle and they assumed that he must have incurred significant legal expenses in pursuing his case. They therefore considered any damage which the book might have caused as miniscule by comparison.

The one juror who told LDRC that she had felt the plaintiff deserved damages was also the juror who felt the reporters had been

grossly irresponsible and who appeared most disposed to believe plaintiff's claim of lack of involvement in drug smuggling. She based her belief that the plaintiff should receive damages on what she felt was the traumatic effect the allegations in the book had on plaintiff's family. This one juror did not indicate what amount she felt was appropriate to be awarded and it may be that she had never arrived at any specific figure in her own mind. It does not appear that she had mentioned her view of the damages issue to the other jurors during the deliberations.

As noted, the judge bifurcated the issue of punitive damages in this case, so that the jury did not initially receive evidence on defendant's net worth and it did not receive legal instructions or a special interrogatory on the punitive damages issue. Because it decided the reporters had not acted in a grossly irresponsible manner, the jury never received either. By all appearances, however, they had no inclination to award punitive damages in this case.

Juror Profiles

The regular jurors in this case were quite similar from a demographic standpoint. Five of the six jurors were women, five of the six jurors were members of minority groups and at least four jurors came from urban, lower middle-class or working-class households. Only one of the four jurors interviewed was a college graduate and it appears that at least one if not both of those not interviewed also did not have college degrees. Politically, a majority of the jurors interviewed described themselves as either Democrats or Liberals.

In terms of attitudes toward the media, three of the four regular jurors interviewed felt the media does a good job overall and believe most of what they read in the print media or watch on television. However, one of these jurors did say that subsequent to this trial she had been misquoted in a newspaper article but, aside from that incident, none of these three jurors seems to have had any personal experience with the media and they displayed no significant pro- or anti-media bias. The fourth juror LDRC interviewed had at least one previous experience wherein a former business associate had been, he felt, badly misquoted and he cited this experience as evidence of the manner in which, he felt, the media distorts the truth. All of the alternates interviewed expressed certain negative feelings toward the media. One had had a personal experience suggesting media inaccuracy and was generally "skeptical" about what appears in the media; one had detected some inaccuracy and "bias" in the media from time to time and the third alternate interviewed was prepared strongly to accept the plaintiff's contention in this case that professional reporters would lie on the witness stand and fabricate information in a publication.

Three of the four jurors interviewed expressed their concern over the extent of drug abuse in the United States. The fourth juror interviewed, while not expressing a strong personal viewpoint on the drug issue, did express her impression that most of the jurors had a keen interest in the subject. This interest ultimately manifested itself in two ways. First, it led to an apparent reluctance on the part of several of the jurors to grant a damage award to a person they suspected of drug dealing. Second, it appeared to lead many of the jurors to adopt a "street-wise" attitude in analyzing the testimony of witnesses and the contentions of the parties. This attitude was clearly detrimental to the plaintiff in that these jurors appeared quite willing to believe that someone who they perceived as having accumulated substantial wealth through business enterprises consistent with drug dealing might well be a drug dealer, despite his adamant denials and despite the fact that he may never have been formally charged or convicted of such activities.

1. Regular Jurors

Juror A

Juror A is a woman in her mid-thirties. She is presently employed as a social worker's aide, and is taking college courses in order to complete a bachelor's degree in social work. Juror A was named the forelady of the jury because of her first position in the jury box. She had a strong interest in the case; she feels strongly about the drug problem, and thinks that it was important that the defendant cover this story. She even asked the defense attorney for a copy of the book in question after the trial. A enthusiastically agreed to speak with LDRC, and commented at length on her impressions of the trial.

Juror A decided to "vote for the defendant" after hearing what she felt were clearly contradictory statements by plaintiff's witnesses. A thought that both the plaintiff's daughter and the foreign police official testifying on plaintiff's behalf contradicted themselves on the stand. She thought those witnesses and the plaintiff himself lied throughout their testimony. At one point during the trial, A said to her fellow jurors, "I'm not listening to any more of these lies." On the other hand, A felt the reporters were believable witnesses who had not acted in an irresponsible manner. She also believed the testimony of defendant's surprise witness that he had participated in a drug deal with the plaintiff and felt his testimony was the key evidence that plaintiff was a drug smuggler, although she suspected the witness had not been fully forthcoming in his testimony concerning his own previous involvement in drug trafficking. A also believed the U.S. drug agents who testified on behalf of the defendant.

