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Journalistic Codes of Ethics: A Proposed Standard for Juries in Libel Trials

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JOURNALISTIC CODES OF ETHICS:

A PROPOSED STANDARD FOR JURIES IN LIBEL TRIALS

by

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ABSTRACT

Journalistic Codes of Ethics:

A Proposed Standard for Juries in Libel Trials

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The standard of judgment for determining fault in tort law as applied to libel is ambiguous. Juries are allowed to rule against media defendants by using a standard that does not consider professional journalistic practice. I argue that the determination of professional fault is beyond the understanding of a lay jury due to the unique professional practice of journalists. Juries find it far easier to empathize with private party plaintiffs than with media defendants. I abstract criteria from standards of conduct for the journalism profession and determine what the reasonable journalist might do in general practice. In conclusion, I offer suggestions for the implementation of these criteria as a solution to the current legal dilemma. (61 pages)

CHAPTER I

REVIEW OF LITERATURE

There has been a huge increase in libel litigation in the United States in the past few decades. The increasing cost of libel litigation to mass media defendants produces a chilling effect through self-censorship. Juries often rule against media defendants without considering professional practices unique to journalists. In order to determine whether a media defendant has been negligent, jurors must have a known standard of measurement for conventional journalistic practice. The mere fact that a plaintiff has taken offense to a publication is not sufficient means to determine libel. A professional negligence standard should be used so the questionable action of the defendant can be better understood by examining the common practice of others in the defendant's profession.

Members of the journalism profession have group norms which provide the basis for a process of understanding responsible behavior. These group norms are found in journalism ethics codes that are accepted by the profession.

The selective use of journalism ethics codes can be defined as a type of judicial reform. Reforms of this type deal with the mechanics of law that are already in

effect, and do not pose any First Amendment threat. Judicial reform also deals directly with the specific problem at hand by offering solutions that apply to the unique characteristics of libel litigation.

I believe the adoption of a restatement of standards from journalism ethics codes would provide an understanding of the professional practices unique to journalism.

The implementation of this approach would lead to a more equitable manner of determining liability in libel litigation.

Evolution of Libel

Libel grew from the English law of defamation with the rise of the printing press. It was different from the older law of slander (spoken defamation) in that a written statement is potentially more damaging than a spoken one (Nelson & Teeter, 1969).

> Libel is defamation by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words. (p. 46)

In the United States, libel suits were a matter to be decided in state courts for nearly two hundred years. Legal scholars have recognized the problematic nature of libel law for decades. The English law of defamation grew

in common law with little intervention from legislation and was not the product of any specific period of time. At the turn of the century (1904), Thomas M. Cooley wrote:

> Special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism from its doubts and difficulties, its meanings and grotesque anomalies. It is, as a whole, absurd in theory and very often mischievous in its practical operation. (as cited in Forer, 1987, p.48)

Prior to 1964, libel actions were based on strict liability, which is the practice of assuming that libel has occurred simply because a false and damaging statement has been published with no regard to whether or not the publisher of the statement acted in a negligent or malicious manner.

However, in 1964 the U.S. Supreme Court decided for the first time to consider the defendant's intentions, to decide where the burden of proof properly lies, and to determine whether all false statements are equally damaging. The court ruled in New York Times v. Sullivan (1964) that the plaintiff has the burden of proving falsity of statements, and that falsity alone is not enough to determine libel. Plaintiffs now have to show degrees of fault, a restriction that becomes more

stringent for plaintiffs who thrust themselves into the public eye or who do the public's business (Holsinger, 1987, p. 98-100).

Mass-media organizations are the primary defendants in the majority of libel cases. In a study that involved more than 700 cases over a span of ten years, approximately 70% of libel cases studied were found to involve members of the news media (Soloski, 1985, p.218).

Elements of Libel

Libel is defamation expressed in print. It is a publication in any form which is harmful to a person's reputation.

Black (1987) defines libel as

> a false and unprivileged publication in writing of defamatory material. A maliciously written or printed publication which tends to blacken a person's reputation or to expose him to public hatred, contempt, or ridicule, or to injure him in his business or profession. (p. 824)

For libel to occur, the five elements of libel must be present. Each of these elements is necessary, but none is sufficient alone.

Element 1: Defamation. The statement must be false and tend to be injurious to reputation. Please

note the use of the word 'reputation,' rather than 'character.' As Pember (1981) says, "Your character is what you are, your reputation is what people think you are. Reputation is what the law protects" (p.146).

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express. (Black, p.375).

Element 2: Identification. The party who successfully sues for libel must have been identified either directly or indirectly. A phrase such as "a highly placed official in local government with ties to the psychiatric profession" may seem innocent enough, but in a small town where there are only a few psychiatrists and one of them is on the city council, identification can easily occur.

Element 3: Communication. The statement must be published or broadcast. This criterion is easier to satisfy than it may seem. All that is required for communication is that one person other than the subject of the communication and the person who initially said or wrote the statement see or hear the statement. In cases

involving mass communication it is sometimes presupposed that communication occurs prior to publication because of the number of people who read the work or hear the broadcast prior to publication.

Element 4: Fault. A person or organization is at fault if the defamation is communicated through the negligence or malice of the publishing or broadcasting agent. A distinction between plaintiffs who are public officials or public figures is made in determining whether the communicator of defamation is at fault. A public official or private figure must show that the communicator acted with actual malice while private individuals need only show that the communicator acted in a way that was negligent. For the purposes of determining libel, anyone who is not a public official or public figure is considered a private individual. In the majority of cases, persons who are considered public figures are those who have assumed roles of importance in society.

> Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. (Overbeck, 1985, p.105)

Element 5: Proof of damage. Damage occurs if the plaintiff can show either that the communicator of defamation acted with actual malice or (if the plaintiff is a private individual) that actual damage occurred through defamation. Often actual damage is a technicality that is satisfied by testimony from the plaintiff. A public official, however, has a stronger burden of defamation, both malice and actual damage (Nelson & Teeter, 1969, p.107-109).

If a statement is provably true, then by definition it is not libel. Note the word 'provably.' "Quoting someone correctly is not enough. The important thing is to be able to satisfy a jury that the libelous statement is substantially correct" (French, Powell & Angione, 1984, p.259). It should be noted that truth is the ultimate defense against libel. Even if a defendant acts with actual malice in his writing, he cannot be successfully sued if he can prove the truth of his allegations.

A Chilling Effect

In spite of the clarity brought to libel decisions through the Supreme Court's rulings in New York Times v. Sullivan (1964), juries, judges, and journalists still find the elements of libel difficult to apply in specific cases.

The law of libel is confusing and does not allow for easy interpretation. This is due to the difficulty of balancing freedom of expression and the rights of the individual who has been defamed.

> [The law of libel] is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. (as cited in Forer, 1987, p.48)

Fear of possible libel actions affect the reporting strategies of newspapers and other publications. In a recent annual national conference of investigative reporters and editors, attorney Sam Klein, counsel for the Philadelphia Inquirer, said that libel has a chilling effect on the press: "There certainly is a chill... in the sense that people have to take second, third and fourth looks at stories" (as cited in Stein, 1987, p.10). Klein also noted that the libel chill is felt at newspapers by reporters, editors, publishers, and attorneys.

Media scholars have recognized the huge impact of libel litigation on the American press. Wissler cited the following problematic areas:

> failure of the courts to address the underlying causes or real issues involved in conflicts, the limited range of remedies that are available, high cost and delay, the courts' overriding

> concern with procedure, and the tendency of adversarial interventions to increase conflict between the parties. ...the average time for a case to be resolved is four years, and the average cost in attorney's fees for the defendant is $90,000. (as cited in Gersh, 1987, p.131)

Media attorney Henry R. Kaufman has addressed the problems of libel litigation and its high cost to media organizations.

> It is obvious that the threat of large awards, the costs of avoiding or appealing them, and the risk that larger awards will ultimately be upheld, has raised the ante across the board in American libel litigation, both in terms of the costs of defense and in terms of the value of the settlements --- either the 'nuisance value' of the meritless claims, or the real value of claims with serious potential for liability, however infrequent they may be. (1986, p. 547)

Many of the large institutions that are sued for libel have the resources to defend themselves. However, small newspapers and television stations do not have the advantage of qualified in-house legal council to handle such problems as they arise. Consequently, they are more vulnerable to legal attack than are the large news agencies. Many media professionals believe that if current trends of litigation continue, only large and wealthy press organizations who have the resources of

capital and insurance will not be discouraged by the threat of libel litigation.

Executive editor of the Philadelphia Inquirer, Eugene Roberts, said:

> It is the alternative voices--the ones without ample treasuries or insurance or sophisticated legal help -- that will be stilled : small newspapers, journals of opinion, private citizens, public interest groups, writers of letters to the editors. In short, individuals and small news organizations that do not have, or cannot afford, the protections of expensive legal help or of libel insurance -- which, of course is growing steadily more costly as libel and slander suits grow ever more numerous. (1985, p. 493)

This fear was confirmed in Green v. Alton Telegraph (1982). The newspaper was forced to file bankruptcy after being ordered to pay a $9.2 million judgment over notes from a story that was never published. The case was finally settled for a mere $1.4 million; the total circulation of the Telegraph at the time of the suit was 38,000.

The Supreme Court has ruled that falsity alone does not constitute libel (New York Times v. Sullivan, 1964; Gertz v. Robert Welch Inc., 1974). Yet juries continue to hand down multi-million dollar judgments without the requirement of fault having been satisfied.

There is good reason to conclude that little empathy exists for media defendants in libel cases. Jurors rule against defendants in over 83% of the libel cases that go to trial (Franklin, 1981, p.804). It is easy for jurors to conclude that a false and potentially damaging story printed in the local newspaper about themselves would certainly be offensive. Through their application of 'reasonableness' from the plaintiff's rather than the defendant's point of view, juries are saying that falsity is enough to impose fault on a media defendant. Jurors seem to gain a certain satisfaction from forcing media institutions to pay.

> A lot of people who make up juries don't like the news media. They think reporters are chronically careless with the facts and cavalier with people's reputations and private lives. Lately, many of these jurors have been expressing their resentment by awarding staggering amounts of damages to plaintiffs. (Sanford, 1981, p.1)

Jonathan Lubell, an attorney involved in libel litigation as council for various plaintiffs, said, "The public believes that the media generally look at themselves as answerable to nobody, and the public wants the media to be answerable ..." (as cited in Franklin, 1984, p.273).

Multi-million dollar awards are not uncommon. In Pring v. Penthouse Int'l Ltd. (1982) the jury awarded

$1.5 million in compensatory damages and $25 million in punitive damages for an alleged defamation which did not even name the plaintiff. A circuit court later set the award aside, but the case cost Penthouse over a million dollars in legal fees (Overbeck, 1985, p.77). In Burnett v. National Enquirer, Inc. (1984) a jury awarded the plaintiff $1.9 million for the defendant's libelous story which stated that Ms. Burnett was intoxicated in a restaurant. The Washington Post was ordered to pay over $2 million in compensatory and punitive damages in Tavoulareas v. Washington Post Co. (1982).

In addition to huge jury awards, legal fees can be staggering. The defense attorney for CBS in Westmoreland v. CBS (1985), in which General William Westmoreland sued CBS for $12 million noted that the combined legal fees for both sides of the case approached $10 million although the case was settled before it reached a jury (Boies, 1985, p.51).

