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TRIALS OF A GENERATION

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TRIALS OF A GENERATION

On August 15, 1982, the Libel Defense Resource Center released its first statistical study of media libel trials. (LDRC BULLETIN No. 4 (Part 1).) The study revealed that since the *Sullivan* decision in 1964, the media suffered plaintiff's verdicts in roughly three out of four jury trials.

Concerned about the media's high failure rate at trial, in 1983 a committee of furrowed-browed in-house and outside counsel, under the leadership of Henry Kaufman, planned and executed the first conference sponsored by the ANPA (now NAA), NAB, and LDRC, titled "Libel: A Practical Workshop for Media Defense Counsel." The program faculty was studded with risen stars like Don Rueben (who always seemed to be at that "what can they do to me now" stage of his career) and Irving Younger (who finished his talk early with a quote from John W. Davis, Esq., "I will now make a gift to the court of my remaining five minutes"). The audience was dominated by whippersnappers from Yale's class of 1979.

The 1983 gathering and ensuing biennial conferences in the 1980's focused on innovative trial tactics calculated to improve our success ratio. The 1985 conference featured David Boies and Stuart Gold, who trumpeted their innovations and successes in the two megatrials of the decade, *Westmoreland v. CBS* and *Sharon v. Time, Inc.* In those days, the judicial dinner speakers were more fun, *e.g.*, Hon. Harold Tyler (introduced by Don Rueben as one of those hard-to-find "retired federal judges that can still talk") and Hon. William J. Bauer (introduced by Rueben as one of the "funniest judges on the federal bench").

The 1987 conference in Denver featured dinner speeches by losing advocates, including Floyd Abrams (*Newton v. NBC*), but their cases did not seem troubling because they involved difficult venues and some troublesome facts. By the close of the 1989 conference convened in Seattle, which was dominated by hands-on demonstrations of trial tasks, the media defense bar seemed almost smug about its ability to handle jury trials. This, even though we had barely nibbled at our bad stats.

But then:

- 5/3/90 $34 million *Sprague v. Philadelphia Inquirer*
- 5/15/90 $29 million *Srivastava v. Harte-Hanks Television, Inc. (KENS-TV, San Antonio)*
- 9/14/90 $13.5 million *Newcomb v. Cleveland Plain Dealer*
- 4/19/91 $58 million *Feazell v. Belo Broad. Corp. (WFAA-TV, Waco)*
- 7/10/91 $18.5 million *Prozeralik v. Capital Cities/ABC, Inc. (WKBW-TV, Niagara Falls)*

The media defense bar and its clients, brows refurrowed, wondered, "What is going on out

there?" Chad Milton organized a panel to address that question at the 1991 biennial conference (which, by then, was co-chaired by one of the '79 whippersnappers) and asked me to prepare and present a survey of the cases that would attempt to identify factors at work. The resulting canvas of jury trial results in media tort cases has since been repeated for each biennial conference, the most recent of which was convened in Arlington, Virginia, in September of 1999 (then and now chaired by two of the '79 Yalies).

As it turned out, the scary spate of big verdicts in the early '90s was simply a coincidence, a random clustering of the fruit-bearing stages of bad facts that occurred at different times dating back to 1973, and the surveys revealed little that has not always been with us. Nonetheless, I have been asked to sum up what these five surveys have shown concerning the profiles of cases most likely to result in one of these ghastly wellhead explosions, to identify the most common and difficult problems in persuading the factfinder, and to discuss the various approaches that our collective experience offers for addressing them.

The surveys provide insights on countless trial problems, including basic problems such as who to keep off the jury, how to deal with jurors' anti-media biases or unduly high expectations of the media, out-of-control plaintiff's counsel, passive judges, when and how to attack the plaintiff, preparing defense witnesses for depositions and trial, appropriate trial demeanor for counsel, using or excluding expert witnesses, and less central but nonetheless sticky problems such as how to explain destroyed notes and "recycled" tapes, placement of corrections in small boxes on page 2, and the like. To avoid clutter and to observe convention on length, I will leave treatment of those topics for a future invitation and concentrate on problems of building good trial themes.