Plaintiff's attorney greatly impressed juror A. She described him as a good lawyer who worked hard and made a good case, but who at times was too aggressive. A mentioned that the defense attorney didn't speak a lot, or get excited, and the jury began to wish he would. His silence bothered the jury at the time, but she concluded that he must have "an ace in the hole," and when the defense produced their surprise witness, she felt her suspicion had been confirmed. She described the judge as stern and without pity for anyone, but she thought he was fair and in fact liked him.

As forelady and a vocal advocate for the defendant, A appears to have been a dominant figure in the deliberations. She was one of the three jurors who originally voted that the references to plaintiff were not "substantially false," and she vigorously attempted to persuade other jurors to accept her position on that question. In doing so she focused on the judge's instruction that the jurors should use their "common sense" in reaching a verdict. While the other jurors recalled the original vote tally on question one as being 3-3, A rather optimistically characterized it as being 4-2, with her recollection being that four jurors initially voted that the references were not substantially false.

It was A's attempts to convince the other jurors to vote "no" on question one which frightened juror D into suggesting a compromise verdict, and it may have been A's ultimate decision to change her vote on that question which broke the impasse among the jurors. A's justification for changing her vote on question one is somewhat unclear. She said she changed her mind when she began to "focus on the passage" in relation to the requirement of "substantial falsity." However, she believed the reporters' accounts of the details in the case and thought they were nevertheless irrelevant in answering question one, recognized that the plaintiff bore the burden of proof and still believed he was a drug smuggler. She also denied that she had changed her vote simply to reach a compromise verdict. If this is in fact the case, her change seems to have flowed from a misapprehension of the meaning of "substantial falsity" -- twisting its meaning completely around -- rather than any change of heart regarding the plaintiff's alleged drug smuggling. In fact, juror A was one of the most vociferous in complaining about the framing of question one. Her conclusion was that if the jury's role was to decide whether or not plaintiff was a drug smuggler, the question should directly have been asked.

A did not think the reporters were grossly irresponsible, and did not think that the plaintiff should have been awarded any damages. A has had no personal experience with the media. Although she doesn't believe everything she reads in newspapers, she does believe investigative stories. She reads newspapers occasionally, and usually watches television news on NBC, ABC or CNN.

Juror B

Juror B is a woman in her 30's who has attended four years of college and works as a clerk for a regional transportation agency. B lives in a working-class neighborhood and considers herself a liberal. She was one of the three jurors who initially voted that the references to plaintiff were "substantially false." Despite this vote, B says she believed that the plaintiff was a drug smuggler from early on in the trial, when she heard the testimony of the plaintiff and the foreign official who testified on his behalf. B asked that the officials' testimony be re-read during the deliberations, and concluded from that re-reading that he was lying in insisting that plaintiff should be excluded from the long list of drug traffickers he had confirmed to the reporters. She believed the testimony of the defendant's surprise witness, although she stated it didn't have any effect on her because at that time she was already convinced of the plaintiff's "guilt." Similarly, B believed the federal drug agents when they testified that the plaintiff was a suspected drug dealer, reasoning that they had no reason to single out the plaintiff and lie on the stand.

B correctly understood that the burden of proof rested on plaintiff in this case. However, in the jury room she insisted that the references to plaintiff were substantially false. This was a result of her belief that what the jury was asked to decide was "not what we heard on the stand, but what we read in the book." In other words, B apparently believed that question one's focus on the "references" to plaintiff in the book meant that the jury was to decide, not the underlying question of whether plaintiff was or was not a drug smuggler, but rather to decide the accuracy of specific details referring to the plaintiff in the book. Since in her view the defendant had not proffered sufficient evidence to refute that of the plaintiff on issues such as villa and nightclub ownership, or the specific route used in smuggling, B concluded that she was legally bound to vote that the references to plaintiff were "substantially false."

B believed the reporters had acted responsibly. While she felt they could have returned to the site of their research for further investigation, she believed that they had originally had their information verified by the foreign police officials. She consequently agreed that no damages should have been awarded. B felt that plaintiff's attorney had a tendency to put words in his witnesses' mouths, and that defendant's attorney -- while rather unassertive at the outset -- got progressively stronger as the case went along. She thought the judge was fair, and didn't favor either party, but also felt that his instructions were confusing. B is an avid reader, regularly reading all the local newspapers, and newsmagazines such as Time and Newsweek. She doesn't believe everything she reads, however. B watches TV news occasionally, and frequently informational programs such as 20/20.

