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Paul M. Levy

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Big Foot, Johnny Carson and the First Amendment

*Paul M. Levy**

MR. LEVY: For the most part, I have been identified with the tabloid industry, having served as General Counsel to Globe International for about thirty years. The good news is that I was representing a publisher of tabloids. As a consequence, I was placed in a position to participate in the advancement of libel law in that I was often presented with an opportunity to argue issues that the *New York Times* and the *Wall Street Journal* didn't confront because they simply didn't deal with circumstances similar to those in which the tabloids were involved.

I think that one of the problems I have had in representing tabloids on a routine basis is that, for all the obvious reasons, tabloids generate the most litigation. Part of the problem is that the tabloid industry publishes different kinds of tabloids, each having a distinct editorial style. One such tabloid is that with which people have great fun; its subject matter deals with Big Foot, aliens, predictions and the like. The assumption is that that kind of attitude, that editorial philosophy, is typical of all tabloids. Indeed that is not the case. Three tabloid publications are published by Globe International: the *Globe*, *The Examiner* and *The Sun*. In the case of the *Enquirer-Star* group, the same is true: the *Star*, the *Enquirer*, and *Weekly World News*.

The Sun publishes fantastic, improbable stories. *The Examiner* is a self-help, celebrity publication which includes human interest stories. *The Globe* publishes stories regarding celebrities and public personalities.

The editorial criteria and policy for each of these publications is very different. Clearly one does not, as in the case of *The Sun*, verify a story about the Loch Ness Monster. People have been trying to do that for some time. One does not verify Big Foot. What such publications publish is, for the most part, imaginative fiction. Such fiction is written in an entertaining fashion and suggests to the reader that it may be true. There is a caveat in the publication to the effect that that which is published is published for entertainment purposes only; it is written with a tongue-in-cheek, satirical attitude.

In the case of the *Globe*, the circumspection engaged in in the editorial process is quite substantial. Since the publisher is on the cutting edge with many of

* These are the remarks of Mr. Paul M. Levy made during his speech as part of the *DePaul-LCA Journal of Art and Entertainment Law* Speaker Series. The topic was "Libel and Defamation in the 1990s." The use of direct quotes is not necessarily intended to suggest these are the verbatim statements made by the parties; rather, they suggest that someone is speaking.

Mr. Levy is a DePaul University College of Law alumnus. In addition to being a founding partner of Deutsch, Levy and Engel, Chartered, Mr. Levy served as General Counsel for Globe International for many years. He has played an integral part in advancing the development of libel law and participated in libel actions involving Frank Sinatra, Cat Stevens, Tom Selleck and Pamela Anderson, to name a few.

these articles, it needs to take all prophylactic measures possible for all the obvious reasons, including the fact that it is a highly visible target.

Celebrities love suing tabloids. There is substantial public bias in favor of the celebrity and substantial prejudice against the tabloids. *Globe International* has, on numerous occasions, been sued by celebrities who never intended to pursue the litigation; they seek the press release which is issued concurrent with the filing of the lawsuit. Because the story with which they take issue is fundamentally and substantially true, the litigation is not prosecuted.

Nonetheless, it is clear that the *Globe* is hyperbolic. Sensation is the editorial style of the *Globe*. That policy has created a substantial problem for me, particularly in light of the fact that the stories are often mean-spirited. If what has been written is mean-spirited, even though true, a jury and a judge will take a dim view of those responsible. Juries simply don't think such conduct is appropriate, regardless of its legal propriety. Such fact is a substantial hurdle that is most difficult to overcome.

Secondly, I must tell you that most of the courts that I have appeared before are not really familiar with the law surrounding the First Amendment. Courts deal with a whole horizon of cases, but not First Amendment litigation; it is a rarity for most. One is routinely confronted with a substantial educative process.

I'd like to tell you of my experience in defending the *Globe* against Judith Exner, who was one of John Kennedy's mistresses. The *Globe* wrote a story that was absolutely true. The story was about the fact that she was one of John Kennedy's mistresses. She was a liaison between Sam Giancana and Kennedy, a girlfriend of both. Exner wrote a book largely admitting the gravamen of what we had published, and did a substantial tour during the course of which she again admitted the truth of that which we had published. Of course, that didn't dissuade her from litigating.