Methods of Reform

Concerned legal and media scholars have suggested various types of reform in response to libel concerns. They have suggested operational reforms, legislative reforms, and judicial reformsOperational reforms are those which are suggested as methods that news organizations can use to avoid libel suits.

Cranberg (1985) suggests that media organizations should be willing to print corrections of false statements (p.223). Soloski (1985) offers persuasive evidence that a concentrated effort in a positive human relations campaign would be a major deterrent for the filing of libel cases (p.220). Spellman (1985) says that if all else fails, news organizations ought to have First Amendment insurance as a protection against bankruptcy (p.13-15).

In the area of legislative reform Forer (1987), in her book A Chilling Effect, draws on her experience as a lawyer and trial judge to propose a national libel statute based on the public's right to know to cure the ills of the present system (p. 342). By giving the public a constitutional 'right to know' Forer proposes that much of the current libel litigation can be removed from the courts through restructured libel defenses and clearly defined rights for both defendants and plaintiffs.

Operational reforms describe benefits that would undoubtedly help media organizations relate better to their readers and story subjects. However, suits will still be filed. Legislative reforms posit some persuasive arguments, but First Amendment concerns regarding the freedom of the press provide major stumbling blocks in the paths of these proposals.

Judicial reform deals with the mechanics of law that are already in place, therefore not posing any First Amendment threat. Judicial reform also deals directly with the problem by offering solutions that apply to the specific litigation of libel cases.

Franklin (1984) and Simon (1984) suggest that the determination of fault is a major problem with current libel law. They state that juries have a tendency to find media defendants at fault without having properly considered the standard by which fault should be determined. They advocate a standard of professional rather than common negligence be used to determine fault for media defendants.

I continue in this course by looking to journalistic group norms to provide a process for understanding responsible behavior. These group norms are already shared by those working as journalists producing the news for mass markets. They provide a much needed procedure by which jurors can determine the nuances of journalistic behavior.

CHAPTER II

COMMON V. PROFESSIONAL NEGLIGENCE

The reasonable person standard[1] is ambiguous for both the juror and the scholar. When first confronted with the phrase 'reasonable person' a juror might ask "To what would the reasonable person take offense?" This is the view of the plaintiff. Determining to what the reasonable person would take offense helps the jurors determine defamation and damage. The second way to apply the reasonable person standard is to ask "What care would the reasonable person take in a given circumstance ?" This is the view of the defendant and used by the juror in determining fault. Here I will focus on the reasonable person standard as applied to the defendant.

The 'reasonable person' is described in (Restatement, 1979, Second, Torts, Section 283)

> The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not identified with any real person; and in particular he is not to be identified with members of the jury, individually or collectively. It is therefore error to instruct the jury that the conduct of a reasonable man is to be determined

[1]Please note that this chapter contains a extensive discussion of a 'reasonable person' standard. This standard is referred to as both 'reasonable person' and 'reasonable man' through the literature. In interest of nonsexist scholarship, 'person' rather than 'man' will be used.

> by what they would themselves have done. (p.13)

Journalists are held to a standard of judgment through common negligence. Libel suits are treated as general tort actions. A tort is a civil act and not a criminal act. Tort and criminal actions appear to be the same in many aspects; however, the burden of proof and determination of damages are different. In a tort action the party who has sustained an injury is designated as the plaintiff and the person charged with committing the tort becomes the defendant. The plaintiff is entitled to money as compensation for the injury.

> A tort describes a person's act (or their failure to act), when there is no right or privilege to do so, and such act (or failure to act) injures the person, property or reputation of another, either directly or indirectly. It is a civil wrong (e.g., a breach of duty) and not a contract violation e.g., (a breach of contract). (Webb, 1981, p.1)

The standard of judgment for determining liability in tort law is the reasonable person standard. The reasonable person standard has its roots in common law and is a broad category for determining whether a person was negligent in their behavior. The Restatement of Torts (1979) notes:

> The words "reasonable man" denote a person exercising those qualities of attention,

> knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others.

The standard of the reasonable man recognizes that negligence is not congruent with

> a standard of conduct demanded by the community for the protection of others against reasonable risk. The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. (Section 283, p.12)

Many states have adopted a common negligence standard (Restatement, Second, Torts Section 580B). Also see Schrottman v. Barnicle (1982) and Kohn v. West Hawaii Today, Inc. (1982). An example of this standard can be seen in Memphis Publishing Co. v. Nichols (1978). The court stated that

> an ordinary negligence standard is applicable in libel actions by private individuals against media defendants.
>
> In determining whether a media defendant is liable to a private individual for defamation, the conduct of the media is to be measured against what a reasonably prudent person would or would not have done under the same or similar circumstances. (p.413)

If the reasonable person standard is used, it is only applicable to cases where jurors need no special skills or understanding to determine fault. However, a professional negligence standard is applicable if questionable action of the defendant can be better understood by looking at the common practice of others in the defendant's profession.

In order to accurately determine whether a journalist has been negligent in his behavior, a juror must be able to articulate what a journalist who was not negligent would have done. One cannot measure something unless there is some known standard of measurement with which to compare it. The mere fact that a plaintiff has taken offense to something that has been published is not sufficient means to determine libel. We must have a standard.

By way of analogy, if a man took his wife to the hospital for routine surgery having been assured no problems were anticipated, he would certainly take offense if his wife died during the operation. However, a jury would not be qualified to judge that the surgeon had been negligent based solely upon the resources provided by their lay experiences. There is no definite standard to be found in the law that enables a court to determine what is reasonable and prudent in every circumstance.

The following quotation is taken from a set of federal jury instructions. It illustrates the fact that a reasonable person standard, formulated for use in physical torts, has very limited applicability in a libel dispute.