CAN WE PREDICT DISASTER?

There are two things our clients really dislike (actually, the list is endless, but two are presently germane). One is first learning of a case's potential for disaster when the verdict is returned. More often than not, the high damage potential of a case is obvious to all, but there are times when our clients depend upon us to identify danger. Our clients also do not like to hear from us about the not-so-obvious but dangerous "downside potential" of a case only after we have expended large sums of money in preparing for trial. Even the decision-makers for media organizations who have a strong resistance to settlement like the option — even if they are not likely to use it — of avoiding trial preparation costs in cases that have real settlement value. How do we identify a "character builder" at the early stages?

The plaintiffs who win big are professionals (including public prosecutors), business persons, and celebrities — people who depend upon their reputations for their livelihoods as well as their senses of self, people who are able to engage the jury.

Less simply stated are the troublesome media behavior patterns. All of the big verdict cases throughout the '80s and '90s featured one or more of the following foibles, some of which are more

obviously problematic than others:

1. defendant fails to consult obvious available sources or documents that could confirm the published facts or provide contrary information;

2. defendant's reporter interviews with leading questions and pushes sources towards desired responses (as shown by outtakes, recordings of interviews, or testimony of sources);

3. defendant fails to confront the plaintiff with the charges;

4. defendant surreptitiously records phone conversations, uses hidden cameras, or employs other "sneaky" newsgathering techniques;

5. defendant relies on sources who are disgruntled, bear a grudge against plaintiff, or are not credible for "obvious reasons;"

6. reporter becomes emotionally involved in the story or demonstrably biased;

7. defendant uses language that carries a greater sting than the facts as known to the publisher (alteration of quotes is in this category);

8. defendant fails to report known countervailing facts which the jury finds significant;

9. defendant destroys or "loses" notes, tapes or any other significant evidence, particularly during the post-complaint stage;

10. defendant (at trial) denies awareness of a defamatory meaning or implication which appears obvious to the jury; and

11. defendant attempts an unsuccessful truth defense;

12. defendant reports credible but unproven charges, or reports the appearance of impropriety, and later events show that the charges were unfounded or not sustainable with satisfying proof; defendant (at trial) takes the position that it was doing its job in reporting serious charges, or raising legitimate questions, presenting both sides, and permitting the public to resolve the controversy.

For counsel defending cases on a trial docket, these cryptic summaries of bad facts are like the subjective descriptions of symptoms contained in Merck's compendium of medical conditions — most who read them believe they may be getting the disease. For those who wish to work through such hypochondria with a more precise analysis of how these factors worked in actual cases, I recommend reviewing the five surveys.

CAN WE PREVENT DISASTER?

Most of the scenarios described above involve past conduct by the defendant. Unquestionably there are cases where bad reporting is enough to seal the fate of a large verdict, but more often than not, the big losses involve not only past conduct, but a trial theme that the jury finds inconsistent or disingenuous. Since the latter is something that we as defense counsel *can* do something about, avoiding items 10, 11, and 12 from the above list should be the main focus of our trial preparation angst.

Of course, the exact dynamic that will play out in a trial is difficult to anticipate, even with the benefit of focus groups and mock trials. There is agreement among defense counsel that the following factors, probably in descending order, most affect the outcome of a case: (1) which party the jury likes best (or least); (2) which party the jury feels is being most honest and direct; (3) which party is the most competent and conscientious at his or her endeavor at life; and (4) whether the plaintiff's proof on liability and damages meets the requirements of the charge to the jury. When trying concepts such as truth, state of mind, and reputation, there are too many normative judgments at issue and too much play in the jury instructions for factor 4 to be dominant. Even successful advocates acknowledge that they prevailed because they were ahead, dead even, or had at least closed the gap with respect to some or all of factors 1 – 3 ("F1-3"). The role of F1-3 probably explains why the defense success rate is approximately the same whether the standard of liability is constitutional malice or mere negligence (*see* LDRC BULLETIN, 1999 issue no. 1, Jan. 31, 1999).