In any event, I filed a motion for summary judgment and argued it in the Southern District of California. Among other things, I argued that which we had published was largely true, but, during the course of argument, I admitted that there was the possibility of there being some inconsistency or some inaccuracy. The judge became irate at this possibility and at one point, half out of his chair, said, "Do you mean to stand there, Counsel, and tell me that your publication can publish a falsity and not be liable?" I responded, "Yes, Your Honor. That's the holding in *New York Times v. Sullivan*."¹ His reply was, and I quote, "I

1. In reviewing the transcript of my comments, it occurred to me that I presumed, perhaps inappropriately, a working knowledge of the facts and opinion in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the precedential 1964 Supreme Court case that constitutionalized the law of libel. A review of the facts and opinion in *Sullivan*, for those who might not have the requisite familiarity, perhaps would be instructive.

On February 29, 1960, Dr. Martin Luther King, Jr., was arrested on charges involving two counts of perjury in connection with the filing of his Alabama state income tax return. The charges were a transparent attempt to punish Dr. King for his civil rights activities, and he was ultimately acquitted. Shortly after Dr. King's arrest, a committee was formed to assist him in his defense. On March 29, 1960, it published a full page advertisement entitled "Heed Their Rising Voices." At the bottom of the ad were the names of prominent citizens comprising the committee and the name of

don't believe it for a moment." Well, of course, that is the essence of the holding in *Sullivan*. That court, like so many others, had not kept pace with the Supreme Court having constitutionalized the law of libel.

As some of you are aware, the "constitutional malice" standard of fault in cases involving public figures precludes an action for libel even though that which was published contains inaccuracies or even falsities.

I recall an occasion when counsel were in chambers discussing jury instructions. I proposed an instruction, and the judge looked at me and said, "What's your authority for that, Mr. Levy?" I said, "Why *Gertz*², Your Honor." He said, "Gertz who?" I apologize for that. I certainly knew who and what *Gertz* was, but the judge, I am afraid, did not.

One day, I suppose some of you will wander out into the hinterlands, as I did, to help defend a libel case in rural Arkansas. We were in a conference over instructions, and the judge leaned back after some heated argument, and he looked at my co-counsel who happened to be from Little Rock. He said, "You know, I am used to practicing here in this community, and if there is one thing I find difficult to deal with, it is big city lawyers . . . lawyers from Little Rock."

the committee, "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South."

The total circulation of the issue of the *New York Times* in question was approximately 650,000. The *Times* was paid slightly more than \$4,800 for the advertisement. Only 394 copies of the *Times* were sent to Alabama. The ad precipitated a violent reaction in Alabama, and soon after its publication, a number of Alabama politicians commenced libel suits.

Among such suits was one filed by L.B. Sullivan, an incumbent Montgomery city commissioner who, among other departments, supervised the police. The *Times'* advertisement did not mention Sullivan by name, and many of the facts and circumstances discussed referred to events entirely outside of Alabama.

After a trial that lasted three days, the jury returned a verdict of \$500,000 against the *Times*. The Supreme Court of Alabama affirmed. In due course, the newspaper appealed to the United States Supreme Court which, in March 1964, reversed the judgment. The majority opinion was written by Justice William Brennan who determined that traditional rules regarding defamation "dampened the vigor and limits the variety of public debate." Justice Brennan then stated the holding that launched a new era for the law of libel:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves that the statement was made with actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*

376 U.S. at 279-80 (emphasis added).

After announcing its new constitutional rule, the Court then undertook a review of the record. In undertaking that review, three important principles emerged which, in due course, became first rank components of the constitutionalization of the law of libel. First, because of the constitutional guarantees the Court had fashioned, the Court engaged in "an independent examination of the whole of the record" to determine if the evidence could support a finding of actual malice. *Id.* at 285. Second, the Court stated that proof of actual malice must be of "convincing clarity," a standard distinctly higher than that normally applicable in civil actions. *Id.* at 285-86. Third, the Court held that neither the *Times'* failure to retract nor its failure to check the facts in the ad against its own files constituted "actual malice." *Id.* at 286-88.