Juror C

Juror C is a woman in her late 30's. C was contacted by telephone and invited to participate in this Study, but she declined to do so, stating that she was through with the case and did not want to be involved. According to the jurors interviewed, juror C initially voted "yes" to question one -- i.e., that the references to the plaintiff were substantially false. However, C appears to have vacillated during the deliberations, and indeed juror A recalled that C had originally voted "no" on the question of substantial falsity. Jurors interviewed reported that C did think that the plaintiff was a drug smuggler, but that she believed that the burden was on the defendant to prove him as such. C thought that the reporters had not acted in a grossly irresponsible manner and voted that way on question two. C apparently made no mention of damages during the deliberations.

Juror D

Juror D is a woman in her mid-30's who attended two years of junior college and who now works as a word processor. This was the third time that D had served on a jury, the other two cases being criminal in nature. She was extremely pro-plaintiff in outlook, admitting that she hoped throughout that the plaintiff would win this case. D voted that the references to plaintiff were substantially false because she felt that it was the defendant's burden to prove that plaintiff was a drug smuggler and the truth of the other details it printed, and in her opinion defendant had not done so. In fact, D was the last of the jurors to acknowledge that plaintiff was "involved" in drug smuggling, doing so only during the deliberations after the foreign police officials' testimony was re-read.

D believed most of the plaintiff's denials of involvement in drug trafficking, although she felt that the police officer testifying on plaintiff's behalf was lying throughout. D gave little credence to defendant's surprise witness, coming into the trial at such a late date. D also did not think highly of the U.S. drug agents, stating that "I don't have much love for police."

In the jury room D was convinced that the references to plaintiff were substantially false, and that the reporters had been grossly irresponsible in painting a false picture of the plaintiff. She disbelieved most of the reporters' testimony. However, when she concluded that the other two jurors voting with her on question one, jurors B and C, might weaken and change their votes she suggested to juror A that a compromise verdict be reached. She would vote "no" on gross irresponsibility if the jury voted "yes" on substantial falsity. D was willing to vote this way because she eventually came

to believe that the plaintiff was under suspicion for drug smuggling, and that the reporters had received his name from Turkish police officials. This led her to conclude that plaintiff probably had been "involved" in drug smuggling in one way or another.

As noted, D was candid in admitting her belief that a compromise verdict had been agreed upon by the jurors. She was disturbed by some of the other jurors' impatience to conclude the deliberations, and the tension and verbal sniping that attitude engendered in the jury room. D was the only juror who believed that the plaintiff should have received damages because of the effect she believed the book had on his family. D felt plaintiff's attorney did a very good job on the case, except that he should have had the plaintiff admit that he did spend time in a nightclub described in the book, since she believed his denials were unbelievable. D also thought defendant's attorney had done everything he could do, and had been especially resourceful in bringing in a surprise witness. She thought the judge was fair and impartial, although she recalled his repeated reprimands of plaintiff's attorney for his outbursts.

D reads a local tabloid newspaper daily, and watches TV news occasionally. She watches Nightline regularly, and reads Time and Newsweek often. She believes that newspapers do take sides on questions, and while she would hope to believe that most of what she reads in the paper is true, she suspects that sometimes it is not. Her feelings against drugs did not appear to be as strong as those of most of the other jurors.

Juror E

Juror E is a 43-year-old man who has a bachelor's degree in education and works as a disability analyst for a government agency. In that position he reviews claims and frequently comes in contact with attorneys. E describes himself as a Democrat and had never served on a jury before being selected in this case. E has a brother who is a rehabilitated drug addict, a fact which he indicated did not come out in the voir dire; however, E claims this fact did not affect his consideration of this case. E was one of the three jurors who initially voted that the references to plaintiff were not substantially false.

E concluded that plaintiff was a drug smuggler near the end of the trial. He suspected that the plaintiff was lying on the stand, but thought that he generally presented his case well. Similarly, he believed the foreign police official who testified on plaintiff's behalf was also lying. Yet what ultimately convinced E that plaintiff was a drug smuggler was defendant's surprise witness who connected plaintiff to another alleged drug transaction. This, he felt, was the key testimony in the case. Although E realized that details printed in the passage were irrelevant in answering question

one, E ultimately switched his vote on that question because, in his words, he felt he was "pinned down by the court's language." Focusing on the passage as printed, and failing to apply the correct burden of proof, E decided that the defendant had not presented sufficient concrete proof of the truth of the allegations contained in that passage.