When the dangerous potential of a case is identified early on, the defense has a much better opportunity to devise schemes to neutralize it, and to test those strategies with focus groups or mock trials.

CAN WE WIN DESPITE FALSITY?

How to win a case even though the defendant's publication is false is an almost universal problem, because cases that lack credible proof of falsity rarely go to trial. The rule of *New York Times v. Sullivan* is that falsity is not enough to recover for defamation, so why should this be such a challenge? When we acknowledge that most jurors walk into the courthouse with the intuition that a publisher should pay when he/she has published a false statement harmful to an individual, and that each is subject to normal human responses to F1-3, the challenge is apparent.

Constitutional Malice

The case in which the proof of falsity is so strong that the defendant must rely exclusively on the plaintiff's inability to prove constitutional malice is at once hard and easy. It is hard because the defendant faces the difficult challenge of persuading a factfinder to apply the counterintuitive "knowing or reckless falsity" standard. It is easy because the difficult strategy decision of how to

address the issue of truth is self-resolved. The defendant must admit falsity from the beginning and let the jury know from the beginning and throughout the trial that falsity is not nearly enough, that the defendant must have published either knowing that the material was false or with serious doubts about its truthfulness (as one of our illustrious members puts it, "the reporter must have looked truth in the face and turned her back on it").

The key lesson of my surveys, as well as the LDRC Juror Attitude studies of the 1980's, is that Justice Ginsberg was right: jurors can find more ways to misunderstand and misapply the constitutional malice standard than we can ever hope to imagine, let alone anticipate. It is like trying to keep sheep together without a pen. We need help from the court (*see* below), and whether we get it or not, we need to remain riveted on the issue, focus on it at every opportunity, work it into the exam of just about every witness.

Maintaining the focus is most difficult when plaintiff's attorney is able to exploit the "constellation of factors" approach which the Supreme Court arguably permitted in *Curtis Publ'g Co. v. Butts* and *Connaughton v. Harte-Hanks Communications*. The "constellation" usually includes the following: failure to seek out one or more sources of corroboration or refutation; sensationalistic bias; omission of details favoring the plaintiff (particularly troublesome when outtakes are available); an ambush interview, a surreptitious taping, or other aggressive reporting style; expert testimony concerning departure from reporting standards. One winning plaintiff's lawyer, as he focused on these factors one-by-one, referred to each as "one plank in the fence of actual malice" (as a one-time Pink Floyd fan, I would have preferred "another brick in the wall").

When the "constellation" method is used by an inflammatory advocate for a sympathetic plaintiff, even the best "neutralization" tactics that counsel can devise are not likely to be effective. Counsel should make every effort to seek help from the court in the form of exclusion of evidence not directly probative of the defendant's attitude toward truth or falsity and repeated charges to the jurors (before, during, and after the evidence) that bring home to them the knowing or reckless falsity in terms they understand. Written instructions that go with the jury into the jury room are a must; if you are before an "old school" federal judge, get on your knees and beg (after quoting Justice Ginsberg). In most cases in which a defendant prevailed on constitutional malice, one or more pro-defense jurors seized upon the written instructions and used them to leverage the others. If possible, flash the key language of the charge on a screen as you explain it and review the evidence. Authorities supporting these and other devices for maintaining the jury's focus, such as bifurcation of liability and damage issues, sequential determination of truth and fault issues, and mid-trial summations, can be found in the LDRC's MODEL TRIAL BRIEF and JURY INSTRUCTION book.

Finally, keep in mind that juries are rarely satisfied with the amount of information they receive, and tend to hold the media defendant responsible for failing to supply any missing piece. This is consistent with the strong intuition of most jurors that the proponent of a proposition (*i.e.*, whatever the defendant's publication says about the plaintiff) has the burden of making it stick. The jury needs to be reminded that the plaintiff, not the defendant, must bear the consequences of inadequate proof of any matter of interest to them. It helps if the special verdict interrogatories on

elements incorporate the burden of proof for each.

