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ANNUAL DINNER
WEDNESDAY, NOVEMBER 8, 2017

Trump and the Press:

A Conversation with Former Presidential Press Secretaries

Ari Fleischer
White House Press Secretary for President George W. Bush

Joe Lockhart
White House Press Secretary for President Bill Clinton

Dana Perino
White House Press Secretary for President George W. Bush

and

Mark McKinnon
Co-Executive Producer,
"**THE CIRCUS: INSIDE THE GREATEST POLITICAL SHOW ON EARTH**"
A Showtime television documentary about the 2016 presidential campaign

Moderated by:
Katy Tur
Anchor, MSNBC Live

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Grand Hyatt New York
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Business Attire

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MLRC
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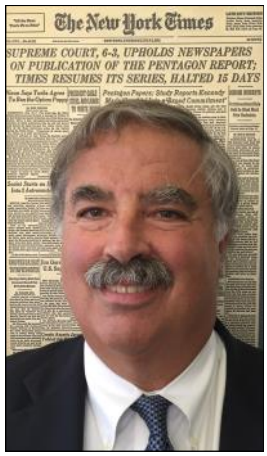
From the Executive Director's Desk

London Conference a Great Success

Event Climaxes with Max Mosley Privacy Debate

The MLRC's London Conference was terrific. The only question was whether that was due to the great programme and events which Dave Heller put together, or our host city of London, which was bustling and lovely and clearly energized and excited our attendees. The answer, of course, was both, but when you add to the mix 235 media lawyers – half from America and half from Europe (plus a few Aussies) – collegially talking about their kids, media issues and what play they saw the previous night, you have a pretty wonderful five days.



George Freeman

As an example, within hours of landing at Heathrow, I was with a group of attendees at the London Olympic Stadium watching the favoured Tottenham Hotspurs nip West Ham United 3-2. A few hours later, I was with other delegates at a crowded pub having hearty English fare (without much flavour) while watching another English Premier League game. And then in a theatre in the teeming West End, a stirring, if somewhat outdated, performance of Tennessee Williams' "Cat on a Hot Tin Roof," starring Sienna Miller.

Sunday we went to a champagne brunch at Mark Stephens' Howard Kennedy firm; then a ferry ride down the Thames to an outdoor get-together on a beautiful sunny day at London's oldest wine bar; and after an MLRC Board meeting, a great reception at Bloomberg's swank and colorful offices.

Monday, the working part of the Conference began at the classically appointed Law Society. The keynote panel did not disappoint. It featured an extremely eloquent and thoughtful discussion about how the media covered – and mis-covered – the rise of of Brexit and Trump and how the media should respond to both the mantra and explosion of "fake news". Making the session even more timely were the results of the German elections just the night before. The speakers were commentator and The Atlantic veteran James Fallows, Bloomberg Editor-in-Chief John Micklethwait and Australian defamation list Judge Judith Gibson. It was a truly erudite conversation

A hearty group of delegates attended a Tottenham v. West Ham football game at the London Olympic Stadium.

(Continued on page 7)

MLRC Executive Director George Freeman moderating a vetting session and questioning Clara Steinitz (Paris) amidst a throng of attendees at the Law Society.

Randy Shapiro questioning experts on Eastern European press freedoms. From left: Laura Zelenko, Bloomberg; Anna Otkina, DLA Piper (Moscow); Dalma Dojcsak, Hungarian Civil Liberties Union; and Andrey Rikhter (Vienna).

(Continued from page 6)

calling on historical, sociological, even biblical references and got the conference started at an extremely high level.

It was followed by a very relevant session on the American Espionage Act and the British Official Secrets Act. It was interesting to see how the issues in interpreting the two acts were surprisingly similar, though, at the same time, one factor, the British ability to get injunctions, is so different from U.S. law and culture. The session went on to discuss one of my favorite subjects – the defenses to a potential Espionage Act prosecution against a journalist – a subject I wrote about in this column a few months ago. And it concluded with discussion about Secure Drops, which many media now use.

After a tasty lunch, we were back at it in the afternoon. Randy Shapiro led a group of Eastern European lawyers and experts through a somewhat depressing discussion of the state of free expression in those countries – though there were some surprising bright spots of victories in getting access to government documents and resisting requests to compel reporters to give up confidential information. As the child of Hungarian parents, I was particularly taken by Dalma Dojcsák of the Hungarian Civil Liberties Union (imagine such an oxymoronic organization in that now authoritarian country) who, when asked what keeps her up at night, said the feeling of most of her neighbors and fellow-citizens that she is an enemy of the state for trying to establish some modicum of free expression in her country.

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Last minute preparations for the privacy debate. Left to right: Liz McNamara, Bob Latham, Fraser Campbell, Max Mosley and Judge Judith Gibson

(Continued from page 7)

To end the working sessions on the first day, European Court of Human Rights Judge Ganna Yudkivska of the Ukraine spoke about the growth of privacy rights from matters of sexuality and truly sensitive information to data about careers and professional life, and how the ECHR balances that right with freedom of expression. Discussion among the delegates ensued in this area where differences between the U.S. and Europe are rather oceanic.

Our attendees strolled down Fleet Street towards Trafalgar Square where Hiscox sponsored a wonderful reception at the National Gallery which overlooks Nelson's Column in the Square. In addition to fine food and drink (champagne and white wine were served, but to ensure no defacing of the artwork, no red wine was allowed – go figure), guided tours were given of the Impressionist rooms. It was quite a day.

Tuesday's session began with a talk by High Court Justice Mark Warby, responsible for most defamation and privacy claims, and a former media lawyer, giving a summary of the state of the law in England and the effect of legislative and procedural reforms over the last few years. A panel of British and Irish libel practitioners then discussed the latest trends and developments.

Right of Publicity panel run by Peter Rienecker, HBO, and Razwana Akram, Simons Muirhead & Burton, starring, not so subtly, Lindsay Lohan.

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I then led a vetting exercise highlighting the differences among U.S., U.K., French, German and Dutch law, by calling for an analysis of a hypothetical article by audience members from those countries. Confirming the tenet that fact is stranger than fiction, the hypo included a presidential candidate who doesn't sleep in the same bed as his wife; has a young mistress who is photographed leaving his apartment (mirroring a French case); candidates hurling unsubstantiated charges and countercharges against each other (should they be reported if reporters don't believe the charges?); an accusation that one candidate had "a face that could break a mirror"; the surprise arrival on a reporter's desk of a brown envelope containing the candidate's tax returns, and so on.

Impresario Dave Heller flanked by Judge Judith Gibson of Australia, left, and ECHR Judge Ganna Yudkivska of Ukraine

In the afternoon, a similar discussion was had regarding the vetting of docudramas and entertainment shows, including right of publicity issues. By the end of the session, American lawyers were arguing whether ROP was a property based theory to recompense for the producer's unjust enrichment or whether it was grounded in privacy principles.

Finally, the pièce de résistance: an Oxford-style debate about whether privacy law is out of control. The main protagonist was none other than the (in)famous Max Mosley, he who successfully sued The News of the World for its coverage of his encounter with five prostitutes in a German-themed (the paper called it Nazi-themed, leading to liability) sex party. Mosley began his argument with the proposition that a Justice going to the bathroom in the morning was a private matter and went on to argue for a very broad scope of the privacy right, while not discussing his night of fun and frolic. The American team of Liz McNamara and Bob Latham responded sharply, wisely not fighting the proposition about the justice's morning urination. Liz stressed that rich people who can afford litigation shouldn't be allowed to prosper by press coverage, but then write their own narrative by using privacy law to chill negative coverage. Bob cleverly invoked scenes of the O.J. Simpson trial to rail against the right to be forgotten. But the star of the show was Fraser Campbell, Mosley's debate partner and a former President of the Oxford Union debate society. To say he was witty, outlandish, brilliant and eloquent would understate his performance; he somehow utilized the possibility of nuclear armageddon to bolster his argument for privacy. Notwithstanding his droll and subtle performance, a subsequent audience vote deemed the Americans the winners.

Despite two days of hard work and partying, an overflow crowd of over 50 in-house lawyers showed up at the Guardian's offices Wednesday morning for a meeting about issues of special concern to in-housers. Gill Phillips led the discussion which was a great coda to the conference.

Federal Court Rejects Sarah Palin Libel Suit Against NY Times Over Editorial

By Jeremy Kutner

A New York federal judge has rebuffed a libel lawsuit brought by former Alaska Governor and television personality Sarah Palin against The New York Times, holding that Palin had failed to plausibly allege that The Times acted with actual malice in publishing an editorial. Palin v. New York Times. (Aug. 31, 2017).