While E was strongly against plaintiff on the issue of truth of the underlying allegations, he also felt that the reporters had been rather sloppy in their information-gathering, and should have gone back to obtain more evidence. However, he did believe that their information had been verified by police officials in the plaintiff's locale. He characterized the reporters as "a little" irresponsible and consequently he voted "no" on question two. E did not want to award plaintiff any damages, since he didn't believe anyone in plaintiff's homeland had read the book.

E called plaintiff's counsel a "real actor -- a good action lawyer." He had concluded that the defense attorney was confused and perhaps even unprepared at the outset of the trial, and E was afraid he would be "eaten alive" by plaintiff's counsel. However, by the end of the trial he had substantially changed his mind, commenting that the defense attorney had gotten stronger as the trial progressed and giving him an "A-plus" on his summation. E noted the annoyance the judge often displayed with plaintiff's attorney, but he felt the judge was impartial and E liked him.

E had previous experience with the media that was quite negative. He stated that while working at a previous job a local newspaper badly misquoted someone on a subject he was familiar with. "I have the feeling that (the media) can get things wrong," E said. E feels that sometimes writers may twist a story for an editor, to get a juicy story. They twist words out of context. Despite his very strong feelings about drugs, E doubted how important it was for the newspapers to undertake a story such as this since people at the street level already fully know what is going on regarding drug trafficking. In fact, E stated his belief that the police and FBI already know who the drug smugglers are, and that it is difficult for "outsiders" such as the defendant's reporters to really "get inside" this type of story. E used to read the paper regularly but he "swore off reading long ago." He does read the business and stock sections of the newspaper and watches some TV news.

Juror F

Juror F is a woman in her 30's who works for a local hospital. She originally agreed to meet with LDRC for an interview, but failed to appear. LDRC subsequently tried to contact her, but without success. According to the other jurors, F was quite adamant in her

belief that plaintiff was a drug smuggler from the very outset of the trial. Her disbelief of the plaintiff's basic testimony led her to that conclusion. During the deliberations F apparently stood firm in this adamant belief and is reported to have largely declined otherwise to join in the deliberations. Juror F originally voted "no" to question one -- i.e., that the references to the plaintiff were not substantially false. It is reported that F ultimately changed her vote on that question immediately after the forelady, Juror A, changed her vote. F did not think the reporters had acted in a grossly irresponsible manner, and voted "no" on question two. F was the juror who, on the first day of the deliberations, suggested that the jurors "give the man one dollar," but this suggestion appears to have been treated as a facetious one both by the other jurors and by F herself. It certainly appears that F did not want to award plaintiff any damages.

2. Alternate Jurors

Juror G

Juror G is a 36-year old man who works as a social worker at a psychiatric center. G has a B.S. in Psychology and a masters degree in Social Work. Of all the jurors and alternates LDRC contacted, G had the most accurate understanding of the judge's instructions on the applicable law and the most complete recall of the evidence in the case.

From an early point in the trial, G found himself disbelieving the plaintiff's statements on the stand, however he worked hard to follow the judge's instructions to keep an open mind as the evidence was presented and only became convinced that plaintiff was a drug smuggler after hearing the testimony of defendant's surprise witness. He thought the surprise witness was credible and was, in fact, the key witness on truth. G initially believed the testimony of the foreign police official who appeared on plaintiff's behalf, but defense counsel's cross-examination suggested to him that the official wasn't telling the truth. When the judge instructed the jurors that the accuracy of any details the defendant printed was irrelevant in deciding question one, G was surprised but he understood that instruction and was not confused by the charge as to "substantial falsity." G also had a clear recollection of where the burden of proof lay on both questions one and two. These instructions convinced G that a verdict for the defense was legally required.

Therefore G said he was shocked when after the trial he learned of the jury's decision on the first question, and felt that for that decision to have been reached the charge must have been amended after the alternates had been excused. G would have voted that the references to plaintiff were not substantially false. He reasoned,

"This was a suit for damages, and the issue -- the only thing that could be damaging to (plaintiff) -- was whether or not he was a drug smuggler. So the 'substantive' issue is whether or not he was involved in drug trafficking."