Negligence

Winning despite falsity when the standard is mere negligence, by a preponderance of the evidence, seems at first blush hopeless. Yet a surprising number of defendants (too many to name here) have prevailed under a negligence standard even when falsity was admitted. The trick is to find a simple, durable theme that appeals to common sense. Of course, when the mistake is reasonably clear, it should be admitted from the beginning, with appropriately apologetic demeanor, so that the sole focus is whether the defendant acted unreasonably in failing to detect and correct the mistake. This usually requires explaining the journalistic process and demonstrating that there were no red flags and that, without the benefit of hindsight, the mistake was one that anyone in the defendant's position would have made. Of course, the road is smoother if the defendant can credibly argue that the publication is true in every way that matters and that the error is inconsequential. Less direct approaches, such as comparing the reasonableness of the defendant's conduct with that of the plaintiff, showing the plaintiff's reputation blemishes were of his/her own making, or even urging that it is the defendant's reputation, not the plaintiff's, that is being unfairly attacked, have caused juries to side with the defendant in cases in which F1-3 have been kept in check.

SHOULD THE DEFENDANT TAKE A RUN AT THE ISSUE OF TRUTH/FALSITY?

This, of course, is the dilemma presented by most cases. Many of the big losses followed truth defenses that the jury not only did not buy, but also found disingenuous. On the other hand, there are experienced defense advocates who maintain that the best way to prevail on the actual malice defense is to make a strong run at proving the substantial truth of the defamatory statement, which, even if it falls slightly short, makes it easier for the jury to understand why the defendant published it. Obviously, whether the tactic is advisable depends on just how "short" the run at truth will fall, a judgment much easier to make after the trial is over. F1-3 are also important.

In most of the cases in which a nearly successful truth defense has favored the defendant, the truth is still unresolvable, not capable of satisfying proof in the courtroom, but still supported by credible sources. Take for example a publication that focused upon a murder suspect in a case in which the evidence is full of reasonable doubts but investigators still believe the suspect guilty. A theme that the defendant diligently, fairly, and accurately presented both the credible proof against the suspect and the information (or lack thereof) tending to acquit her may fail on the issue of truth but cause the plaintiff to trip over the constitutional malice hurdle. The defendant must take care to avoid becoming identified with the accusers, and to maintain distance from them by showing the defendant was willing to question them and include the information favoring the plaintiff.

On the other hand, where the truth appears fully discernable from the courtroom proof, the defendant is likely better off acknowledging falsity and focusing on the truth as it appeared to the

defendant at the time of the publication. For example, where a newspaper's headline reads "Inspectors Find Rats" at a restaurant, when the source material is an inspection report that notes "evidence of rodents," a truth defense may be dangerous. (I have chosen this readily identifiable case for repeated reference because it is simple yet subtly dangerous, since most of us would have tried this case exactly as did able defense counsel, and because, happily, the Indiana Supreme Court agreed that rats versus rodents was a distinction without a difference and set aside the million dollar verdict.) Keep in mind that during a defamation trial, the jury microfocuses upon the defendant's words and conduct. Up close, rats look very different from mice.

CAN WE WIN DESPITE FALSITY ON THE BASIS OF "SUBSTANTIAL TRUTH"?

Suppose the defendant's publication details four separate incidents of reprehensible conduct on the part of the plaintiff, all of the same general character, and the defendant is mistaken on one of them. Can the defendant admit the falsity, assure the jury it would like to have that one back and do it differently, but nonetheless argue that the publication as a whole was substantially true, because it had exactly the same effect upon readers or viewers as it would if it had not contained the one falsely reported incident?

Some defendants have prevailed in such cases, both on the issues of falsity and fault. *See da Silva v. Time, Inc.* (1997 Survey) (with help from F1-3, defendant successfully argued that an article accompanied by a photo depicting plaintiff as a prostitute was substantially true even though the plaintiff had "reformed," married, and become a mother before the publication); *Robinson v. KTRK-TV* (1993 Survey) (defendant successfully urged errors on amounts of money involved in broadcast about city loans to councilman's brother did not affect substantial truth). Going this route presents a significant challenge, however, because the defendant must keep the jury focused upon two very counterintuitive notions. In addition to the difficult issue of constitutional malice, counsel must also communicate to the factfinders and keep them focused on the idea that even though the publication contains a harmful, false statement, the publication is not legally false unless the false statement renders the publication as a whole significantly more damaging than it would have been without it. To succeed, the defendant will need (1) good stead with F1-3, (2) an intelligent jury, and (3) a helpful jury charge. There is authority for very good charges to the jury on this issue. *See* LDRC DEFENSE COUNSEL SECTION MODEL TRIAL BRIEF, § III.H.1.