Judge Jed Rakoff's decision is notable both for the unusual procedural posture in which it was decided – the court held an evidentiary hearing on a motion to dismiss – and its strong defense of constitutional protections for reporting on public affairs.

Background

On June 14, 2017, a man named James Hodkinson opened fire on members of Congress and current and former congressional aides on a baseball field in Virginia. Four people were shot, including Representative Steve Scalise, and Hodkinson was killed by police. The tragic incident instantly made national headlines, particularly after news emerged that the shots were directed at Republicans, and that Hodkinson professed to be an ardent supporter of Senator Bernie Sanders, a Democrat.

On the day of the shooting, The Times published an editorial that addressed the tragedy of the event itself, the lack of effective national gun control, and the heated nature of American political rhetoric both in 2017 and in the recent past. As the editorial itself noted, the shootings in Virginia were not the first time that American political figures had been victims of gun violence in recent years. In 2011, a gunman named Jared Lee Loughner shot nineteen people at a political event in Tucson. The violence left a federal judge and five other people dead, and wounded thirteen others, including Representative Gabrielle Giffords, Loughner's apparent target. That shooting also raised questions about whether there was a relationship between political rhetoric and gun violence directed at public officials. At the time, those questions were fueled by the fact that a political action committee called SarahPAC (which supported Palin's political efforts) had earlier published a map that placed crosshairs over the congressional districts of certain Democrats, including Giffords. Following the Arizona shooting, that map, and its role in creating a toxic political climate, were the subject of substantial commentary, which even drew public responses from Palin herself.

Judge Jed Rakoff's decision is notable for the unusual procedural posture in which it was decided – the court held an evidentiary hearing on a motion to dismiss.

The editorial, titled "America's Lethal Politics," took note of this earlier episode in two passages that became the focal point of the litigation:

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> Was this attack evidence of how vicious American politics has become? Probably. In 2011, when Jared Lee Loughner opened fire in a supermarket parking lot, grievously wounding Representative Gabby Giffords and killing six people, including a 9-year-old girl, the link to political incitement was clear. Before the shooting, Sarah Palin's political action committee circulated a map of targeted electoral districts that put Ms. Giffords and 19 other Democrats under stylized cross hairs.
>
> Conservatives and right-wing media were quick on Wednesday to demand forceful condemnation of hate speech and crimes by anti-Trump liberals. They're right. Though there's no sign of incitement as direct as in the Giffords attack, liberals should of course hold themselves to the same standard of decency that they ask of the right.

The editorial also contained – embedded in the word "circulated" in this passage – a hyperlink to a series of articles published by ABC News about the Arizona shooting.

Soon after the editorial was published, readers began posting on social media that, while SarahPAC had indeed published the map, later investigations and evaluations of Loughner had not yielded evidence that he had ever seen the map or that it had influenced his behavior. This point was also made in a story published later that same evening in The Times's news section, as well as in one of the hyperlinked ABC News stories.

The Times issues a correction on its Twitter feed

The next morning, The Times published a series of corrections, which included eliminating the language referencing a "direct" link between the map and the Giffords shooting and clarifying that the map had placed crosshairs over a graphic depicting Rep. Giffords's district, and not over an image of Rep. Giffords herself. The Times also published an apology on social media, saying "We're sorry about this and we appreciate that our readers called us on the mistake."

The Litigation

Less than two weeks after the editorial was published, Palin filed a defamation lawsuit in the United States District Court for the Southern District of New York, seeking damages for injury

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to her reputation, punitive damages and disgorgement of The Times's profits attributable to the editorial.

Palin claimed that the editorial defamed her by asserting that she had incited the Giffords shooting. In support of her claims that The Times published the challenged statements with actual malice, Palin's Complaint alleged that (1) at the time of the editorial's publication, The Times was aware of other reporting in its own archives, in its contemporaneous coverage of the Virginia shooting, and in the hyperlinked ABC stories, stating that there was no evidence that Loughner was inspired by the map, (2) The Times was motivated to publish false and defamatory statements about Palin in order to drive readership and because it disagreed with her political views, (3) The Times had violated its own ethical guidelines, which admonished its staff, among other things, to publish accurate information, and (4) The Times failed adequately to retract the editorial or to apologize to Palin personally.

The Times moved to dismiss Palin's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, making four arguments. First, The Times argued that the challenged passages were not "of and concerning" Palin because responsibility for the map's publication was attributed to Palin's PAC, and not to Palin herself. Second, The Times contended that the alleged defamation – that the map had caused Loughner to shoot Rep. Giffords – was not capable of being proven true or false because, as construed by Palin, it was about Loughner's internal (and unprovable) motivations. Third, The Times asserted that Palin had failed plausibly to allege that The Times knew that the meaning she attributed to the challenged statements was false or probably false. Finally, The Times argued that Palin was not, in any event, entitled to recover disgorgement of profits as damages in a defamation action.

Palin claimed that the editorial defamed her by asserting that she had incited the Giffords shooting.

After briefing was completed and oral argument held, Judge Rakoff took the unusual step of *sua sponte* ordering an evidentiary hearing, explaining that such a hearing was necessary "to help inform the Court of what inferences are reasonable or unreasonable" in the context of determining whether Palin had or could plausibly allege actual malice. Less than a week later, The Times's Editorial Page Editor, James Bennet, testified in a public hearing, where he was questioned extensively by lawyers for both parties and by the Court.

Bennet testified that he wrote the challenged passages of the editorial and that, when he did so, he did not know whether Loughner had seen the map or had been influenced by it. Rather, he testified that his intention was to communicate a different meaning – i.e., that the "direct" link of which he wrote was between the map and Rep. Giffords, not between the map and Loughner, and that the map, in his view, contributed generally to an atmosphere of "political incitement," not specifically to Loughner's conduct. Moreover, Bennet testified that, when he wrote the editorial, he did not consult prior news coverage discussing the controversy surrounding the map (in The Times's archives or otherwise) and that he did not read the hyperlinked ABC news reports, which he said had been inserted by a colleague in a previous draft of the editorial. On cross-examination, Palin's counsel established that Bennet's brother is

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a Democrat and a member of the U.S. Senate, who had, among other things, supported political candidates who had run against those endorsed by Palin.

The Decision

Judge Rakoff's began his decision with the following observation: "Nowhere is political journalism so free, so robust, or perhaps so rowdy as in the United States. In the exercise of that freedom, mistakes will be made, some of which will be hurtful to others." Nevertheless, he continued, "if political journalism is to achieve its constitutionally endorsed role of challenging the powerful, legal redress by a public figure must be limited to those cases where the public figure has a plausible factual basis for complaining that the mistake was made maliciously." In this case, Judge Rakoff's introduction concluded, Palin had "fail[ed] to make that showing."

As this introductory passage suggests, the Court was not persuaded by The Times's arguments that the editorial was not "of and concerning" Palin or that the offending statements were not capable of being true or false, rendering the issue of whether the Complaint had plausibly alleged actual malice dispositive. And, because he ruled in The Times's favor on that issue, Judge Rakoff did not address whether Palin would otherwise have been entitled to secure the disgorgement of profits as an element of her damages.

"Nowhere is political journalism so free, so robust, or perhaps so rowdy as in the United States. In the exercise of that freedom, mistakes will be made, some of which will be hurtful to others."

In adjudicating the actual malice issue, Judge Rakoff adhered to the Second Circuit's mandate in *Biro v. Conde Nast*, 807 F.3d 541 (2d Cir. 2015), and to the lessons of the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), that a complaint's allegations of actual malice must be "plausible" to survive a motion to dismiss. Accordingly, his opinion examined each of Palin's purported bases for such a finding and found them lacking.

Before he did so, however, Judge Rakoff paused to address why he had – without objection from the parties – decided to hold an evidentiary hearing before adjudicating the motion. On its face, the Court explained, the Complaint failed to state a plausible claim that The Times had published the challenged statements with actual malice because, among other things, "it failed to identify any individual at the Times who allegedly acted with actual malice, positing instead a kind of collective knowledge unrecognized by the law in this area." Thus, although Judge Rakoff said he "might have dismissed the complaint on such grounds," he concluded that the Court "could not carry out its prescribed role in ascertaining whether the numerous allegations in the complaint to the effect that 'the Times' knew this, or intended that, could, when taken most favorably to the plaintiff, be attributed to a specific individual or individuals without the Court knowing a modicum of factual background."