G did not concern himself greatly with the reporters' performance, since he would never have reached the second question on the special verdict form. He thought not interviewing the plaintiff was sloppy on their part, but after the testimony of the surprise witness that fact did not matter as much to him, since he felt the reporters had "gotten the goods" on the plaintiff. He did not think the reporters had been grossly irresponsible, and did not think the plaintiff deserved to be awarded any damages.

Although G thought plaintiff's attorney was too flamboyant and repetitious and made outrageous requests to the witnesses, G still felt that he did a basically "good job." However, at one point during cross-examination of the surprise witness G even began to feel that plaintiff's counsel was acting like a "Mafia mouthpiece." G also thought the defendant's attorney did good work, and that he won the case by producing his surprise witness. He thought the judge was fair, kept a tight rein on plaintiff attorney's objections, and was running a tight court overall.

G had no strong personal feelings or experiences regarding drugs. Because of the heavy workload in his job he rarely gets a chance to read daily newspapers, but he does watch TV news and reads a Sunday newspaper. G recalled one instance in which a newspaper article about a psychiatric center at which he had worked presented what he considered a distorted view, and the article angered him. He is uncertain whether reporters lie when working on a story. "I think people frequently operate out of self-interest, so I'm generally skeptical of everyone," G said.

Juror H

Juror H is a woman in her late 20's who works in the printing department of a large communications company. H's initial reaction to the case was that the defendant was "guilty," although she considered the plaintiff "one of the biggest drug smugglers you'll ever see," and didn't think he proved anything. However, H's understanding was that the burden was on the defendant to prove "their charges." This perception may have flowed from the fact that H had previously served as a juror in an eight-month criminal trial.

H thought the plaintiff did a good job on the stand, but that the police official who testified on his behalf "lied from beginning to end." The defendant's surprise witness proved to H that he had completed an earlier drug deal with the plaintiff, but she did not consider that enough evidence for the defendant to win the case.

Not only did H confuse the burden of proof, she also felt that details written in the passage concerning plaintiff were relevant in answering question one. She therefore criticized the defendant for not being able to prove the truth of these incidental details. Had H been involved in the deliberations, she would have voted that the references to plaintiff were substantially false.

H thought the reporters were lying during the trial, and had a "who cares?" attitude about their reporting. She felt they should have gotten more information, confronted the plaintiff with their charges, and in general should have done more work. She did think the reporters originally received their information on the plaintiff from foreign sources, and was unable to say whether they had been grossly irresponsible or not. H did not think the book's publication had disturbed the plaintiff's life, and did not think he deserved anywhere near the amount of money he was requesting.

H felt the plaintiff's attorney was loud but effective, and that the defendant's attorney simply needed more time to prepare evidence for a case. H is concerned about the drug problem because she has seen people living around her dying as a result of drugs. H said she had heard of libel issues before this case but was not familiar with a major recent libel case that had been brought against her employer.

Juror I

Juror I is a high school-educated woman in her mid-40s who works as a reservationist for a major airline. She had served as a juror in a previous criminal trial. She complained that she did not know any of the legal standards in this case until the close of the trial. Juror I understood that in this case it was up to the plaintiff to prove that he was not a drug smuggler, and she felt he did not accomplish that. However she found some of his testimony credible and she was not convinced that the plaintiff was a drug smuggler until the end of the trial. Had she taken part in the deliberations, Juror I would have voted that the references to plaintiff were not substantially false.

Juror I never reached a definite conclusion on the foreign police official who testified for the plaintiff, although she felt that he was too involved with the reporters not to have said anything to them. Juror I thought the defendant's surprise witness did a good job testifying, and she did not accept plaintiff counsel's criticism of the late date of his appearance at the trial. Juror I also did not think the accuracy or inaccuracy of the details the reporters printed made much difference in the case. She thought the U.S. drug agents would not have testified on defendant's behalf without some basis, although she didn't like the fact that one of them was paid to testify, believing it was his civic duty to do so.

Juror I felt that the defendant absolutely did not act in a grossly irresponsible manner. She didn't think the reporters lied or that they had pulled the plaintiff's name from a hat, and she didn't think they were negligent. However, she did feel that they could have consolidated their records more, may have stretched some facts in their reporting and might have done a better job if they had known there would be a libel suit against them in the future. Juror I did not feel the plaintiff was harmed by the book or was in any financial trouble, and she did not feel he deserved to be awarded any damages.