> The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined.
>
> What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. [author emphasis] (Devitt, Blackmar & Wolff, 1987, p.137)

It is the duty of the court to note the special circumstances and events of each case and to make its determinations on the particular facts of the case before it. If the facts of the case are such that there is room for disagreement as to the existence of negligence, the matter should be brought before a jury.

The Supreme Court did not intend that a common standard of negligence be applied to libel, as was made clear in judicial opinion expressed in Gertz v. Robert Welch, Inc. (1974). Anderson (as cited in Franklin, 1984 p.260) offered his opinion about the type of negligence mentioned in Gertz:

> Few would deny that negligence in the physical torts represents a very flexible mechanism for obtaining the judgment of both judge and jury on a specific fact situation. But negligence under Gertz serves an entirely different purpose--the preservation of a minimum area of "breathing space" for the press--which it attempts to accomplish by freeing publishers and broadcasters from liability for innocent misstatements.

Anderson also noted that past experience with common law negligence has shown that a standard of reasonable care would not provide protection from unwarranted liability for the media, and therefore would not eliminate unnecessary self-censorship.

Res Ipsa Loquitur

A legal doctrine comes into play at this point which specifically explains the tendency of juries to impose liability simply because a thing was published. This doctrine is known as res ipsa loquitur

> The thing speaks for itself. ... res ipsa loquitur is rule of evidence whereby negligence of the alleged wrongdoer may be inferred from mere fact that accident happened provided character of accident and circumstances attending it lead reasonably to belief that in absence of negligence it would not have occurred and that thing which caused injury is shown to have been under management and control of alleged wrongdoer. (Black, 1987, p.1173)

Res ipsa loquitur is of great concern for media defendants. Devitt, et al. (1987) offered the following council for judges instructing juries.

> In ordinary cases, the mere fact that an accident happens does not furnish evidence that it was caused by any person's negligence, and the plaintiff must point to some negligent act or omission on the part of the defendant (p.143).

The Restatement of the Law (1979) also recognized the danger of res ipsa loquitur for media defendants.

> The court should be cautious in permitting the doctrine of res ipsa loquitur to take the case to the jury and permit the jury, on the basis of its own lay inferences, to decide that the defendant must have been negligent because it published a false and defamatory communication. This could produce a form of strict liability de facto and thus circumvent the constitutional requirement of fault. (Section 580 B, p.228)

If jurors are allowed to decide that libel exists without appeal to negligence, the Constitutional rights of the defendants are ignored. This judgment was articulated in Gertz v. Robert Welch, Inc. (1974).

> We hold that, so long as they do not impose liability without fault, [author emphasis] the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private

> individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. [author emphasis] (418 U.S. at 347)

Professional Standards

Standards which take into consideration the practices of a given profession are dealt with extensively in a casebook on tort law by Prosser, Wade, & Schwartz which notes that litigation involving persons who provide services is on the rise. In cases of this sort, the 'reasonable person' assumes the expertise of the professional involved in the case. It is here that the difference between professional and lay negligence occurs.

> When the person rendering the service holds himself out as having superior knowledge, training and skill, he is held to a standard which expresses this. This has been consistently true of the traditional professions; it has more recently applied to the groups newly aspiring to the title of professional, and is coming to apply to artisans and craftsmen. The standard, however, is still expressed in objective form-- the knowledge, training and skill (or ability and competence) of an ordinary

> member of the profession in good standing. (1982, p.187)

Prosser, et al. go on to explain that a professional is usually one who contracts to render services, and liability to provide services of a professional quality grows out of that contract.

> When the professional is engaged in work that is technical in nature--not a matter of "common knowledge" --a lay jury is not in a position to understand without explanation the nature of the work of the application of the standard of care to this work. [author emphasis] (1982, p.187)

A plaintiff must provide expert testimony concerning matters which the jury cannot understand. If this is not done, the judge has the option of deciding that the jury does not have sufficient evidence to make a determination. In this case, the judge will be obligated to direct a verdict for the defendant.

Professional negligence is synonymous with malpractice. Malpractice is a standard for determining fault. It is any type of professional misconduct, or unreasonable lack of skill in professional duty. Using a malpractice approach provides information for lay people who do not understand the complexities of professional conduct. For example, physicians are often called in as expert witnesses to help the jury understand how a competent practitioner would handle a difficult technique

competent practitioner would handle a difficult technique or concept. 'Malpractice' is defined as

> failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss or damage to the recipient of those services or to those entitled to rely upon them. (Black, 1987, p.864)

Professional journalism standards would be indicative of the conventional behavior of a professional reporter. One of the key requirements for an occupation to be considered a profession by the legal community is that some special skill, education, or training be a requisite for practice of the given vocation.

> The labor and skill involved in a profession is predominately mental or intellectual, rather than physical or manual. The term originally contemplated only theology, law, medicine, but as the applications of science and learning are extended to other departments and affairs, other vocations also receive the name, which implies professed attainments in special knowledge as distinguished from mere skill. (Black, 1987, p. 1089)

There are many similarities between journalism and other occupations which are widely accepted as professions. College programs that teach journalism and graduate programs in journalism and mass communication

are becoming more common. However, journalists are not required to hold licenses to practice their craft. Under the terms of the Constitution, it would be virtually impossible to legally require journalists to be licensed. Like physicians or attorneys, professional journalists have a vernacular and standards of conduct that are specific to their vocation. To quote one legal scholar,

> It is hard to imagine what would happen if a jury were charged with deciding how an ordinarily prudent person would perform an appendectomy or conduct a legal appeal. Similarly, it is hard to imagine that prudent person preparing an investigative story. (Simon, 1984, p.459)

An example of the need for jurors to consider the unique circumstances and special skills of journalists was mentioned in Gobin v. Globe Publishing Co. (1975). The court noted an applicable standard would be one which took into consideration "the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances" (p.76).