Thus, as Judge Rakoff explained it, the evidentiary hearing was designed "to ascertain who was (or were) the author(s) of the offending statements and other basic facts that would provide

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the context for assessing the plausibility or implausibility of the complaint's allegations." In that regard, the Court stressed that, in adjudicating the motion, it has refrained from making credibility determinations based on Bennet's testimony and had instead relied only on the complaint's allegations supplemented by those "background facts" that were either "undisputed" or "where disputed, [were] taken most favorably to the plaintiff."

At the outset of his analysis of the "plausibility" of Palin's allegations of actual malice, Judge Rakoff identified the following undisputed facts:

> To put the matter simply, Bennet – as the undisputed testimony shows – wrote the putatively offending passages of the editorial over a period of a few hours and published it very soon thereafter. Shortly after that, his mistakes in linking the SarahPAC Map to the Loughner shooting were called to his attention, and he immediately corrected the errors, not only in the editorial itself but also by publishing corrections both electronically and in print. Such behavior is much more plausibly consistent with making an unintended mistake and then correcting it than with acting with actual malice.

The Court dismissed the case with prejudice, holding that even if Palin included all of the facts elicited in the evidentiary hearing in an amended complaint, her claim would still fail.

He then proceeded to assess whether any of the Complaint's allegations, even when supplemented by facts adduced at the evidentiary hearing, could plausibly lead to a different conclusion. In so doing, he concluded that both Palin's reliance on The Times's purported political or economic motives and its alleged failure to follow its own journalistic guidelines had been rejected by the Supreme Court as sufficient to support a finding of actual malice and did not survive a "plausibility" analysis in any event. In that regard, the Court specifically rejected Palin's contentions regarding the partisan affiliations of Bennet's brother, asserting that "[i]f such political opposition counted as evidence of actual malice, the protections imposed by [*New York Times Co. v.*] *Sullivan* and its progeny would swiftly become a nullity."

In addition, Judge Rakoff rejected Palin's contention that Bennet's failure to review prior news coverage of the Arizona shooting amounted to a "purposeful avoidance" of the truth sufficient to demonstrate actual malice. As the Court explained, "it is well established that supposed research failures do not constitute clear and convincing evidence of actual malice, even of the 'reckless' kind." In the last analysis, Judge Rakoff concluded, "each and every item of alleged support for plaintiff's claim of actual malice consists either of gross supposition or of evidence so weak that, even together, these items cannot support the high degree of particularized proof that must be provided before plaintiff can be said to have adequately alleged clear and convincing evidence of actual malice."

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Finally, the Court dismissed the case with prejudice, holding that even if Palin included all of the facts elicited in the evidentiary hearing in an amended complaint, her claim would still fail. As Judge Rakoff explained:

> We come back to the basics. What we have here is an editorial, written and rewritten rapidly in order to voice an opinion on an immediate event of importance, in which are included a few factual inaccuracies somewhat pertaining to Mrs. Palin that are very rapidly corrected. Negligence this may be; but defamation of a public figure it plainly is not.

In the wake of the Court's decision, Palin has indicated her intention to file a motion for reconsideration.

Jeremy Kutner is an associate at Levine Sullivan Koch & Schulz, LLP which, along with The Times's in-house counsel David McCraw and Ian MacDougall, and Tom Leatherbury of Vinson & Elkins, represents the defendant. The plaintiff is represented by Kenneth G. Turkel and Shane B. Vogt of Bajo Cuva Cohen Turkel and S. Preston Ricardo of Gollenback Eisman Assor Bell & Peskoe LLP.

California Court Holds Transgender Misidentification Is Not Facially Defamatory

Richard Simmons Loses SLAPP Motion Against Publications

By Cydney Swofford Freeman

In what appears to be a case of first impression, a California trial court has held that misidentifying a person as transgender is not defamatory on its face. Simmons v. American Media Inc., et al., No. BC 660633 (Cal. Super. Sept. 1, 2017) (Keosian, J.).

Fitness guru Richard Simmons removed himself from the public eye in early 2014, without explanation. His sudden and unexplained absence spurred widespread discussion, including a chart-topping podcast, "Missing Richard Simmons." In June 2016, the National Enquirer and Radar Online published articles reporting that Simmons' "self-imposed exile" was due to an ongoing gender transition. The stories included an interview with a former Simmons employee, and photographs of Simmons dressed as a woman.

In May 2017, Simmons sued American Media, Inc. (which owns the National Enquirer and Radar Online); AMI's CEO, David Pecker; Editor Dylan Howard; and the Coleman-Rayner photo agency and one of its employees. The suit alleged four counts of libel, and a claim for false light invasion of privacy. In his complaint, Simmons alleged that he "has been an avid supporter of the LGBTQ community for his entire life," but he claimed that identifying him as transgender was actionable because he "has a legal right to insist that he not be portrayed as someone he is not" and "to be portrayed in a manner that is truthful."

Defendants filed a SLAPP motion arguing that under California law and the First Amendment, falsity alone is not sufficient to make out a defamation claim. To be actionable, the claim must also be defamatory. Moreover, under California law, because Simmons failed to plead any special damages, he only could state a claim if the publications at issue were defamatory on their face.

Defendants urged that under California law, it is not facially or per se defamatory to misidentify someone as transgender, because doing so does not impute anything inherently shameful or odious. Among other authorities, the argument cited to recent case law holding that false imputations of homosexuality are no longer considered defamatory per se. *See, e.g., Greenly v. Sara Lee Corp.*, 2008 WL 1925230, at *8 & n.15 (E.D. Cal. Apr. 30, 2008); *Yonaty v. Mincolla*, 97 A.D.3d 141, 144, 945 N.Y.S.2d 774 (N.Y. App. Div. 2012). The motion also analogized to developments in case law universally repudiating former authority that, in some jurisdictions, held that falsely describing someone's race could be defamatory. *See, e.g., Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 553 (Ga. App. 1989) ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). Finally, the motion argued that Simmons could not state a separate claim for false light

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invasion of privacy, relying on California cases holding that false light claims based on allegedly defamatory statements must meet the same burdens as defamation claims.

In response, Simmons argued that a false statement that someone is transgender, on its face, subjects the person to harm and condemnation. Despite increasing acceptance of LGTBQ rights, Simmons argued that widespread prejudice against transgender people persists, which is sufficient to find the imputation is defamatory as a matter of law. Simmons also argued that if his libel claims failed, he still should be permitted to proceed with his false light claim.

In an order entered September 1, 2017, Los Angeles Superior Court Judge Gregory Keosian held that under California law, a libel claim cannot survive (absent special damages) unless the statement at issue has a "natural tendency to injure" the plaintiff's reputation. Noting that this is a matter of first impression, the Court agreed with defendants that misidentifying someone as transgender is not defamatory on its face.

The Court likened the case to libel claims based on misidentification of other immutable characteristics such as race, sexual orientation, legitimacy, or certain medical conditions – statements that at one time may have been found to be defamatory per se, but which no longer are. The Court noted that even if transgender individuals may be "held in contempt by a portion of the population," it refused to "validate those prejudices by legally recognizing them," and concluded that being misidentified as transgender does not expose one to "hatred, contempt, ridicule, or obloquy," cause them "to be shunned or avoided," or have "a tendency to injure [a person] in [their] occupation." Judge Keosian found that "a reasonable person would not be 'highly offended' by a misidentification of belonging to what is, in California, a protected class."

Noting that this is a matter of first impression, the Court agreed with defendants that misidentifying someone as transgender is not defamatory on its face.

The Court also dismissed Simmons' false light claim, holding that it was "essentially superfluous" because it was based on the same facts as Simmons' libel claims. The decision rests on a solid line of California case law denying add-on false light claims and treating them as substantively equivalent to defamation claims when they are based on the alleged falsity of a publication.

The Court's order dismissed Simmons' entire case, and held that Defendants are entitled to recover their attorneys' fees under the SLAPP statute, Cal. Code Civ. Proc. § 425.16. Simmons' attorneys have publicly announced they intend to appeal.

Defendants American Media, Inc., Radar Online, David Pecker and Dylan Howard are represented by Kelli L. Sager, Eric M. Stahl, and Cydney Swofford Freeman of Davis Wright Tremaine LLP; Richard B. Kendall and Joshua W. Sussman of Kendall Brill & Kelly LLP; and Cameron Stracher of American Media, Inc. Jean-Paul Jassy and Kevin L. Vick of Jassy Vick Carolan LLP represent defendant Coleman-Rayner and an individual defendant. Plaintiff Richard Simmons is represented by Neville L. Johnson, Douglas L. Johnson, Jennifer J. McGrath, and Aviel Dahan of Johnson & Johnson LLP.