I have tried this two-issue approach in two cases. In both, I received "deer in the headlights" looks from most of the jurors when the two counterintuitive concepts were first introduced, and the looks had not completely disappeared by the time I concluded the opening statement. In the first case, which was dismissed at the close of the plaintiff's proof, post-trial interviews indicated that the jurors were still hopelessly confused. In the second case, it worked, but only with the help of one or two very bright jurors. *See Smiley's Too, Inc. v. The Denver Post, Inc.* (1995 Survey).

CAN WE COPE WITH ISSUES OF MEANING?

The most prevalent and knotty problem is the defendant's trial treatment of issues of meaning. The simplest but not least dangerous presentation of this problem arises when the meaning of a particular word or phrase is in issue. To insist that the words "inspectors find rats" means the same thing as "inspectors find evidence of rodents" may not only fail to persuade the jury, but risks the jurors' perception of an attitude of arrogance, lack of contrition, and dishonest debunking bias, all of which plays into the pre-existing attitudes about the media that some jurors bring to the courthouse. "If you're not playing it straight now, why should we believe you were playing it straight when you published the article?"

Libel by Implication

The same problems over meaning present themselves more insidiously when the defendant "neutrally" reports serious charges against the plaintiff, or a series of interesting and seemingly related facts that raise the "appearance of impropriety." Here are some real life examples:

Defendant reports that a district attorney gave favorable plea bargains to alleged spouse-beaters, and the plaintiff (district attorney) claims the defendant's report failed to disclose the mitigating circumstances of the cases and thus falsely implies the misfeasance by plaintiff.

The defendant reports that a district attorney is inexplicably lax in prosecuting drug cases, and the plaintiff claims this implies bribery.

Defendant reports that a judge's concurrence in favor of the defendant in the appeal of an environmental case came after the judge attended an outing sponsored by the defendant's industry, in a limousine provided by the law firm representing the defendant, focusing upon the issue of whether the judge should have disclosed this to all parties. The plaintiff alleges that the article implied a fix.

The defendant's report raises questions about a district attorneys' decision, ten years ago, not to prosecute the son of a friend for a killing on the basis of self-defense without referring the case to a special prosecutor, which plaintiff alleges implies an allegation of impropriety.

The defendant reports the plaintiff's receipt of a government grant and inability to account for how the money was spent, due in part to the destruction of plaintiff's records in a fire, emphasizing lack of any government monitoring to see whether funds are being used as represented in the grant application. The plaintiff alleges that the article implies that the funds were misappropriated by plaintiff.

The defendant publishes a detailed piece on the financing of plaintiff's low-income housing project with a loan from the city made while plaintiff's brother served as councilman and mayor *pro*

tem. Plaintiff claims the article charges that he is a bad credit risk who could not get a loan at arm's length.

In each of these cases, the defendant insisted that it merely reported both sides of an issue involving public officials, public funds, or the appearance of impropriety, as was their right and duty. The plaintiff countered, "why publish this information at all unless the defendant intends to convey its belief that the plaintiff has done something wrong?" The defendant rejoins that "the public, not the defendant, should decide what is right and wrong in these circumstances, and the defendant's reporting does nothing more than permit the public to make those judgments." As good as it sounds, professing neutrality can be dangerous when the jury believes the publisher's claim is belied not only by its gathering and selection of material to report, but also by the words chosen to report it.