The Restatement (1979) is in agreement with this consideration. It notes that a standard of negligence should consider the practices of the journalism profession.

> The defendant, if a professional disseminator of news, such as a newspaper, magazine, or broadcasting station, or employee,

> such as reporter, is held to skill and experience normally possessed by members of that profession. Customs and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself. (Section 580B, p.228)

Standards of conduct which define proper conventional behavior "set by the profession itself" are exactly what is needed to remove a great deal of confusion from libel law. Since no standards have been specifically articulated, it is crucial to find correct standards of judgment.

Codes of ethics have been established through professional journalism organizations for more than 60 years. The Code of Ethics of the American Society of Newspaper Editors (see appendix B) was written in 1923. The Society of Professional Journalists, Sigma Delta Chi Code of Ethics (see appendix A) was adopted in 1926 and revised in 1973 (Goodwin, 1983, p.15). These codes are based on a self policing ideal and can provide important clues as to the general practice of the journalism profession and what is considered to be reasonable behavior. In the next chapter, suggestions will be offered for the introduction of data from journalism codes that will allow juries to consider specific factors of behavior in light of prevailing journalistic convention.

CHAPTER III

DEFINING STANDARDS OF CONDUCT

In the previous chapter, I argued that jurors ought to determine 'fault' in libel cases based on a standard of professional negligence rather than a reasonable person standard. Here I clarify what I mean by professional standards for journalists.

One movement away from using the "reasonable person" as a basis for determining journalistic negligence is the use of expert witnesses in libel trials. Expert witnesses are used in tort cases that involve allegations of professional negligence. An expert witness can help jurors understand the subject well enough to make an informed decision about the facts of the case. Expert testimony, if provided in a particular case, must come from individuals who, through the benefit of experience, specialized training or education, possess specific knowledge which makes them qualified to offer such testimony.

> An 'expert' may be defined as a person who is so qualified, either by actual experience or careful study, as to enable him to form a definite opinion of his own respecting a division of science, branch of art, or department of trade about which persons having no particular training or special study are incapable of forming accurate opinions or of deducing correct

> conclusions. (American Jurisprudence, 1967, p.493) (cites deleted)

Marian Huttenstine is one of a handful of journalism professors who serves as an expert witness in libel trials. Huttenstine is an assistant professor at the University of Alabama who has been serving as an expert witness for 10 years. She appears only for the defendant; in the 70 cases in which she has been involved, she has been able to convince the jury that due care was used in all but 6 or 7 of them (personal communication, June 27-28, 1988) .

Huttenstine uses what is taught at her university or what a knowledgeable local reporter would have done under similar circumstances as a standard for determining whether or not the defendant has used due care. She can't define 'due care' outside of a specific situation, but her test is to ask "What care would a reasonable person with some professional training take in a given situation?"

Expert witnesses may, from experience, be able to say that due care has been exercised in one case, but not in another, and not be able to articulate the guidelines that form the criteria upon which they are making the judgment. This is one of the key reasons for formulation of professional negligence standards for journalism. The current concept of what is 'reasonable' is hopelessly

vague and ambiguous. Mere opinion, even expert opinion, must be mated with measurement standards for professional conduct. Applicable clarity is only available through professional standards.

In other professions, medicine for example, expert witnesses are used in combination with written standards so that jurors have an opportunity to understand general requirements for responsibility and also how those general requirements are expressed in a certain circumstance. However, medicine and law have a set of standards that must be accepted by all practitioners. The American Medical Association and American Bar Association codes of ethics provide not only written statements of practitioners' standards, but also provide for punishment for infractions of the codes.

Journalists form a looser, less accountable organization than do other professionals. Licensing or strict accountability would interfere with First Amendment freedoms. Nevertheless, journalists do share group norms and professional values.

> U.S. journalists, like members of every other formal or informal group, operate within a set of understood conventions that govern behavior. Every group, from children playing together to committees designated to perform a certain task, has largely unstated expectations of how all people within the group should do or perform. (Elliott, 1985, p.25)

It is because of journalistic shared values or group norms that travelers trust newspapers in strange U.S. cities. "Travelers from Boston believe what they read in the Buffalo daily and the one in Boise as well because all U.S. news organizations share a promise to provide accurate accounts" (Elliott, 1986, p.38).

At this point it should be mentioned that there is an ongoing and sometimes hotly contested debate as to whether or not journalism is a profession or simply a vocation. However, my suggestions concerning journalism ethics codes do not impact the professionalism debate. I am not advocating licensing for journalism. I simply propose that journalists articulate what is already known and provide that information to juries.

Codes of Ethics

Although journalists do not have one single code of ethics, there are major codes that are widely used. They are the codes of The Society of Professional Journalists and Association of Newspaper Editors (SPJ and ASNE). The ASNE code was adopted in 1923, and the SPJ code dates back to 1973 (Goodwin, 1983, p. 14). I would like to show how material from these two widely accepted codes of ethics can help articulate standards for the responsible journalist.

Codes of ethics are, in many ways, the articulation of shared values of the profession. Codes of ethics can help jurors understand how a responsible journalist would act. However, the codes themselves are a bit confusing. Elliott noted, "The SPJ/SDX code exemplifies the usual confusing mix of minimum expectations and ideal characteristics in a single document" (1985, p.24).

In recognizing the ambiguity of ethics codes and the confusion between minimum and ideal standards of behavior, Elliott suggested that the differences between conventional and ideal standards be noted.