Mississippi Appellate Court Reinstates Defense Verdict for Blogger

Failure to File Appeal Brief Not a "Confession of Error"

The Mississippi Court of Appeals reinstated a defense verdict in favor of a blogger who was sued by a municipal clerk for defamation. *Griffith v. Wall,* No. 2016 CA 01131 (Miss. App. Aug. 29, 2017). The case has an unusual procedural background. The blogger had won a trial verdict in county court, but he failed to file a brief on appeal. The circuit court treated defendant's failure to file a brief as a "confession of error" and granted judgment to plaintiff.

The Court of Appeals reversed, ruling that the circuit court should have disregarded defendant's failure to file a brief because there was a "sound and unmistakable basis" to affirm the defense verdict.

Background

The plaintiff, Merlene Wall, was the municipal clerk of Lumberton, a small town in south Mississippi. Defendant Jonathan Griffith runs the "Lumberton Informer" – a blog covering local news and events. Wall sued Griffith over several critical blog posts and related anonymous third-party comments. The county court apparently entered a temporary injunction against defendant barring him from defaming plaintiff during the pendency of the trial.

However, following a trial, the county court rendered a verdict in favor of the blogger. The court held that plaintiff was a public figure and that defendant's statements were protected opinion and/or made without actual malice. The court also found that defendant was not responsible for the anonymous comments.

Plaintiff appealed to the circuit court, raising a new (and erroneous) argument that defendant was responsible for the anonymous comments under the CDA. Defendant did not file a brief in opposition and the circuit court granted judgment to plaintiff.

Court of Appeal Decision

The Court of Appeals noted that failure to file a brief can be treated as a confession of error "when the record is complicated or voluminous, and the appellant has presented an apparent case of error." However, failure to file a brief is not always fatal to an appellee. The court can disregard failure to file a brief and affirm judgment in "situations where there is a sound and unmistakable basis upon which the judgment may be safely affirmed."

Here the judgment could be affirmed because plaintiff failed to prove falsity or actual malice. Moreover, her argument on appeal that defendant was liable for third-party comments had no basis in law. "In reaching this end, it is not our intent to condone a litigant's failure to file a brief. Nor do we encourage future litigants to approach the appellate process in a careless manner; for when a litigant does so, he does so at his own peril. Yet we find that in this specific case, with these specific facts, a case of error was not made."

Defamation Suit By 9/11 Scammer Dismissed

By Matthew Leish

The latest attempt by a convicted 9/11 scammer to sue the Daily News has been dismissed on res judicata grounds. Kendall v. Cuomo, 2017 WL 4124342 (S.D.N.Y. September 15, 2017).

Cyril Kendall – who bills himself as "the World's Most Unique Man" in his pleadings – was convicted in 2003 of defrauding several charities by falsely claiming that his nonexistent son "Wilfred" had been killed in the September 11 attacks.

Eight years later, on October 3, 2011, the Daily News published an article entitled "Good Riddance! Worst 9/11 scammer to be freed after 8 yrs. in jail, get boot from U.S." Kendall promptly sued for defamation in state court, claiming that the article was false because he supposedly had never actually been convicted due to an error in the indictment number in a filing by the prosecution – an argument that two judges had previously labeled "delusional" in the context of his criminal proceedings and appeals.

Kendall's state court complaint contended (among other things) that the Daily News had published the article for the purpose of causing corrections officers to retaliate against him, and that he was in fact retaliated against by corrections officers and other prison staff.

On August 17, 2012, Justice Anil Singh dismissed the state court complaint in a scathing opinion which noted that Kendall "has a history of filing frivolous motions" and that his claims are "unfailingly without merit." *Kendall v. Hutchinson*, No. 100245/12 (Sup. Ct. N.Y. Co. August 17, 2002).

Undeterred, Kendall then sued the Daily News in the Southern District of New York over the same article. Instead of asserting claims for defamation, this time Kendall asserted civil rights claims and other vaguely pled causes of action, the gist of which was that the Daily News article was a "deadly and dangerous weapon" created by the Daily News for the purpose of having Kendall killed by corrections officers. He sought $773 million in damages – somewhat less than the $7 billion he sought in his state court action. Kendall also brought claims against various state officials and corrections officers.

Judge Carter noted that under governing New York law, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy."

Motion to Dismiss

The Daily News moved to dismissed on res judicata and other grounds. After a delay of several years caused by Kendall's health problems, briefing was finally completed in early 2017. On September 15, 2017, Judge Andrew Carter granted the Daily News' motion to

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dismiss. Judge Carter noted that under governing New York law, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Kendall v. Cuomo, 2017 WL 4124342 at *2, quoting Giannone v. York Tape & Label, Inc., 548 F.3d 191, 194 (2d Cir. 2008).

Judge Carter found that Kendall's claims, like his claims in the prior state court action, were based on the October 3, 2011 Daily News article and contained the same allegations that the Daily News published the article with the intention that the non-Daily News defendants would retaliate against him. The only difference was that Kendall alleged defamation in the state court action and civil rights violations in the new lawsuit. Since "the only change is not the facts but the theory," 2017 WL 4124342 at *3, Judge Carter found that Kendall's claims were barred by res judicata.

If Kendall decides to sue again, he will need to do so from Guyana, where he was apparently deported in June.

Matthew Leish is Deputy General Counsel for Daily News, L.P. He represented the Daily News defendants. The plaintiff represented himself pro se.

New Hampshire Court Dismisses Libel Suit for Lack of Personal Jurisdiction

Court Rebuffs Plaintiff's Effort to Take Advantage of Three Year Statute of Limitation

An Arizona brokerage firm failed to establish that an online business journal with offices In New York, California, and Washington DC had the minimum contacts with New Hampshire to be sued there for defamation. Scottsdale Capital Advisors Corp. and John Hurry v. The Deal, LLC and William Meagher, No. 16-cv-545 (D.N.H. Sept. 8, 2017).

At issue in the case are three articles published in the online subscription business journal *The Deal Pipeline* about a federal investigation into plaintiff's trading of stock in Biozoom Inc. Among other things, the articles stated that individuals who traded in Biozoom stock through Scottsdale "enjoyed perks that were not available to other Scottsdale clients" and that "several red flags were raised regarding the Biozoom trades at Scottsdale," but that "no follow-up occurred at the broker-dealer."

Scottsdale Capital and one of its executive officers sued in New Hampshire federal district court for libel and related privacy claims, alleging it was not under any investigation by the FBI at the time of publication and that it did not give special treatment to Biozoom shareholders.

None of the parties had any connection to New Hampshire. Indeed, plaintiffs conceded at oral argument that they sued in New Hampshire because its statute of limitations would not time-bar their claims.

The court allowed plaintiff to take discovery on jurisdiction. This showed there was only one subscriber in the state, Dartmouth University, and none of the university's registered users had viewed the articles at issue. The court rejected plaintiff's argument that the subscription contract with Dartmouth constituted an ongoing business relationship in New Hampshire sufficient to exercise personal jurisdiction. "Absent any viewing of the allegedly libelous statements in New Hampshire, the plaintiffs' reputations in New Hampshire cannot have been blemished by the articles' publication," the court held.

The court also held that plaintiffs failed to establish purposeful availment. The circulation of the allegedly-defamatory articles in New Hampshire was negligible and defendants had no other purposeful contact with New Hampshire.

Applying First Circuit precedent, the court also conducted a "reasonableness" test looking at (1) the defendant's burden of appearing in the forum state, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies.

None of these factors weighed in plaintiffs' favor. In fact, plaintiffs did not respond to defendants' argument that this litigation was brought strategically to coerce defendants to reveal the identity of their confidential source to bolster plaintiffs position in unrelated litigation.

Plaintiffs are represented by Charles Harder, Harder Mirell & Abrams, Beverly Hills, CA. Defendants are represented by Elizabeth McNamara and John Browning, Davis Wright Tremaine, New York.

Federal Court in Texas Denies Motion to Compel The Dallas Morning News to Disclose Anonymous Web Commenters

By Paul C. Watler and James C. McFall

A motion to compel *The Dallas Morning News* to unmask anonymous posters to an online article was denied by the U.S. District Court for the Eastern District of Texas.

In Diamond Consortium Inc. v. Brian Manookian, No. 4:17-MC-13, slip op. at 3–8 (E.D. Tex. Aug. 3, 2017), the court clarified the applicable standard for district courts in the Fifth Circuit tasked with determining whether to issue a subpoena that seeks to identify an anonymous internet user who is not a party to the underlying litigation. *Id.* at 3.