Juror I thought the plaintiff's attorney was over-dramatic and frequently insulted the jurors' intelligence. On the other hand, she felt the defense attorney "got the job done without all the shenanigans." She stated she is "not a big newspaper reader." She said that Time magazine confused her because it "always had contradictions in its statistics." Juror I often sees slight inaccuracies in TV newscasts and thinks the media can be biased, but she doesn't think reporters intentionally report false information. In this case, she "could not see the three reporters conniving to lie." Her belief was that they would not last long in the profession if they did so. Juror I did not have any extensive familiarity with libel but did vaguely remember the Westmoreland and Sharon cases.

Juror J

Juror J is a woman, approximately 40 years of age, who works as a lab technician at a local hospital. J received several letters from LDRC requesting an interview, but did not respond. From conversations with other jurors, it is believed that she also felt plaintiff was a drug smuggler.

Juror K

Juror K is a man in his mid-40's who works as a routeman for a dry cleaners. LDRC was unable to locate or contact Juror K. However, based on conversations with other jurors it is believed he too felt plaintiff was a drug smuggler.

Juror L

Juror L is an approximately 50-year-old man who is presently unemployed. LDRC was unable to locate or contact Juror L. However, based on conversations with other jurors it is believed he also felt plaintiff was a drug smuggler.

LDRC Analysis

The visible results of the jury's deliberations in this case, a split special verdict finding in favor of the libel plaintiff on the truth/falsity issue while at the same time finding in favor of the media defendant on the issue of fault and thereby granting judgment for the defense, would at face value appear to have been a logical and predictable one. It is a pattern that has been followed not infrequently in previous media libel cases, perhaps most notably in Sharon v. Time. However, an in-depth look below the surface of this seemingly plausible Solomonic outcome reveals a far more complex picture and suggests the very real dangers and pitfalls -- for both plaintiffs and defendants in libel actions -- of entrusting ones reputation, personal or professional, to the common sense perceptions and decisions of even the most well-meaning lay jury.

From the libel plaintiff's point of view -- and assuming for these purposes that the plaintiff is genuinely aggrieved by charges that in fact are false -- the jury's unanimously negative response to the plaintiff's claim of innocence in this case demonstrates the fearsome prospect that is certainly always present when truth/falsity is seriously contested and when the underlying charges are ones that are difficult definitively to prove or disprove -- i.e., the prospect that the jury will ultimately disbelieve the plaintiff and find the charges to be true and that this will be revealed by means of a special verdict or otherwise. Such a result, of course, could leave the plaintiff, after a presumably arduous and costly litigation, in a worse position than if the libel suit had never been brought or pursued in the first place.

From the media libel defendant's point of view -- and again assuming that the journalists were not at fault, actually or at least in the legal sense, in publishing charges that may have turned out to be false -- the jury's at best lukewarm response to the newspaper's claim in this case, not only of lack of fault but of investigative journalism of the highest caliber, demonstrates the perhaps impossibly high standards to which juries may hold the media, even where as in this case the jury has concluded that the underlying charge was both true and highly significant. If this seems to be second-guessing by the jury from hindsight and more than a bit unfair, this case nonetheless forcefully shows that media libel defendants must be wary of jury's propensities to second-guess their methods in this fashion. Based on the findings of LDRC's Jury Studies to date, juries seem quite prepared to agree with a libel plaintiff's contention that you can always do more to check a story and it does not necessarily impress them either that an extensive investigation was undertaken or that the gist of the story is true, so long as details are wrong and something more could have been done to make the publication more accurate. Here most of the jurors agreed with the contention that the journalism was "sloppy" even though they felt the story ultimately published was essentially

correct and even though they had no particular sympathy for a plaintiff they apparently all believed was involved in drug trafficking.