> Codes necessarily state standards of professional practice, but the term 'standards' is itself ambiguous. 'Standards of professional practice' can mean anything from minimal expectations for all practitioners to the perceived ideal for which practitioners should strive. Carefully articulated codes of ethics should recognize the differences between minimal standards and standard-as-ideal. (1985, p.22)

Ethics codes would be more understandable and therefore useful if specific standards for behavior were abstracted into understandable categories that would help jurors understand the behavior of journalists. Abstracting some conventional standards from the codes gives us a sense of how journalists are generally

supposed to act. 'Supposed to act' is a key phrase; the codes were written primarily with an idealistic tone. Journalists are certain to fall short of some of the goals noted in codes of ethics. For example, journalists are supposed to seek the truth.

> WE BELIEVE in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth. (SPJ)

Realistically, delivering "public enlightenment" is beyond the ability of the mortal journalist.

> Now, truth is certainly an important value for U.S. journalists, but the TRUTH of a situation is often complex and not always attainable prior to the day's deadline. Realistically, journalists often provide "facts as we know them" while striving for the ideal of truth. (Elliott, 1985, p.24)

From this interpretation we can see why falsity alone is not and should not constitute libel. However, journalists do strive for the truth through reporting the facts as they become known.

The validity of reporting the facts as they are uncovered was supported by the Supreme Court in Associated Press v. Walker (1967). The Court understood and allowed for journalistic elements that affected a story sent over the Associated Press wire. Even though there was a factual error in the story, the Court cited

mitigating circumstances in its opinion. The Associated Press had to contend with deadline pressures when it filed the story; the reporter on the scene had a reputation for being reliable, and the story was in accordance with the subject's previous comments and activities (Overbeck, 1985, p.102).

In Associated Press v. Walker (1967) the press was reporting the "facts as we know them" and was vindicated by the Supreme Court for doing so. This case illustrates the willingness of the judicial system to accept the guidelines and natural limitations of journalism.

Some of the other shared group norms which are contained in the ethics codes serve to indicate to jurors what a reasonable journalist would do in normal practice. For example, reporters are supposed to keep their own opinion out of the stories they write.

> Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free from opinion or bias of any kind. (ASNE)

The responsible journalist is also supposed to be as thorough and accurate as he can be.

> By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities. (ASNE)

Journalists are expected to retract or correct mistakes which they publish or broadcast.

> It is the privilege, as it is the duty, of a newspaper to make prompt and complete correction of its own serious mistakes of fact or opinion, whatever their origin. (ASNE)

Having illustrated what a professional standard of negligence might include, I would like to consider how professional negligence would affect the outcome of an actual case.

In Gannett Co. v. Re (1985) the plaintiff, Ronald Re, was the inventor of an experimental car that ran on compressed air. In a demonstration for the media Mr. Re unsuccessfully tried to start the car and resorted to the use of jumper cables and push-starting. Finally, after approximately 30 minutes, the plaintiff was successful in starting the car. It ran at the speed of about ten miles an hour and only for approximately one-quarter mile. Two years later the plaintiff was indicted on 19 felony and misdemeanor counts which involved securities fraud, theft, attempted theft, and conspiracy involving another invention.

David L. Preston, a reporter for the defendant newspaper publisher, was told to write a story about the indictment. In checking the newspaper's files Preston found two stories that mentioned the demonstration of the

air-powered car. These stories said that the plaintiff had difficulty starting the car, but that it did run.

Preston called the attorney general's office and discussed the indictment. He then attempted to contact the plaintiff, the plaintiff's attorney, and an associate of the plaintiff, but was unsuccessful in his attempts. The subsequent article which appeared in the News Journal the following morning correctly stated the events of the indictment, but was erroneous in background information. In speaking of the plaintiff and his air-powered car demonstration two years before, the article stated: "He displayed a car he said was powered by compressed air. The car failed to start, however." (as cited in Gannett v. Re, 11 Media Law Reporter, p.2327).

When the case went to trial, the jury, on the basis of the plaintiff's allegations that he suffered financial loss due to the false statement in the article published by the defendant, awarded 1.3 million dollars to the plaintiff.

On appeal, the court found that the plaintiff had not shown financial loss and that the false statement published by the defendant was insufficient to award punitive damages. The court also noted that the amount awarded by the jury was so out of proportion that it could not be awarded to the plaintiff in good conscience.

In this case, the jury should have understood that

while the statement was false and damaging, the reporter was not guilty of professional negligence. The reporter had contacted the attorney general's office to verify the details of the indictment.

From the codes, we know that responsible journalists should not print damaging information without giving the story subject a chance to reply:

> A newspaper should not publish unofficial charges affecting reputation or moral character without opportunity given to the accused to be heard; right practice demands the giving of such opportunity in all cases of serious accusation outside judicial proceedings. (ASNE)

However, the defendant, in good faith, had attempted to contact the plaintiff, the plaintiff's attorney, and an associate of the plaintiff, and was under pressure to produce a story to meet a deadline. If the jurors would have considered these factors, then they would have been reluctant to hand down an award of 1.3 million dollars for the plaintiff.

Gannett Co. v. Re (1985) involved overemphasis on an unfortunate turn of phrase. The reporter had written "failed to start" when he should have written "difficulty in starting." Professional negligence standards should include provisions that take deadline pressures into account as one of the mitigating factors that affect

account as one of the mitigating factors that affect journalistic behavior.

In Associated Press v. Walker (1967) the factors contributing to a riot were reported by the journalist who wrote the story. Retired U.S. Army General Edwin Walker was on hand to speak to a group of whites who opposed school desegregation. After Walker's address the group attacked federal marshals who were there to protect the first black who had enrolled in the university. The Associated Press story that was dispatched very shortly after the incident said that Walker led the charge on the marshals. Walker denied that he had assumed command of the crowd or led a charge against the federal marshals. The jury that heard the case awarded $800,000 in punitive and compensatory damages to Walker.