Background

The Diamond Consortium, Inc. d/b/a the Diamond Doctor is a Dallas-based diamond retailer owned by David Blank. *See Diamond Consortium, Inc. v. Hammervold*, No. 4:17-cv-452, 2017 WL 2834683, at *1 (E.D. Tex. June 30, 2017). In late-2015, a series of advertisements, fliers, billboards, and online posts and videos accused the Diamond Doctor and Blank ("Plaintiffs") of fraudulently selling diamonds at inflated prices.

The court clarified the applicable standard for district courts in the Fifth Circuit tasked with determining whether to issue a subpoena that seeks to identify an anonymous internet user who is not a party to the underlying litigation.

After learning of the posts and advertisements, plaintiffs filed suit against three attorneys and their respective law firms ("Defendants"), alleging that they fraudulently created and published the posts and advertisements as part of an extortion scheme. *Id.* Specifically, plaintiffs maintained that Defendant Brian Manookian, a Nashville, TN, attorney and associated defendants threatened the Diamond Doctor "with several diamond over-grading lawsuits" unless plaintiffs paid defendants a monthly retainer for ten years to the tune of three million dollars. *Id.* In response, Manookian filed a counterclaim, alleging that Blank published "false and disparaging remarks" on the Diamond Doctor's website. *Diamond Consortium*, slip op. at 1.

In May 2016, *The News* published an article on its website (and later in print) detailing the dispute. See Cheryl Hall, What's behind those Facebook posts, highway billboards slamming Dallas' Diamond Doctor? Users of *The News*' website then made posts in the comments section of the online article. Some of those commenters posted anonymously under screen names.

Defendants - assuming that the anonymous commenters were either Plaintiffs or actors posting at Plaintiffs' behest - served *The News* with a subpoena seeking the production of documents and information identifying the anonymous commenters. *The News* objected to Defendants' subpoena, arguing, among other things, that the defendants had not made the

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showing required to overcome the commenters' First Amendment right to speak anonymously. Defendants then filed a motion seeking to compel *The News'* compliance with the subpoena.

Magistrate Judge Christine A. Nowak, applying the four-factor test set forth in *Doe v. 2TheMart.com*, denied Defendants' motion. *Id.* at 1–3 Defendants objected to the ruling, arguing that the magistrate used the proper standard but erred in its application.

Analysis

The Eastern District was tasked with determining whether the magistrate's application of the *2TheMart.com* test was "clearly erroneous or contrary to law." The court adopted the *2TheMart.com* test as "the appropriate standard to apply" for determining whether to issue a subpoena that seeks to identify "an anonymous [i]nternet user who is *not a party to the underlying litigation*." *Id.* at 3 (emphasis added). Previously, the issue had been addressed in the Fifth Circuit only in the context of an anonymous internet user's identity being necessary to identify a potential party to the case. The Eastern District's ruling added clarity for the standard to be applied when litigants seek the identity of anonymous commenters who are not a party to the underlying lawsuit.

The *2TheMart.com* test considers whether: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose; (2) the information sought relates to a core claim or defense; (3) the identifying information is directly and materially relevant to that claim or defense; and (4) the information needed for establishing or disproving that claim or defense is unavailable from any other source. *Diamond Consortium*, slip op. at 3 (citing *2TheMart.com*, 140 F. Supp. 2d at 1095). Defendants argued that the magistrate erred in the application of the second, third, and fourth factors. Defendants contended that the commenters' identities would show that plaintiffs acted with unclean hands, which *might* prevent them from receiving an injunction and support defendants' civil conspiracy claim. The Court disagreed.

As to the second factor, "[o]nly when the identifying information is needed to advance core claims or defenses can it be sufficiently material to compromise First Amendment rights." *Id.* (quoting *2TheMart.com*, 140 F. Supp. 2d at 1096). The court explained, "Defendants' core counterclaim [was] defamation, not civil conspiracy." Yet the counterclaim failed to name any anonymous commenter as a party to the suit or otherwise allege that plaintiffs were responsible for defamatory comments on *The News'* website. What's more, the court continued, Defendants' unclean hands defense related to just one of plaintiffs' 11 claims in the underlying suit and therefore did "not go to the heart of the matter." On that basis, the court concluded that the commenters' identifying information was unnecessary to advance Defendants' core counterclaims or defenses.

With respect to the third factor, the court found: "When First Amendment rights are at stake," the threshold for relevancy is higher than in general discovery disputes — "[o]nly when the information sought is directly and materially relevant to a core claim or defense can the need for the information outweigh the First Amendment right to speak anonymously." And even assuming that Defendants' unclean hands defense and civil conspiracy counterclaim were

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core matters, the anonymous commenters' identities were not materially relevant because Defendants had already cited evidence in support of those positions. The commenters' identifying information was cumulative of evidence already in the record and therefore unnecessary for the litigation to proceed.

Finally, the court considered whether defendants could obtain the commenters' identities from another source. Defendants claimed they could not because the other potential sources were not likely to divulge the commenters' identities. The court was not persuaded by this argument. As the court explained, requests "to reveal commenters' identities on the basis that they *might* be unable to get the information from another source" are insufficient to overcome the commenters' First Amendment rights. (emphasis added).

Ultimately, the court concluded that the magistrate did not clearly err in applying the *2TheMart.com* test and overruled defendants' objections to the order denying their motion to compel. In so doing, the court joined a majority of federal district courts that apply the *2TheMart.com* test to subpoenas seeking the identity of anonymous internet users who are not parties to the underlying lawsuits.

The Dallas Morning News, Inc. was represented by its long-time outside counsel, Paul C. Watler, a partner with Jackson Walker LLP, along with Jackson Walker associate James C. McFall. Defendants-movants were represented by Chris Schwegmann and Andrés Correa of Lynn Pinker Cox & Hurst, LLP.

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Lachaux, Seriously Limiting Serious Harm

By Nicola Cain

On September 12, the Court of Appeal handed down judgment in Lachaux v AOL (UK), Independent Print Ltd & Evening Standard Ltd [2017] EWCA Civ 1334, the first time it has considered the meaning and application of the serious harm threshold in the Defamation Act 2013.

The Court ruled that rather than a wholesale reform of the law, the serious harm threshold represents a mere revision of the principle established in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) that in order to be defamatory a statement must surpass a threshold of seriousness, being a tendency to cause substantial harm. The Defamation Act 2013 therefore only requires there to be a tendency for the publication to cause serious harm and has not abolished the presumption of damage.

An application for permission to appeal to the Supreme Court has been lodged on behalf of Independent Print Limited and Evening Standard Limited, but not yet determined.

Facts

The case of Lachaux concerned separate actions in respect of publications in 2014 by the Huffington Post, the Independent and the Evening Standard which, variously, suggested that Lachaux was guilty of domestic violence and abuse, child abduction, fabricating false allegations against his former partner and manipulating the Emirati legal system to unjustifiably deprive his former partner of access to their child. The Claimant attributed the publications to a campaign against him by his former partner. The Huffington Post removed its article and published an apology a number of months later, when it received the Claimant's complaint.

The readership of the two Huffington Post articles was around 4,800 and between 154,000 and 232,000 for the print copies of the Independent articles, with 5,655 unique visitors online, and between 523,000 and 785,000 for the print copy of i. The Evening Standard's readership figures were between 1.67 million and 2.5 million for the print edition and 1,955 unique online visitors.

First Instance Decision

At first instance, trial was directed of the preliminary issue of whether the publications had caused or were likely to cause serious harm to the Claimant's reputation, as well as in relation to the meaning of the publications and, in relation to the Huffington Post, whether the proceedings were an abuse of process.

Warby J held that s1(1) required a claimant to prove on the balance of probabilities that a statement had caused or was likely to cause serious harm, thus displacing the principle that libel was actionable without proof of damage. In making its determination the court could have

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regard not only to the meaning of the statement and the harmful tendency of that meaning, but also to all relevant circumstances including any evidence of what in fact happened.

Warby J considered that while an inference of serious harm might be drawn, that may not be justified by the evidence and where an issue of whether serious harm had been or was likely to be caused was raised it would usually be preferable to deal with that as a preliminary issue.

The obiter view was expressed that, by contrast with the view of Mr Justice Bean in *Cooke v MGN*, the time at which the threshold must be surmounted was at the time when serious harm is determined rather than when the claim was issued.

Applying those principles, all but the second Huffington Post article were held to pass the serious harm threshold.