In sum, it is almost unavoidable but to conclude that in this case only the slightest shift in the composition of the jury, in the overall impressions conveyed during the trial by plaintiff, his counsel or his key witness, or in the unique availability of a surprise witness linking the plaintiff to another otherwise unrelated drug transaction -- that any shift in these key factors could have led to a quite different outcome. One wonders, for example, what the outcome might have been in such circumstances, had the lesser "negligence" standard been applied and had plaintiff's counsel been able to focus on such alleged negligence rather than on the far more extreme contention that professional reporters had lied and fabricated serious accusations. In short, even a Pulitzer Prize-winning article, staunchly defended by top-notch media defense counsel, an article said to be based on numerous sources and vigorously stood by through a dozen years of litigation by a highly-respected media company and top-flight, professional reporters, can still come surprisingly close to coming out at the wrong end of a libel jury verdict.

What all of this says about how to defend a libel case successfully must ultimately be left to the good judgment and instincts of media defense counsel in future cases. It is still far too early, based on the limited number of LDRC Jury Studies, to reach confident generalizations regarding jury behavior in libel actions -- at least conclusions generalizable enough by themselves to dictate defense strategy in particular future cases.

Nonetheless, there is at least one perhaps obvious, but nonetheless critically-important, conclusion that is already painfully apparent from LDRC's Studies thus far. That is, that legal instructions ultimately play a pivotal role in the jury's deliberation process. In LDRC Jury Study #1, a reasonably good set of instructions on the actual malice issue was largely ignored by a jury predisposed against the defense on the issue of truth or falsity. In Jury Study #2, deficiencies in the instructions may have led a jury otherwise somewhat sympathetic to the defense to misapprehend the law and conclude that a verdict for the plaintiff was legally required. In this third LDRC Jury Study, the jury's failure to recall crucial elements of the judge's charge, combined with a confusingly framed special interrogatory, led to a split verdict inconsistent with the jury's near unanimous underlying factual view of the case.

With legal instructions being obviously so crucial to the outcome of jury cases -- particularly in media libel cases where by constitutional command the law places heavy burdens on the libel plaintiff -- it is almost incredible how little attention the law pays to educating jurors generally regarding these governing legal

standards or to assuring that the language and structure of jury instructions is clear, comprehensible and can be remembered and referred to by the jury during its deliberations. It would appear foolhardy in the extreme to expect a lay jury, unschooled in the niceties of libel law, fully to comprehend and recall a lengthy and complex set of jury instructions based on a single reading at the end of an often long trial. In this case, for example, the jurors failed to recall and largely turned on its head even the most basic element of burden of proof. Upon reflection, it is hardly surprising that a lay jury, more familiar with "Perry Mason" (or perhaps today "L.A. Law") than with the legal standards applicable to a civil libel claim, could erroneously conclude, after four or five weeks of trial where the major issue in the case fairly appeared to the jury to be the "guilt" or "innocence" of the plaintiff with regard to a charge of serious criminal activity, that such charges must be "proven" in a court of law by those making such allegations. One reading of a civil libel burden of proof instruction was obviously not enough to disabuse a majority of at least this jury of such a "common sense" notion. In this case, defendant's counsel unsuccessfully sought additional readings of the burden instruction and its inclusion in a special interrogatory. LDRC's Jury Studies have not revealed a pattern of conscious jury "nullification," or even an inherent inability to comprehend instructions, so much as a fundamental failure in the trial process meaningfully to educate the jury so that they can grasp, recall and be guided by complex, as this case once again demonstrates, often counterintuitive legal standards.

Much more can and must be done to assure that we don't build into the libel system a fruitless charade whereby juries, left largely ignorant of the governing legal standards, do their best to find facts based on the diligent application of their good common sense only to find their verdicts systematically reversed on appeal because of legal errors that could have been avoided at trial. The simple expedient of agreeing on operative charge language prior to the trial so that counsel for both sides can confidently refer to the governing legal standards in their presentations; of pre-charging on key legal standards by the judge at the outset of the case; of interim legal charges or attorney summations to bolster the jury's continued awareness of these standards throughout the case; of clearer, briefer and simpler charge language in the closing charge and of providing the jury with a full (or summarized) text of the instructions, could all help enormously. Attention must also be paid to assuring a more perfect congruence between charge language and any jury interrogatories or special verdict form. While this task would appear simple enough, two of the three LDRC Studies revealed fundamental disparities between charge and verdict form which substantially affected the outcomes of those cases. (For a welcome judicial recognition of the need for such reforms in the context of libel jury trials, see the excellent concurring opinion of Judge Ruth Ginsburg in Tavoulareas v. Washington Post, 13 Med.L.Rptr. 2377, 2408-11 (D.C. Cir. 1987) (en banc).)