If the jury had had the benefit of professional standards, they likely would not have ruled against the media defendant. The reporting practices of the Associated Press and its reporter were influenced by the circumstances of the events surrounding the story.

The Restatement (1979) warns that the jury should not be permitted

> on the basis of its own lay inferences, to decide that the defendant must have been negligent because it published a false and defamatory communication. This could produce a form of strict liability de facto and thus

> circumvent the constitutional requirement of fault. (Section 580B, p.228)

Had the jurors understood this principle, the time spent and expense of the appeal process could have been avoided. Codes of ethics provide important insight that could help juries determine when a journalist has acted in accordance with group norms or has been in violation of them. However, more succinct statements within the codes are needed if we expect to provide an understandable guide that will help jurors. These statements, when combined with applicable factors from the law, would provide important insight for jurors in determining libel judgments. I will consider a procedure for obtaining this information in the following chapter.

CHAPTER IV

CONCLUSION

Application of Conventional Standards

In searching for a standard of judgment for juries to use in determining liability for mass media defendants, I advocate a 'restatement' approach. The legal profession has done this for decades in the Restatement of the Law. The Restatement is a detailed, multi-volume set of books that states the law as it is written and provides commentary and examples of how and under what circumstances the law is to be applied. This process serves to insure against improper interpretation of the law.

In a similar manner, a restatement of the conventional behaviors and shared group norms detailed in the SPJ and ASNE codes and elsewhere would help jurors understand what constitutes professional negligence.

First, statements of essential shared values and group norms need to be collected. These may be from codes of ethics and from media practitioners. Input from practitioners is vital because shared values exist that are not mentioned in the codes. Another valuable source of information is case law where a professional negligence standard was applied. It is important to know

what a particular court means in applying this standard.

Second, the restatements need to be drafted. After rough drafts are completed, media professionals and journalism educators could check the correctness of the material. If the restatements are acceptable to these experts, they would have the important benefit of shared agreement. Input from those who have served as expert witnesses in libel trials would also be a very important contributor to the restatements.

The restatement of journalism codes has applicability in other areas of concern, such as invasion of privacy or conduct with sources for stories. However, those areas are beyond the scope of the topic at hand. A libel restatement should list the factors in the codes that are most applicable to libel law. These factors should include provisions for accuracy, objectivity, and retractions of mistakes. Following the principle of restatement, each of these provisions should include clearly defined examples of what it means for a reporter to truthful and accurate, etc. This could be accomplished through the use of hypothetical examples in which the journalist acts as a normal, responsible member of the journalism profession.

Benefits of Conventional Standards

If juries had clearly articulated standards of behavior for media professionals they would be able to utilize them in many ways. The most obvious benefit of the restatements is their value as a replacement for the reasonable person standard, which has been shown to be inappropriate. If standards of this type were presented to jurors, they would be able to determine what a 'reasonable journalist' is, and under what constraints and pressures he is expected to perform.

As a judge instructs the jury in a libel trial he could provide copies of the restatements to jurors. The restatements would serve the two very important functions of helping the jury understand how a reasonable journalist should have acted under the circumstances of the particular case before them and under what pressures or mitigating circumstances the journalist was working when the events of the case transpired.

Council for the media defendant, armed with a set of standards that are reinforced by restatements to facilitate understanding, would be able to explain the actions of the defendant in a much more understandable way.

If media institutions had such standards, they would be able to explain their procedures and possibly avoid libel disputes. Cranberg (1985, p.221) noted the

majority of persons who sued for libel contacted the media before they contacted legal council. Soloski found that

> almost all plaintiffs who first contact the media ask for retraction, correction, or apology. As would be expected, the media reject most of these requests. It is then that the parties contact an attorney. (1985, p.220)

The set of minimum standards would be useful in training new employees at media agencies as well as students in university journalism programs. By familiarizing themselves with these standards, newcomers would be aware of the 'taboos of the trade' and avoid costly blunders.

Finally, if reporters had these standards as a reference, then they would be better equipped to handle their assignments and fulfill their obligations, because they would know exactly what is expected of them. However, these standards are a two-edged sword; with the protection they provide comes a degree of accountability. If media defendants have trespassed the standards of behavior and have no justification for doing so, they run the risk of having those standards used against them in court by a plaintiff.

The media, by articulating standards of essential group norms, can show some degree of self-imposed

accountability for their actions. This may go against the grain of many free-spirited reporters, but the days of the cavalier journalist who flaunts his power as a watchdog unhindered by law and accountable to no one are long gone. "Congress shall make no law ..." still holds true, but the general populace is making law abridging the freedom of the press. This law is being enforced by the rising cost of libel litigation and its subsequent chilling effect on the media's reporting ability.

It is time for media institutions to articulate standards of behavior to be used by juries in determining fault before juries hand down more huge awards. It is far more beneficial for the media to articulate their own standards of conduct than to have policy dictated to them by outside forces that have no knowledge of or consideration for professional journalistic behavior.

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APPENDICES

Appendix A: The Society of Professional Journalists, Sigma Delta Chi, Code of Ethics

The Society of Professional Journalists, Sigma Delta Chi believes the duty of journalists is to serve the truth.

We believe the agencies of mass communication are carriers of public discussion and information, acting on their Constitutional mandate and freedom to learn and report the facts.

We believe in public enlightenment as the forerunner of justice, and in our Constitutional role to seek the truth as part of the public's right to know the truth.

We believe those responsibilities carry obligations that require journalists to perform with intelligence, objectivity, accuracy and fairness.

To these ends, we declare acceptance of the standards of practice here set forth:

RESPONSIBILITY:

The public's right to know of events of public importance and interest is the overriding mission of the mass media. The purpose of distributing news and enlightened opinion is to serve the general welfare.

Journalists who use their professional status as representatives of the public for selfish or other unworthy motives violate a high trust.