Appeal

The Defendants appealed against the findings that all but one of the articles complained of passed the serious harm threshold, leading the Claimant to argue that Warby J had failed to properly interpret and apply s1(1).

Giving the judgment of the court, Davis LJ dismissed as being undesirable the reliance upon comments by Ministers in evidencing the intentions of Parliament in enacting section 1(1). He concluded that the words "likely to cause" in section 1(1) should not be understood as requiring a claimant to prove that it was more likely than not that serious harm would be caused, but rather that the words connote a "tendency" to cause serious harm.

He rejected Warby J's finding that the presumption of damage had been abolished, which he considered was not clearly intended by Parliament, but did find that a raised threshold of harm was nevertheless compatible with the presumption of damage. He considered that the point at which harm to reputation occurs would ordinarily be at the point of publication.

In relation to the need to prove serious harm, Davis LJ held that a preliminary hearing would not usually be necessary and it would be more appropriate, and indeed fairer to a claimant, for the issue to be resolved at trial. He determined that courts should be slow to direct a preliminary issue involving substantial evidence.

Alternatively, if it was not appropriate to be left to trial, it might be speedily dealt with at the same time as an application for determination of meaning, whereby if it were determined that a publication conveys a serious defamatory imputation then an inference of serious reputational harm "ordinarily can and should be drawn", whereas a meaning that did not convey a serious defamatory imputation would leave the claim vulnerable to being struck out – but this would not be inevitable. Davis LJ indicated that he would not limit the drawing of an inference of serious harm merely in cases where allegations of terrorism or paedophilia were alleged.

Use of the Jameel abuse jurisdiction or the summary judgment procedure under Part 24 were suggested as the preferred routes for defendants to deal with the issue of serious harm, with the example being given of this being appropriate where there was irrefutable evidence of very limited publication, no grapevine percolation and firm evidence that no one thought less of the claimant by reason of the publication.

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Davis LJ endorsed the view of Judge Moloney QC in *Theedom v Nourish Training Ltd* that the presentation of evidence as to serious harm would be of little assistance and would potentially duplicate arguments as to quantum, which would be best left to trial. He considered that avoiding a proliferation of pre-trial hearings would save costs and discourage heavy-handed conduct by "well-resourced defendants" and would be in accordance with the overriding objective.

The principles were drawn together at paragraph 82 as follows:

> *(1) Section 1(1) of the 2013 Act has the effect of giving statutory status to Thornton, albeit also raising the threshold from one of substantiality to one of seriousness: no less, no more but equally no more, no less. Thornton has thus itself been superseded by statute.*
>
> *(2) The common law presumption as to damage in cases of libel, the common law principle that the cause of action accrues on the date of publication, the established position as to limitation and the common law objective single meaning rule are all unaffected by s.1 (1).*
>
> *(3) If there is an issue as to meaning (or any related issue as to reference) that can be resolved at a meaning hearing, applying the usual objective approach in the usual way. If there is a further issue as to serious harm, then there may be cases where such issue can also appropriately be dealt with at the meaning hearing. If the meaning so assessed is evaluated as seriously defamatory it will ordinarily then be proper to draw an inference of serious reputational harm. Once that threshold is reached further evidence will then be likely to be more relevant to quantum and any continuing dispute should ordinarily be left to trial.*
>
> *(4) Courts should ordinarily be slow to direct a preliminary issue, involving substantial evidence, on a dispute as to whether serious reputational harm has been caused or is likely to be caused by the published statement.*
>
> *(5) A defendant disputing the existence of serious harm may in an appropriate case, if the circumstances so warrant, issue a Part 24 summary judgment application or issue a Jameel application: the Jameel jurisdiction continuing to be available after the 2013 Act as before (albeit in reality likely only relatively rarely to be appropriately used).*
>
> *(6) All interlocutory process in such cases should be sought to be managed in a way that is proportionate and cost-effective and actively promotes the overriding objective.*
>
> *(7) Finally, it may be that in some respects the position with regard to bodies trading for profit, under s.1(2), will be different. I say nothing about that subsection which clearly is designed to operate in a way rather different from s.1(1).*

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As a consequence, the Court held that an inference of serious reputational harm arose and, also having regard to the significant readership of the publications and the Defendants' status as influential and reputable publishers, the appeal was dismissed.

Comment

This is a disappointing and regressive judgment for defendants, which contrasts with the indications given by Parliament as to how they envisaged the new section would protect defendants by reforming and strengthening the law and enabling weak claims to be disposed of at an early stage.

In practice, the decision gives little guidance on the circumstances in which an inference of serious harm might be drawn and therefore less serious imputations and/or cases involving Chase Level 2 and 3 meanings may well still result in preliminary issues being directed, whether in conjunction with a determination of meaning or on a standalone basis, albeit that such hearings and the evidence required for them may be curtailed.

The finding that serious harm occurs at the point of publication may limit the potential impact of the publication of a prompt apology, particularly in relation to cases bearing the most serious imputations and therefore defendants may have to fall back upon the offer of amends regime.

Pending the outcome of the application for permission to appeal, this long-awaited judgment will cause further uncertainty for parties and may lead to issues of serious harm being left for trial, thus leading to further resources being expended on unmeritorious claims.

Nicola Cain is a Legal Director at RPC specializing in media and data protection compliance, regulation, enforcement and disputes.

MLRC London Conference 2017

Privacy and the Press in the Digital Age: The Right to Know vs. The Right to be Forgotten

By Judge Ganna Yudkivska, ECtHR

Ladies and Gentlemen,

It's a great pleasure and privilege to address today the top media lawyers from all over the world.

I was asked to tackle the Court's approach to the right to privacy, as protected by Article 8 of the Convention, in particular in the digital age – a topical and speedily developing issue.

As technology develops, and the online world takes over the real world, our increasing online presence is becoming a defining feature of XXI century, with new challenges frequently emerging. Yet, against this backdrop, there is still no real consensus on what the right to privacy embraces. Warren and Brandeis famously defined it as "the right to be let alone".[1] The South African Constitutional Court defined privacy as 'the right of a person to live his or her life as he or she pleases', and the Canadian Supreme Court has defined it as 'the narrow sphere of personal autonomy within which inherently private choices are made'."[2]

More recently, a concept of the "right to be forgotten", which is at the heart of our discussion today, emerged in EU law as an understandable reaction to the all-pervading penetration of modern technologies into our private lives.

The Strasbourg Court has adopted a very generous understanding of the notion of private life and correspondence, thus inevitably increasing the range of actions that might constitute interference on the one hand, and expected positive actions by the State on the other. Article 8 of the Convention was originally understood as a classic negative right, guaranteeing protection from unlawful and arbitrary State's interference with one's private and family life, home and correspondence. It has developed nowadays into an unlimited source of a number of positive and negative obligations, deriving from what is understood to be covered by the concept of "private life".

Obviously, Article 8 covers multiple aspects of a person's physical and social identity, including gender identification, sexual orientation, information about a person's health, ethnic identity and elements relating to a person's right to their image. This provision also covers a wide range of interests – environmental protection[3], career issues[4], access to artificial insemination facilities[5], change of identity documents following sex change[6], ability to obtain drugs enabling one to commit suicide[7], the choice of name for a child[8], the choice of place of

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birth[9], the possibility of obtaining recognition of nationality to the extent it might affect one's identity[10], and many other "aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world"[11].

It is also important to stress that the concept of "private life" under the Convention is much wider than the American concept of a "reasonable expectation of privacy"; although the latter notion was used in the Court's case-law, most recently in GC case of *Barbulescu v. Romania* [12]. This case concerned the applicant's dismissal following a monitoring of his electronic messaging mainly via Yahoo messenger account, which the applicant had been instructed to create to communicate with customers. It was established that he used the company's Internet for personal purposes during working hours in breach of internal regulations. The Court left open a question if the applicant had a reasonable expectation of privacy given clear instructions by the employer to refrain from any personal activities in the workplace, because "these instructions could not reduce private social life in the workplace to zero".

Another example is the case of *Khmel v. Russia*[13], where the applicant, a Member of the Parliament, was filmed at a public place - a police station - being apprehended in a drunken state and behaving aggressively toward police officers. He complained that he had been filmed illegally and that the video footage had been sent to a regional television station. The Court found a violation of Article 8.

I should now say a few words about the right to reputation, as it is at the heart of the majority of defamation cases you are dealing with, and subsequently the ECtHR's balancing of Articles 8 and 10.

As you know, the European Convention is rooted in the Universal Declaration. Article 8 of the Convention has its basis in Article 12 UDHR: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation.' It has been reported that the drafters of the Universal Declaration discussed heavily the inclusion of the protection of honour and reputation, since it's primarily focus is on horizontal relationships and attacks by or through the media.