2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Mr. Gertz honored us with his presence at this lecture today, adding meaning to the printed opinion of the Supreme Court.

[Laughter]. I began to get a little paranoid. He then leaned back and looked around and contemplated a bit further. I don't know what point he was trying to make, but he went on to say, "But there are lawyers worse than lawyers from Little Rock; there are lawyers from Birmingham. When they come here, it is a real problem." "But," he said, "there is one category of lawyer that I cannot abide." He looked at me squarely and said, "That's a tall building lawyer." That's what I was, since he understood that I took an elevator to reach my office. That branded me absolutely.

Some judges do care enough to engage in the process of educating themselves. A libel case that I tried in Little Rock is a good example. The local judge had passed away, and the docket was getting quite full. An appellate judge from the Eighth Circuit came down from Minneapolis to try the case. He was apparently not familiar with First Amendment law. Indeed, he took a very dim view of the material that we had published, and so said vigorously and frequently. His preliminary rulings were very much anti-defendant, which was, in his view, disreputable. However, because he had very good law clerks and because he cared about the law and the issues involved, he educated himself throughout the trial of the case so that, in due course, he gave a very fair set of instructions that helped yield a not guilty verdict.

I am reminded of a classic example of the educative process at work in open court. We were picking a jury in a United States District Court in Arkansas. In civil cases, a federal court jury is comprised of six persons. We had impaneled five jurors. A sixth juror was being subjected to *voir dire* by the judge. The judge was questioning this one fellow who was seemingly not formally educated. The judge said, "Mr. Juror, is there any reason why you cannot judge this matter fairly and impartially?" He responded, "I am afraid so." The judge, somewhat surprised, asked, "Why is that? Do you know one of the parties?" He said, "No." The judge then asked, "What's your concern?" He replied, simply but elegantly, "I believe in the First Amendment." Shocked, the judge asked, "What does that mean?" The prospective juror answered, "It means that people should be able to publish that which they see fit to publish, and I believe that. They can be wrong. But I think it is more important they publish it." The judge then engaged in a dialogue with the potential juror, which I am convinced affected the other five jurors far more than anything I had to say; and, after the juror was excused, the publication was found not liable.

I indicated that I was going to talk a bit about a plaintiff's case that I handled. I don't handle many plaintiff's cases, but this plaintiff happened to be Johnny Carson. The case was filed in the Northern District of Illinois and ultimately appealed to the Seventh Circuit.³

Let me say that in a libel case, the first inquiry is "Who is the plaintiff?" Is the plaintiff a public figure or is he a private figure? Mr. Gertz knows all about that. He knows all about the varying standards of liability which he helped establish. The fact of the matter is, that whether one is a public figure is often a com-

3. Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

plex question of law to be decided, pretrial, by the court. One, however, does know how the question is resolved in the case of Johnny Carson. Johnny Carson is an all-purpose public figure. If a plaintiff is a public figure, it is incumbent on that person to prove actual malice. Actual malice is a standard of liability which many courts do not understand. Actual malice or constitutional malice is not the kind of malice that you are probably accustomed to. Common law malice equates to spite, ill-will or contempt. Constitutional malice, in the First Amendment sense, is the publication of material with knowing falsity or with reckless disregard for whether or not that which you have published is true. Reckless disregard is a very high burden, a very difficult burden to meet. Carson was involved as a libel plaintiff in a case when actual malice had not been precisely defined.

In brief, the facts of the case were these: there was a newspaper in Chicago called *Chicago Today*. The newspaper had a columnist by the name of Bruce Vilanch. Vilanch did a story on why Johnny Carson was contemplating moving his show from New York to California. Vilanch speculated on a host of different reasons why the move was proposed and observed peripherally that the woman whom Johnny Carson was seeing was a Bel-Air divorcee, Joanna Holland.