Many defense counsel, with the benefit of the hindsight, believe it is better to acknowledge the meaning that a jury will most likely find is conveyed by a publication, acknowledge the deviations from the truth that can be credibly argued, and focus upon the defendant's good faith based upon what she knew at the time of the publication and her lack of awareness of any meaning not consistent with that knowledge. It is difficult to resist the temptation of attempting to justify the defendant's publication by pushing its meaning closer to the facts, but where the gap is substantial, the attempt creates a tension that gets released in the jury room.

It is now reasonably well established that a defendant is entitled to a charge that requires the plaintiff to prove that defendant published with a knowing or reckless state of mind both as to falsity and as to any defamatory meaning allegedly implied by the words used. *See* MODEL TRIAL BRIEF, § III.H.3. Some defendants have persuaded juries that the implied defamatory meaning alleged by plaintiff was unintended. *See Stokes v. CBS* (1999 Survey) (jury determined that defendant did not broadcast program on stalled criminal investigation with a "high degree of awareness that the average viewer would interpret it to convey the . . . meaning" that plaintiff was guilty); *Street v. Philadelphia Inquirer* (1993 Survey) (jury determined that defendants did not publish article about gas commission member's failure to pay his gas bill with "high degree of awareness that readers would interpret the article as alleging" that plaintiff had committed a crime).

When implied meaning is potentially an issue, defense counsel should be aware of a jury room phenomenon that has blindsided several defendants. In a startling number of cases, juries have found no falsity for purposes of a claim for defamation, but found liability on a claim for false light invasion of privacy. The commonly employed formulation of the tort, is that the defendant "portrayed the plaintiff in a false light" or gave publicity to a matter that "placed plaintiff before the public in a false light." The principal source for this language is the *Restatement (Second) of Torts* § 652E. (This is unfortunate, because the *Restatement* is not intended as a plain language statement of the law for juries, and is ill-suited to that purpose.) Apparently, these juries were willing to find that the "gestalt" of the publication carried with it pejorative impressions of the plaintiff that could not be discerned from specific statements contained in the publication. Counsel should insist that the verdict form contain a required finding that particular words in issue are false as an essential element of any claim premised upon falsity, including false light invasion of privacy. *See Sack on Defamation* § 12.3.1.1

(3d ed. 1999).

Libel by Omission — Outtakes

Frequently, the crux of a libel by implication claim is that the defendant's report, although literally true, omitted information that would have created a more favorable impression of the plaintiff. This creates the most difficulty for defense counsel in cases involving the electronic media when the plaintiff has the benefit of "outtakes." In print media cases (except in the case of magazines for which elaborate "proof" records are kept), evidence of omitted material is usually filtered through a non-visual description by a reporter, who has spent hours with counsel preparing for her testimony. For the electronic media, the omitted material comes in the form of vivid, life-sized (or larger) real time audio and visual. When they are available and admitted, outtakes provide a significant opportunity for an effective plaintiff's advocate to encourage jurors to play editor and to urge that the defendant's omission of materials favorable to the plaintiff was deliberate distortion. A defendant rarely is able to exclude evidence of outtakes or other omitted material on issues of falsity and fault.

Counsel who have succeeded notwithstanding the availability of outtakes recommend a strategy in which the defendant explains how editing is unavoidable because of limited airtime and urges that the material reported is not only truthful but fair. The defense faces an uphill battle unless it is also able to persuade the court to instruct the jury, preferably at the beginning as well as at the end of the case, concerning the very limited role of the jury in assessing editorial choices. As an example of such a charge:

> A defendant alleged to have unfairly edited and published a disparaging statement cannot be held liable for refusing to publish everything a plaintiff would like. The choice of material to go into a television broadcast, and decisions made as to limitations on the size and content of a program, and on the treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. You may not find a defendant liable for broadcasting truthful statements because it failed to include additional statements that might have cast the plaintiffs in a more favorable or balanced light, if the gist of the broadcast as a whole and the complained of statements are substantially true. However, a publisher who deliberately distorts meaning to create a false, disparaging statement cannot rely on editorial right or privilege to avoid liability. (*See Texas Beef Group v. Winfrey*, 1999 Survey.)

The three points — necessity, fairness, and "editing is for editors" — should be stressed in opening, during examination of each witness who addresses program content, and in summation.