The fathers of the Convention focused on vertical relationships only and did not include the protection of reputation as a subjective right under the right to privacy. Instead, they transferred it to paragraph 2 of Article 10 ECHR as one of the grounds on which states may legitimately limit the right to freedom of expression and the freedom of the press [14].

The clear stance that there is no protected right to reputation was followed by the Court in its early case law on Article 8. Yet in 2000, in the case of *Marlow v. the UK*[15], where the applicant complained that the judgments of the domestic courts contained defamatory observations in breach of Article 8, the Court held "that the applicant's complaint relates to a

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perceived affront to his dignity and reputation caused by statements… This is not a matter which falls within the protection guaranteed by Article 8 of the Convention".

However, the approach was changed in 2007 in the case of *Pfeifer v. Austria*[16], where the applicant complained against the acquittal in defamation proceedings of an author who allegedly published a defamatory letter against him. The Court held that a person's reputation, even if that person was criticised in the context of a public debate, formed part of his or her personal identity and psychological integrity and therefore also fell within the scope of his or her "private life". The same considerations must also apply to personal honour. Still, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life.[17]

For example, in *Soro v Estonia*[18], information about the applicant's previous employment as a KGB driver was published in the paper and Internet versions of the State Gazette. The Court held that published information concerned the applicant's past and affected his reputation and so constituted an interference with his right to respect for private life.

Although Geoffrey Robertson, who is here today, called the inclusion of the right to reputation into right to privacy contrarily to the original intentions of the drafters of the Convention "intellectually devious reading of the Convention", the right to "reputation" is now a part of the concept of private life, as protected by Article 8. Moreover, even "the reputation of a deceased member of a person's family may affect that person's private life and identity, and thus come within the scope of Article 8"[19], which clearly makes media reporting on past events even more vulnerable and susceptible to numerous defamation claims.

I will now come to the main topic of today's upcoming discussion – the "right to be forgotten".

We all remember George Orwell's "who controls the past controls the future". In the Digital Age, it appears that there are no second chances. An individual does not have the opportunity to escape his or her past. For example, in many other jurisdictions, certain convictions are considered spent after a period of time and thus no longer have to be declared on employment applications etc. This gives the individual the opportunity to be genuinely rehabilitated and to start over with a clean slate. Not so nowadays, where an employer or any other interested person can run a Google search and locate a newspaper article from many years ago.

The "right to be forgotten" was prominently recognised by the Court of Justice of the European Union in the famous *Google Spain* case. I assume you all know the case better than I do, so I can only mention that this judgment contains no reference to the Strasbourg Court's case-law and apparently provides for a different balancing exercise.

While the CJEU accepted that a 'fair balance' must be struck between the rights to data protection and privacy on the one hand and the interest of the general public in having access to

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the information on the other,[20] the Court also held that "as a rule" the privacy and data protection rights should prevail.[21]

For the ECtHR, the right to freedom of expression applies not only to the content of information, but also to the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information.'[22] Thus, for example, if certain online platforms are told not to show certain web pages on search results, this can amount to an interference with Article 10. Firstly, it can interfere with the publisher's ability to impart information and secondly it can interfere with the public's ability to receive information. The "right to be forgotten" might thus become a serious threat to free online speech in the coming years, unless a delicate balancing exercise is performed on a case by case basis to determine which right will be given greater weight.

The ECtHR's balancing exercise is well-known - in a number of cases, starting with the leading *Von Hannover* judgment and repeated in many cases, most recently, in *Satamedia v Finland,'* the Court has provided a list of factors to be taken into account:

(i) contribution to a debate of general interest;

(ii) how well-known is the person concerned and what is the subject of the report;

(iii) prior conduct of the person concerned;

(iv) method of obtaining the information and its veracity;

(v) content, form and consequences of the publication; and

(vi) severity of the sanction imposed [on the party claiming an interference with freedom of expression].[23]

As you see, this balancing exercise is not easily reconcilable with the *Google Spain* judgment, according to which the rights to privacy and data protection "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name."[24] It is also noteworthy that the CJEU referred to accessing information as an "interest" rather than as a fundamental right. At the same time, according to the ECtHR's findings in its landmark judgment of *Magyar Helsinki Bizottság v. Hungary,* a right of access to information may arise in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right[25].

It is clear that the ECtHR does not prioritise the "right to be forgotten" without due consideration of the potential wider impact on freedom of expression. While it is true that the

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Internet poses new risks to data protection and privacy, this does not justify any downgrading of the fundamental right to freedom of expression.

There are several recent cases where the Court engaged with the issues raised by the "right to be forgotten".

In *Wegrzynowski and Smolczewski v Poland*[26] the applicants won a defamation case against journalists over an article in a newspaper negatively describing them. The domestic courts ordered the newspaper to publish an apology. However, when the applicants requested that the same article be removed from the newspaper's website, the domestic courts dismissed their claim, considering that this would amount "to censorship and the rewriting of history".

The Strasbourg Court found that the judgment declaring the impugned article to be in breach of the applicants' rights, had not created a legitimate expectation that the article would be removed from the newspaper's website. Also, it agreed with the domestic courts that it was not their role to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found defamatory by final judicial decisions. In such a situation, a comment on the article's webpage informing the public of the outcome of the defamation proceedings might be sufficient.

In *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*[27], the *Times* published two articles on someone presented as a "Russian mafia boss". These articles were posted on the Times website simultaneously with their publication in the paper newspaper. The person concerned brought two libel cases – the first one concerning the articles themselves, and the second one – a year later – concerning their continuing Internet publication. Only following the second claim, the newspaper added a notice to the Internet archives announcing that both articles were subject to libel litigation and were not to be reproduced or relied on. The applicant newspaper argued that only the first publication of an article posted on the Internet could give rise to a defamation claim and not any subsequent downloads by Internet readers. However, the domestic courts held that a new cause of action occurred every time the defamatory material was accessed. The Strasbourg Court considered that the requirement to publish an appropriate disclaimer to an article contained in an Internet archive constituted a proportionate interference with the right to freedom of expression.

The most recent case on this issue, *Fürst-Pfeifer v. Austria*[28], concerned a publication about the applicant - a psychological expert for court proceedings - stating that she suffered from psychological problems based on a psychological expert report about her from 1993. The domestic courts dismissed her claim – although the passages about her mental state in the article affected her private life, the content of the article was true, and the publication was directly linked to her public function as a court-appointed expert.

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The Strasbourg Court agreed with its domestic counterparts. Remarkably, although the case was examined under Article 8, the Court stressed importance of Article 10:

"…It is (Article 10) which has been specifically designed by the drafters of the Convention to provide guidance concerning freedom of speech – also a core issue in the present application. Paragraph 2 of Article 10 recognises that freedom of speech may be restricted in order to protect reputation. In other words, the Convention itself announces that restrictions on freedom of expression are to be determined within the framework of Article 10 enshrining freedom of speech".

To conclude, nobody desires that people be stigmatised indefinitely for their past indiscretions. In this respect, increasing the individual's control over personal data is a welcome move. However, we must be cautious that when faced with new challenges we do not overreact and trample upon other fundamental rights.

The Court's recent jurisprudence suggests that it will stick to its well-developed and carefully nuanced assessment, weighing the equally important rights against each other. And this Court recognises that the more sophisticated modern technologies become, enlarging the State's capacity to obtain, process and store private communications, the greater the need for adequate legal safeguards securing respect for human rights.

Notes

[1] Dorothy J. Glancy. The Invention of the Right to Privacy// Arizona Law Review, v.21, n.1, pp.1-39 (1979), p.1.

[2] Toby Mendel, Andrew Puddephatt, Ben Wagner, Dixie Hawtin, Natalia Torres. Global Survey on Internet Privacy and Freedom of Expression. UNESCO series on internet freedom. 144 p. (2012), p.50.

[3] See, among many others, *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C.

[4] See among many others *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, ECHR 2004-VIII.

[5] *Dickson v. the United Kingdom* [GC], no. 44362/04, ECHR 2007-V.

[6] *Hämäläinen v. Finland* [GC], no. 37359/09, ECHR 2014.

[7] *Gross v. Switzerland*, no. 67810/10, 14 May 2013.

[8] *Guillot v. France*, no. 22500/93, 24 October 1996.

[9] *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, ECHR 2016.

[10] *Mennesson v. France*, no. 65192/116, 26 June 2014.

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[11] See *Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007.