With that article as the sole and exclusive source, another publication, the *National Insider*, took the fact that Joanna Holland was a Bel-Air divorcee and ran a story headlined *Johnny Carson Is Moving To Los Angeles So He Can Be Near The Woman Who Broke Up His Marriage*. That was unfortunate since Joanna Holland never lived in California. It was the one single thing in the *Chicago Today* article that was completely untrue. Holland had never even visited California. From that, the *National Insider* created a story.

I will quote some of that which the *National Insider* reported, and then indicate whether or not there was any support for the statement. Just as a sample, the article stated that Carson moved to California "so that he can be closer to the woman who broke up his marriage." For that there was no support, for as I have stated, Joanna Holland didn't live in California. The article further stated that "she has been in the background of Johnny Carson's hectic life for the past several years. After the Carson split, Johnny began dating Joanna Holland openly." Not true; Carson had not met Holland until subsequent to his divorce. As a further example, "Johnny chaffed and fretted at the distance separating him from his lady. John saw two choices. Give up Joanna or give up the *Tonight Show*." Wholly unsupported. "Give up the *Tonight Show* or give up Joanna." Unsupported. "But greedy person that he is he could not see giving up those dollars just for love." No support. "Let's move the *Tonight Show* lock, stock and barrel to Hollywood he told flabbergasted NBC execs. Although accustomed to Carson's harsh demands, the network execs took a while to recover from that one." No support, the conversation never occurred. On and on ad nauseam. Suffice to say, the dialogue, the colloquy, and the circumstances had all been fictionalized.

The suit was filed, and a very fine lawyer, Burton Joseph, filed a motion for summary judgment on behalf of the publication. Burt argued what many felt at the time: that for people like Johnny Carson, actual malice presented a hurdle that was so substantial that the differences between the article and reality, which

I have read to you, were not sufficient to establish malice in the constitutional sense; and that Carson couldn't clear that hurdle. My view was if actual malice had any meaning, this circumstance met that test. Judge McGarr did not agree with Carson's position. He ruled against us and for the publication. Let me quote to you from his Memorandum Opinion since, again, it reflected the prevailing view.

The plaintiffs herein fell within the parameters of the *Times* text. The *Tonight Show* is a nationally televised program and Mr. Carson is a nationally known celebrity and thus a "public figure." Ms. Holland through her association with Carson is at least involved in a "matter of public or general concern." They must, therefore, anticipate and endure some scurrilous or otherwise unpleasant comments and the present state of the law accept without legal power to resist the attentions of even so lurid and disgusting a publication as the defendant in this case. The most repulsive speech enjoys immunity provided it falls short of the deliberate and reckless untruth.

That view shocked me since there can be no more deliberate and reckless untruth than a wholesale fictionalization. Judge McGarr did not see it that way.

The plaintiffs attempt to prove actual malice by showing some discrepancies between the *National Insider* article and the similar story in *Chicago Today*. This effort does not reveal the *National Insider* article to be the "calculated falsehood" which entitled a public figure to relief. Therefore, the court believes the plaintiff cannot prove actual malice.

I was appalled. I was hard-pressed to explain the opinion and its reasoning to Carson. He did not, for example, understand how one could fictionalize a conversation and not have that equated to a calculated falsehood. The Seventh Circuit saw the matter differently than Judge McGarr. I will quote briefly from that opinion.

In the catalogue of responsibilities of journalists, right next to plagiarism, which parts of the *National Insider* article seem to be, must be a canon that a journalist does not invent quotations and attribute them to actual persons. If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. In any event, *St. Amant [v. Thompson]*, 390 U.S. 727 (1968) expressly gives as another example of reckless disregard for the truth "any product of [one's] imagination." 390 U.S. at 732, 88 S.Ct. 1323.

Because of both the completely fabricated marriage-breaker accusations and the wholly imagined but supposedly precisely quoted conversations regarding the purported struggle preceding the westward move of the *Tonight Show*, the plaintiffs are entitled to a jury's determination of whether actual malice existed.

And so the case stood, and still stands, for the principle that regardless how pervasive one's public figure status may be, he is still capable, under the appropriate factual circumstances, of establishing actual malice.

Thank you very much. [Applause].