CAN WE KEEP DAMAGE UNDER CONTROL?

Perhaps the biggest stumper of all is how to limit the plaintiff's damage recovery to reasonable proportions and limit compensatory damages to losses that were actually caused by the statements for which liability is found. Plaintiffs frequently claim, and juries are all too willing to award, compensation for everything that did not go as hoped for in the plaintiff's life after the publication. Trial themes such as "the plaintiff's losses were his own doing and were caused by his own conduct, not the defendant's reporting" or "the plaintiff is unwilling to accept responsibility for his own role in what has happened in his life and seeks to blame the defendant's article instead of getting on with it" have worked, but only when the defendant is in good shape on F1-3.

Effective strategies for dealing with causation and damage issues are even more difficult when liability is seriously in issue, and the trial is not bifurcated between liability and damages, because the defendant is reluctant to focus too much attention on damage issues. As many of the surveyed verdicts show, ignoring the damage issues can be very risky. The chances of winning with the jury are usually less than chances of success on appeal, and a verdict substantially in excess of insurance coverage means that the defendant must incur significant expenses and tie up major assets to obtain a supersedeas bond, not to mention risk a ruinous loss if the appeal is unsuccessful. In cases in which damage exposure is high, the defendant can no longer afford to pass on damages.

Damages present at least two separate problems, each of which could be the subject of a day-long clinic and is beyond the scope of this article. The first is proportionality. The defendant must find a way of keeping non-economic items of damage, including reputation injury, pain and suffering, and even punitive damages, within sensible ranges. This is commonly done through the art of suggestion, such as by analogies to physical injuries, the average person's annual salary, or other benchmarks from the real world that come in manageable proportions.

The second problem is limiting recovery, particularly for economic injuries for which there is no generally accepted profile that serves as a real-world proportional limitation (as demonstrated by *Pennzoil*'s $7.5 billion compensatory damage verdict), to losses that were actually and provably caused by the particular statements for which liability is found. The causation problem is most critical and pesky when damages are likely caused by other factors such as industry and market conditions, other publicity concerning the same or other conduct, and truthful portions of the publication in issue. Some help from the court in exclusion of evidence and charging the jury (*e.g.*, "the plaintiff is permitted to recover only those losses which you find the plaintiff would not have experienced had the defendant's headline contained the word 'rodents' instead of the word 'rats'") is useful, if not essential.

For some additional strategies, *see* Kelley & Zansberg, "Why Courts Should Require Plaintiffs Claiming Losses to Prove that Falsity Caused Them," 15 COMMUNICATIONS LAWYER, (Fall 1997).

CONCLUSION

At the close of the millennium, the Defense Counsel Section of the LDRC has never been more vital. Under the masterful leadership of Sandra ("Tom Sawyer") Baron, our numerous committees are busy whitewashing not just the "fence of actual malice," but also every other edifice and artifice being thrown up by the fermenting plaintiffs' bar. After 1992, the only trial over media content that resulted in a "megaverdict" was *MMAR v. Dow Jones*, but that has since vaporized. Do I detect smugness anew? I think not. In the relatively short life of the DCS, we seem to have learned that some things will never change.

The lodestar that emerges from my jury trial surveys is that we must learn to purge our trial themes of internal tensions, and distill them to their simple and durable best. In making those important pretrial judgments, we need to remember that jurors sympathize with individuals who are subject to adverse publicity, and they tend to have high expectations of the media, particularly for avoiding injury to people. Increasing attention should be paid to the identity and character of the defendant and its journalism and differentiating it from the ubiquitous and widely despised "the media," for whom profit is perceived as the only motive. But the simplest and most important lesson of trial strategy to be gleaned from our generation of experience is the honesty piece, the need to "play it straight." Whatever newsgathering and reporting has resulted in the jury trial, we only make it worse by attempting to spin it in ways that jurors find disingenuous. The old homily, "truth is the best defense" is as true before a jury as it is in the original publication giving rise to the claim. A trial theme has to be very candid and internally consistent to survive the scrutiny of these folks.