[12] *Bărbulescu v. Romania* [GC], no. 61496/08, 5 September 2017.

[13] *Khmel v. Russia,* no. 20383/04, 12 December 2013.

[14] B. van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"', Utrecht Journal of International and European Law, 2015-80, p. 25-50.

[15] *Marlow v. the United Kingdom*, (dec.) no. 42015/98, 5 December 2000.

[16] *Pfeifer v. Austria,* no. 12556/03, 15 November 2007.

[17] See *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII.

[18] *Sõro v. Estonia*, no. 22588/08, 3 September 2015.

[19] *Putistin v. Ukraine*, no. 16882/03, § 33, 21 November 2013.

[20] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* Case C-131/12 (13 May 2014) at [81].

[21] Ibid at [99].

[22] *Autronic AG v Switzerland* , no. 12726/87, § 47, 22 May 1990.

[23] *Von Hannover v. Germany (no. 2)* judgment ([GC], nos. 40660/08 and 60641/08, § 108, ECHR 2012, and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 62, 27 June 2017.

[24] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* Case C-131/12 (13 May 2014) at [99].

[25] *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 156, ECHR 2016

[26] *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 57, 16 July 2013.

[27] *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* (nos. 3002/03 and 23676/03, ECHR 2009.

[28] *Fürst-Pfeifer v. Austria*, nos. 33677/10 and 52340/10, 17 May 2016.

10 Questions to a Media Lawyer: Laura Handman

Laura Handman is a partner at Davis Wright Tremaine, dividing her time between the New York and Washington D.C. Offices and is co-chair of the firm's Appellate Practice.

If you'd like to participate in this monthly series, let us know: medialaw@medialaw.org.

1. How'd you get into media law? What was your first job?

I trace the roots of my interest in media law to several people. First and foremost my mother who, had she been born 30 years later, probably would have been a media lawyer. Instead, she focused her career on fighting censorship. For example, when a school in Tucson wouldn't allow a teacher to put on the Pulitzer Prize-winning play "The Shadow Box," then fired the teacher, my mother had Christopher Reeve perform a reading of the play in Tucson.

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My father, still with us at 95, has also been an inspiration. He has been in the theater my whole life, putting on new American plays, and teaching acting – he still teaches four nights a week. He got me thinking about the power of language. People ask me why I didn't become an actor. That's easy: I don't have the talent. But when you're in a court room, you're in a role and I think my father's training has rubbed off in that regard.

Another inspiration is Victor Kovner, who I've known since I was 16 and who has been my law partner for 30 years. He remains my guiding light.

My first job in media law was in 1983. I had left the U.S. Attorney's office in the Eastern District of New York and joined Coudert Brothers in New York. In those early years, I represented 60 Minutes and went to a maximum-security prison in Florida where the allegation was that guards had used a prisoner as part of a "Goon Squad." And I represented Geraldo Rivera in a suit brought by the then head of the U.S. Marshals Service for a report that protected witnesses had been killed or committed suicide because of problems in the Service. From then on, I was hooked on media law.

2. What do you like most about your job? What do you like least?

What I like least is easy: billing.

I love every other part of the job. Litigation is my adrenaline, but I also love pre-publication review. Our clients include everything from Pew Charitable Trust to the Atlantic to the New York Post. Each is a different genre, and each has a different risk level, a different brand, a different style of writing, and different subject matter. I love the array. It's always interesting and challenging.

3. What's the biggest blunder you've committed on the job?

I'd had a nice victory in New York's highest court in *Finger v. Omni*, a right of publicity case over an illustration for an article on how caffeine-injected sperm performed better in in-vitro fertilization. Omni used a picture of the large Finger family to illustrate. The family took issue, saying "We're all naturally born; we don't even drink coffee!" We won. The court deferred to editorial judgment, that the photo was illustrative and reasonably related to a newsworthy story.

With that victory in hand, I felt we were in a good position for another right of publicity case in a mid-level New York appellate court, *Nieves v. HBO*. The case involved a television show called Family Bonds, which followed a family in the bail bondsman business. The episode in question showed the youngest member of the family on his first assignment. The cameras were in the truck, the guys were talking, and he was trying to be as macho as the others. A woman crossed their path in the street. He said something I won't repeat here about getting aroused, and they included those seconds in the show as illustrative of his first time out and the sort of back and forth banter of the family. I thought it was reasonably related and newsworthy. And

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although vulgar, I felt it was a compliment to her good looks. Wrong! The five male judges were extremely hostile and protective of her and they affirmed the denial of the motion to dismiss.

4. Highest court you've argued in or most high-profile case?

I haven't argued in the Supreme Court, but I appear often in the Circuits – this year in the D.C. Circuit we got a decision establishing that inadvertent misreading of a court document was not actual malice. I've been lucky to work on cases that have had real legal impact. For instance, I argued two cases, one in the D.C. Circuit and one in New York Supreme Court, which produced the first opinions in the U.S. to hold that British libel judgments were repugnant to our fundamental constitutional policy and should not be enforced.

Those two decisions ultimately set the table for the unanimous passage of the SPEECH Act in Congress, and that in turn led the British to adopt the Defamation Reform Act, which gets closer to having a fault standard. The Parliamentarians said they were shamed by what had happened in the U.S.

A more recent case was in the New York's First Department in 2014: *Stepanov v. Dow Jones*. The opinion laid out standards for libel by implication for the first time at the appellate level in New York. In that case, the judge wrote there had to be a "rigorous showing" on the face of the article that the implication was affirmatively intended or endorsed by the publication.

Handman on the cover of the New York Times Magazine in 1986.

Another case that had impact was again for Dow Jones. In 1989, the AMA had obtained an injunction that prohibited the federal government from releasing information about what doctors received as reimbursement from Medicare. We went back to the court, 34 years later, and got the injunction vacated over the AMA's objection. We then submitted a FOIA request and were able to convince HHS to release that data. That led to important stories about our health care system, which won the Wall Street Journal the 2015 Pulitzer Prize.

5. What's a surprising object in your office?

On my office wall are two covers of the New York Times Magazine. I was on the cover in 1986. I had just returned to work from having my daughter and I was approached by a reporter

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for a story on how the role of wives had changed. I have to say being just back from maternity leave was probably not the best time to be giving an interview on this subject, but I did. My picture was taken with my husband's hands on my shoulder with the title "The American Wife." It's ironic because I don't at all think of myself in any way, shape or form as a typical American wife.

Underneath it is another New York Times Magazine cover with a picture of my husband, Harold Ickes. The story is called "The President's Man and His Secrets," by Michael Lewis. Above my husband is a picture of his father, who had been Secretary of the Interior under Franklin D. Roosevelt.

Behind my desk is a poster from Animal Planet's hit series, Whale Wars. The show involved Sea Shepherd's efforts to intercept whaling in the Southern Ocean, sometimes by ramming Japanese boats. Sea Shepherd was eventually enjoined from approaching closer than 500 yards. We did the challenging pre-broadcast review of the show.

6. What's the first website you check in the morning?

I get three newspapers delivered that I read religiously – the New York Times, the Washington Post and the Wall Street Journal. I have read the New York Post's Page Six gossip column the night before for work. Online, I look at Law360 Media and Entertainment and Columbia Journalism Review's daily morning newsletter. And, of course, I am a devoted reader of the MLRC's daily clips.

7. It's almost a cliché for lawyers to tell those contemplating law school: "Don't go." What do you think?

When people want their kids to go to law school, they say "Go talk to Laura." I'm an enthusiastic lawyer. I love what I do and I love the people I do it with. I can't believe I'm paid to do it. It's incredibly fulfilling. The First Amendment is my passion. I tell them, "Find your passion."

8. One piece of advice for someone looking to get into media law?

The most necessary skill is to be a great brief writer because most of our cases are decided long before we get to trial. So wherever you learn that skill – even a law firm doing commercial litigation – it will serve you well.

You should also look for internship opportunities: at NPR or with the Reporters Committee or places where you'll at least get exposure to media lawyers. Prior journalism experience also sharpens your instincts. Beyond that, it is being at the right place at the right time.

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9. What issue keeps you up at night?

Leaks. I've represented a number of reporters in leak investigations. I don't have any reason to believe it's going to get any better. In fact, I'm fearful that it could get much worse, that reporters could be prosecuted for the first time under the Espionage Act for reporting on classified information that they receive.

10. What would you have done if you hadn't been a lawyer?

I sometimes think I could've been a hostess, like Elaine at Elaine's, a Manhattan cafe where artists, politicians and journalists would congregate. I would preside over the conversation.