FREEDOM OF THE PRESS:

Freedom of the press is to guarded as an inalienable right of the people in a free society. It carries with it the freedom and the responsibility to discuss, question and challenge actions and utterances of our government and of our public and private institutions. Journalists uphold the right to speak unpopular opinions and the privilege to agree with the majority.

ETHICS:

Journalists must be free of obligation to any interest other than the public's right to know the truth.

1. Gifts, favors, free travel, special treatment or privileges can compromise the integrity of journalists and their employers. Nothing of value should be accepted.

2. Secondary employment, political involvement, holding public office and service in community organizations should be avoided if it compromises the integrity of journalists and their employers. Journalists and their employers should conduct their

personal lives in a manner which protects them from conflict of interest, real or apparent. Their responsibilities to the public eye are paramount. That is the nature of their profession.

3. So-called news communications form private sources should not be published or broadcast without substantiation of their claims to news value.

4. Journalists will seek news that serves the public interest, despite the obstacles. They will make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

5. Journalist's acknowledge the newsman's ethic of protecting confidential sources of information.

ACCURACY AND OBJECTIVITY:

Good faith with the pubic is the foundation of all worthy journalism.

1. Truth is our ultimate goal.

2. Objectivity in reporting the news is another goal, which serves as the mark of an experienced professional. It is a standard of performance toward which we strive. We honor those who achieve it.

3. There is no excuse for inaccuracies or lack of thoroughness.

4. Newspaper headlines should be fully warranted by the contents of the articles they accompany. Photographs and telecasts should give an accurate picture of an event and not highlight a minor incident out of context.

5. Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free of opinion or bias and represent all sides of an issue.

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.

7. Journalists recognize their responsibility for offering informed analysis, comment and editorial opinion on public events and issues. They accept the obligation to present such material by individuals whose competence, experience, and judgement qualify them for it.

8. Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such.

FAIR PLAY:

Journalists at all times will show respect for the dignity, privacy, rights and well-being of people encountered in the course of gathering and presenting the news.

1. The news media should not communicate unofficial charges affecting reputation or moral character without giving the accused a chance to reply.

2. The news media must guard against invading a person's right to privacy.

3. The media should not pander to morbid curiosity about details of vice and crime.

4. It is the duty of the news media to make complete and prompt corrections of their errors.

5. Journalists should be accountable to the public for their reports and the public should be encouraged to voice its grievances against the media. Open dialogue with our readers, viewers and listeners should be fostered.

PLEDGE:

Journalists should actively censure and try to prevent violations of these standards, and they should encourage their observance by all newspeople. Adherence to this code of ethics is intended to preserve the bond of mutual trust and respect between American journalists and the American people.

Adopted 1926, Revised 1973

Appendix B: Code of Ethics
or Canons of Journalism,
American Society of Newspaper Editors

The primary function of newspapers is to communicate to the human race what its members do, feel and think. Journalism, therefore, demands of its practitioners the widest range of intelligence, or knowledge, and of experience, as well as natural and trained powers of observation and reasoning. To its opportunities as a chronicle are indissolubly linked its obligations as teacher and interpreter.

To the end of finding some means of codifying sound practice and just aspirations of American journalism, these canons are set forth:

I.

RESPONSIBILITY -- The right of a newspaper to attract and hold readers is restricted by nothing but considerations of public welfare. The use a newspaper makes of the share of public attention it gains serves to determine its sense of responsibility, which it shares with every member if its staff. A journalist who uses his power for any selfish or otherwise unworthy purpose is faithless to a high trust.

II.

FREEDOM OF THE PRESS -- Freedom of the press is to be guarded as a vital right of mankind. It is the unquestionable right to discuss whatever is not explicitly forbidden by law, including the wisdom of any restrictive statute.

III.

INDEPENDENCE -- Freedom from all obligations except that of fidelity to the public interest is vital.

1. Promotion of any private interest contrary to the general welfare, for whatever reason, is not compatible with honest journalism. So-called news communications from private sources should not be published without public notice of their source or else substantiation of their claims to value as news, both in form and substance.

2. Partisanship, in editorial comment which knowingly departs from the truth, does violence to the best spirit of American journalism; in the news columns it is subversive of a fundamental principle of the profession.

IV.

SINCERITY, TRUTHFULNESS, ACCURACY -- Good faith with the reader is the foundation of all journalism worthy of the name.

1. By every consideration of good faith a newspaper is constrained to be truthful. It is not to be excused for lack of thoroughness or accuracy within its control, or failure to obtain command of these essential qualities.

2. Headlines should be fully warranted by the contents of the articles they surmount.

V.

IMPARTIALITY -- Sound practice makes clear distinction between news reports and expressions of opinion. News reports should be free from opinion or bias of any kind.

1. This rule does not apply to so-called special articles unmistakably devoted to advocacy or characterized by a signature authorizing the writer's own conclusions and interpretation.

VI.

FAIR PLAY -- A newspaper should not publish unofficial charges affecting reputation or moral

character without giving the accused the opportunity to be heard; right practice demands the giving of such opportunity in all cases of serious accusations outside judicial proceedings.

1. A newspaper should not invade private rights or feeling without sure warrant of public right as distinguished from public curiosity.

2. It is the privilege, as it is the duty, of a newspaper to make prompt and complete correction of its own serious mistakes of fact or opinion, whatever their origin.

DECENCY -- A newspaper cannot escape conviction of insincerity if while professing high moral purpose it supplies incentives to base conduct, such as are to be found in details of crime and vice, publication of which is not demonstrably for the public good. Lacking authority to enforce its canons the journalism here represented can but express the hope that deliberate pandering to vicious instincts will encounter effective public disapproval or yield to the influence of a preponderant professional condemnation.